

InvestSC Designated Investor Contract

During the House Legislative Oversight Committee's Economic Development, Transportation, and Natural Resources meeting on September 20, 2022, members requested various information. Attached, and listed below, is information requested that relates to InvestSC and the Venture Capital Authority. Venture Capital Authority staff provided the information to House Legislative Oversight Committee staff via email during the days following the meeting.

- Designated Investor Contract Agreement between Venture Capital Authority and InvestSC

Execution Copy

DESIGNATED INVESTOR CONTRACT

BETWEEN

THE SOUTH CAROLINA VENTURE CAPITAL AUTHORITY

AND

INVESTSC, INC.

DATED

JUNE 22, 2007

DESIGNATED INVESTOR CONTRACT

This Designated Investor Contract (the "Agreement") is being entered into on this 22nd day of June, 2007 between the South Carolina Venture Capital Authority (the "VCA"), an agency of the State of South Carolina (the "State") created within the South Carolina Department of Commerce (the "Department of Commerce") and InvestSC, Inc. (the "Company"), a non-profit corporation formed under the laws of the State. Terms appearing in quotations that are not otherwise defined herein shall have the meanings assigned to them in the VCA Act (defined below).

WITNESSETH:

WHEREAS, the VCA was formed pursuant to the terms of the Venture Capital Investment Act of South Carolina, codified at Section 11-45-10, *et seq.* of the Code of Laws of South Carolina 1976, as amended (the "VCA Act");

WHEREAS, under the terms of the VCA Act, the VCA is authorized to enter into one or more "designated investor contracts" with one or more "designated investor groups" in order to accomplish the purposes described in the VCA Act, including the borrowing of funds from a "lender" in exchange for the issuance of one or more "certificate[s]" representing a "tax credit" not to exceed the principal amount of borrowed funds plus required interest in order to provide "venture capital" to "South Carolina based companies" (the "VC Program");

WHEREAS, the South Carolina Jobs-Economic Development Authority ("JEDA") was formed pursuant to the terms of the South Carolina Jobs-Economic Development Fund Act, codified at Section 41-43-10, *et seq.* of the Code of Laws of South Carolina 1976, as amended (the "JEDA Act");

WHEREAS, under Section 41-43-240 of the JEDA Act, JEDA is permitted to form non-profit corporations in order to carry out the purposes of the JEDA Act, including the promotion and development of the business and economic welfare of the State of South Carolina (the "State");

WHEREAS, the VCA, acting by and through its Board of Directors (the "VCA Board"), has requested that JEDA form a non-profit corporation in order to serve as a "designated investor group" and assist the VCA in accomplishing the goals of the VC Program;

WHEREAS, in response to the VCA, the Board of Directors of JEDA (the "JEDA Board") has authorized the creation of a non-profit corporation, the Company, to serve as a designed investor group under the VCA Act;

WHEREAS, the Company is, in accordance with the intent of JEDA and the VCA, a completely separate and distinct entity from JEDA with an independent Board of Directors (the "Company Board") and employees who are independent from JEDA, the VCA and the State; and

WHEREAS, in order to accomplish the goals and objectives of the VC Program, the VCA and the Company are entering into this Agreement, which is intended to constitute a designated investor contract under the terms of the VCA Act.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS THAT, IN CONSIDERATION OF THE PREMISES AND OTHER GOOD AND VALUABLE CONSIDERATION, THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED, THE PARTIES HERETO AGREE AS FOLLOWS:

ARTICLE I
REPRESENTATIONS AND WARRANTIES

Section 1.1. *By the VCA.* The VCA hereby represents and warrants the following to the Company:

a. The VCA Board has selected the Company to serve as a designated investor group under Section 11-45-50(A)(3) of the VCA Act, and upon execution of this Agreement, the Company will be a designated investor group for purposes of the VCA Act;

b. The VCA Board has approved DBAH Capital, LLC, as a “lender” (the “Lender”) under the VCA Act and, as required by the VCA Act, received approval of the Lender from the South Carolina State Budget and Control Board (the “Budget and Control Board”) on June 12, 2007;

c. The VCA Board conducted research into the background, financial capacity, and business operations of the four venture capital funds (the “Funds”) described on the attached **Exhibit A**, determined that each Fund was eligible for selection as an “investor” under the VCA Act, verified that each of the Funds’ investment plans provides for investments into “South Carolina based companies” as provided in the VCA Act and determined by the VCA Board;

d. The VCA Board hereby authorizes the Company to invest the proceeds of the Loan (defined below) with each of the Funds in accordance with Section 11-45-50(B)(2) of the VCA Act, so long as the Company requires the Funds to undertake such investments in compliance with Section 11-45-70 of the VCA Act. The Company shall only invest in the Funds and shall not make any direct investments into South Carolina based companies, despite provisions in Section 11-45-50(b)(2) of the VCA Act granting authority for a designated investor group to make direct investments. To the extent there are any excess proceeds available for investment, the VCA shall provide written direction to the Company with the respect to the investment of such excess proceeds;

e. As contemplated by the VCA Act, the VCA Board has determined that “South Carolina based companies” are companies that contribute to the overall objective of “strengthening South Carolina’s economic base, while achieving investment capital appreciation”;

f. The VCA Board has authorized the issuance of its initial tax credit certificate, a form of which is attached hereto as Exhibit B-1, as contemplated in the VCA Act, to the Lender (as described in the Securities Purchase Agreement between the Company and DBAH Capital, LLC dated as of June 22, 2007; hereafter, the “SPA”), and the issuance of blank tax credit certificates to authorized transferees, as provided in Section 11-45-55(E) of the VCA Act, a form of which is attached hereto as Exhibit B-2 (the initial tax credit certificates and the blank tax credit certificates are hereinafter collectively referred to as the “Certificates”), which Certificates shall serve as a source of security for the Loan (as defined below);

g. The VCA Board has taken all action required to be taken by the VCA Act to ensure the valid issuance of the Certificates, including obtaining the approval of the Budget and Control Board of the form of the Certificates, and the entering into of a Memorandum of Understanding among the VCA, the South Carolina Department of Revenue and the South Carolina Department of Insurance in connection with the establishment of a system of registration for the Certificates; and

h. The VCA Board has taken all actions required to be taken by the VCA Board to ensure that the VC Program is in compliance in all respects with the terms of the VCA Act.

Section 1.2. *By the Company.* The Company hereby represents and warrants the following to the VCA:

- a. The Company Board has approved the terms of the SPA, under the terms of which the Purchasers (as defined in the SPA) have agreed, upon the fulfillment of certain conditions, to purchase the Company's Senior Notes in the amount of \$50,000,000 (the "Loan"); and the closing of the Loan shall be accomplished pursuant to the terms of the SPA and such other documents as the Purchasers may reasonably require, including, without limitation, the Pledge and Security Agreement of even date herewith among the Purchasers and the Company, and the Consent and Agreement of even date herewith among the VCA, the Company, and the Purchasers (together with the SPA, the "Loan Documents");
- b. The Company Board has approved the Funds as "investors" under the VCA Act and approved the investment plans proffered by each of the Funds and further determined that each Fund, as set forth in its investment plan, is qualified to: (1) make the most effective and efficient utilization of the investment; and (2) invest in venture capital investments, requiring equity, near-equity, or seed capital which promote the economic development goals of the State in accordance with the strategy established by the Department of Commerce by and through the VCA;
- c. The Company Board has approved the terms of the limited partnership agreements, side letters, subscription agreements and related documents presented by each of the Funds (collectively, the "Fund Documents");
- d. The Company is authorized under the terms of its organizational documents to undertake the transactions embodied by this Agreement, the Loan Documents and the Fund Documents;
- e. The Company Board has approved the Company to serve as a designated investor group for purposes of assisting the VCA in the accomplishment of the goals and objectives of the VC Program;
- f. The Company Board has approved the terms of the Loan Documents; and
- g. On an interim basis, pending selection of the manager by the Company Board, Elliott E. Franks (the "Interim Manager") is serving as the manager of the Company in accordance with the VCA Act.

ARTICLE II
COVENANTS AND COMMITMENTS

Section 2.1. *By the VCA.* The VCA hereby covenants and commits to the Company as follows:

- a. For so long as the Company remains (i) the borrower under the Loan Documents with respect to the Loan, and (ii) a limited partner in one or more Funds, the VCA shall not, in the absence of written consent from the Purchasers, which shall not be unreasonably withheld, (a) remove or replace the Company as a designated investor group under the VCA Act; (b) effect the assignment of all assets, liabilities, and tax credits acquired or incurred by the Company and hereby waives the right to assign all assets, liabilities and tax credits acquired or incurred by the Company as set forth in Section 11-45-50(D)(2) of the VCA Act; or (c) establish any guidelines or regulations under the VCA Act;
- b. The VCA shall not take or omit to take any action that causes the Company to be in default under the terms of the Loan Documents, the Fund Documents, or any other agreement to which the Company becomes a party pursuant to the fulfillment of its responsibilities as a designated investor group under the VCA Act; and
- c. The VCA shall take all necessary and reasonable steps required to ensure that the Company has sufficient funds available to it to pay all of the Company's direct operating expenditures.

Accordingly, on a date certain and in accordance with the terms of the SPA, the Company is hereby authorized, pursuant to the procedures for withdrawal of funds provided in the Account Control Agreement applicable to the Operating Account, to transfer the sum of \$400,000 from the Operating Account (as defined in the SPA) into the Company's checking account (the "Checking Account"), which account shall be subject in all respects to the lien rights of the Lender established with respect to the Notes; the extension of said lien rights to the Checking Account shall be memorialized and perfected pursuant to an account control agreement, the terms of which shall be mutually agreeable to the Collateral Agent, the Company and the depository bank holding the Checking Account. Said amount shall be used by the Company to (i) pay the costs and expenses incurred by the Company in connection with its formation, and negotiations with the Purchaser and the Funds, to include the attorney's fees associated therewith and (ii) pay the direct operating expenses of the Company for the remainder of calendar year 2007. Upon presentation of its operating budget for the remainder of 2007 to the VCA, the Company shall, in accordance with the withdrawal and transfer process set forth above, transfer an additional amount, up to \$125,000, to the Checking Account. Thereafter, beginning on January 2, 2008, and on the first business day of each month thereafter throughout the term of this Agreement, the Company, in accordance with the procedures set forth above, is hereby authorized to withdraw from the Operating Account a sum equal to its budgeted monthly operating expenditures, which on a calendar year basis shall not exceed \$250,000, and transfer such amount into the Checking Account. The Company shall provide to the VCA Board, at least 10 business days prior to the date of the first such transfer in any calendar year, an annual operating budget for the calendar year in question.

Section 2.2. *By the Company.* The Company hereby covenants to the VCA as follows:

a. The Company has selected each of the Funds as an investor and has approved the Investment Plans submitted by each of the Funds;

b. The Company shall enter into the Loan Documents, the terms of which shall be agreeable to the Company and its legal counsel;

c. The Company shall deposit the proceeds of the Loan into an account designated as the "revolving fund" as required by the SPA and invest the proceeds of the Loan with each of the Funds in accordance with Section 11-45-50(B)(2) of the VCA Act. The Company has agreed with the Funds that each shall undertake investments in compliance with Section 11-45-70 of the VCA Act as provided in the respective Fund Documents. The Company shall only invest in the Funds and shall not make any direct investments into South Carolina based companies, despite provisions in Section 11-45-50(b)(2) of the VCA Act granting authority for a designated investor group to make direct investments. To the extent there are any excess proceeds available for investment, the Company will take written direction from the VCA with the respect to the investment of such excess proceeds;

d. The Company shall, as permitted under the Fund Documents, provide copies to the VCA of all annual reports distributed by the Funds to the limited partners in each of the Funds;

e. In compliance with Section 11-45-90 of the VCA Act, the Company shall prepare and submit an annual report to the VCA, which report shall include the annual audited financial statements of the Company. The initial annual report shall be due on March 31, 2008, and thereafter such reports shall be due on the last business day of the first quarter of each year;

f. Beginning in 2008, and thereafter through to the termination of this Agreement, the Company shall within 45 calendar days of the close of each quarter submit a quarterly report including the following information: (i) quarterly financial statements of the Company, (ii) as permitted under the Fund Documents and assuming receipt of sufficient information therefore from the Funds, a quarterly investment summary detailing the investments made by each of the Funds, and (iii) as permitted under the

Fund Documents and assuming receipt of sufficient information therefore from the Funds, a quarterly “internal rate of return” and return analysis for each of the Funds and for the overall portfolio comprising all of the Funds’ investments;

g. All directors on the Company Board, as well as the employees and agents of the Company, shall be bound by and comply with the conflict of interest rules set forth in Section 11-45-40 of the VCA Act. As of the date of this Agreement, no conflict of interest exists as defined in Section 11-45-40 of the VCA Act;

h. The Company recognizes that the VCA will undertake efforts to identify contingent purchasers of the Certificates and hereby agrees to use its best efforts to assist the VCA in this regard; and

i. The Company Board shall select a manager as required by the VCA Act. The identity and qualifications of the managerial candidate approved by the Company Board shall be provided to the VCA Board Chair in advance of the candidate’s anticipated start date. The Interim Manager shall serve as the manager until such time as a successor has been selected.

ARTICLE III MISCELLANEOUS

Section 3.1. *Term.* This Agreement shall terminate automatically on the later of the termination date of the Loan Documents or the Fund Documents.

Section 3.2. *Third Party Beneficiary.* Each of the Purchasers shall be an express third party beneficiary of this Agreement and shall be entitled to enforce the provisions of this Agreement as if it were a party hereto. No amendment or other change to this Agreement shall be effective without the prior written consent of the Required Purchasers (as defined in the SPA), which consent shall not be unreasonably withheld.

Section 3.3. *Events of Default and Remedies.* Failure of either party to strictly comply with the terms of this Agreement shall constitute an Event of Default hereunder. Upon receipt of written notice of the occurrence of an Event of Default hereunder, the party receiving such notice shall have 30 calendar days to cure the Event of Default. If the party fails to cure such Event of Default, the party that issued the written notice shall have at its disposal all applicable administrative, legal and equitable remedies.

Section 3.4. *Applicable Law.* This Agreement shall be governed by, and construed in accordance with, South Carolina law.

Section 3.5. *Binding Effect of Agreement.* This Agreement represents binding and enforceable commitments of the VCA and the Company.

Section 3.6. *Severability.* In the event and to the extent (and only to the extent) that any provision or any part of a provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable the remainder of that provision or any other provision or part of a provision of this Agreement.

Section 3.7. *Complete Agreement; Amendment.* This Agreement constitutes the entire agreement between the parties and supersedes all agreements, representations, warranties, statements, promises and understandings, whether oral or written, with respect to the subject matter hereof, and no party hereto shall be bound by any oral or written agreements, statements, promises, or understandings not specifically set forth in this Agreement.

Section 3.8. Counterpart Execution. This Agreement may be executed in multiple counterparts.

Section 3.9. Closing Costs of the Loan. The Company and the VCA hereby acknowledge that on the closing date of the Loan (the "Closing Date"), the Company, or its agent, shall pay the costs and expenses incurred by each of the parties in connection with the Loan and issuance of the Certificates, including attorneys' fees, which are required to be paid on the Closing Date (collectively, the "Closing Costs"). The Closing Costs shall be paid from the proceeds of the Loan.

Section 3.10. Notices. Any notices or communications required under this Agreement shall be provided in writing and delivered to the addressees identified below by U.S. mail, facsimile or courier:

To the VCA: The South Carolina Venture Capital Authority
ATTN: Program Manager and Dept. of Commerce General Counsel
1201 Main Street, 16th Floor
Columbia, South Carolina 29201
phone: 803.737.0400
fax: 803.737.0418

with a further copy (which shall not constitute notice) to:

Nexsen Pruet Adams Kleemeier, LLC
ATTN: Burnet R. Maybank
1230 Main Street, Suite 700
Columbia, SC 29201
phone: 803.771.8900
fax: 803.253.8277

To the Company: InvestSC, Inc.
ATTN: Executive Director
1201 Main Street, Suite 1600
Columbia, South Carolina 29201
phone: 803.737.0268
fax: 803.737.0628

with a further copy (which shall not constitute notice) to:

Parker Poe Adams & Bernstein, LLP
ATTN: Ray E. Jones
1201 Main Street, Suite 1450
Columbia, SC 29201
phone: 803.255.8000
fax: 803.255.8017

To the Initial Purchasers*: DBAH Capital, LLC
60 Wall Street
New York, New York 10005
Attention: Legal Department
Telecopy: (212) 797-5420

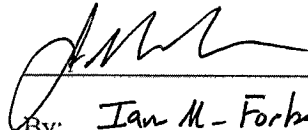
with a further copy (which shall not constitute notice) to:

Milbank Tweed Hadley & McCloy LLP
One Chase Manhattan Plaza
New York, NY 10024
Attention: Trayton M. Davis
fax: 212.822.5349

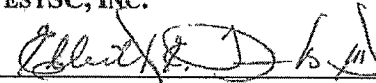
*In case of any other Purchaser, to such address and/or telecopy number as any such Purchaser shall have advised by notice as provided in the Securities Purchase Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

THE SOUTH CAROLINA VENTURE CAPITAL
AUTHORITY


By: Ian M. Forbes
Its: ~~Chairperson~~ Executive Director

INVESTSC, INC.


By: Elliot Franks
Its: President

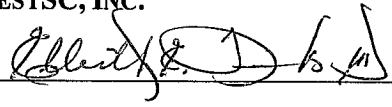
(Designated Investor Contract Signature Page)

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

**THE SOUTH CAROLINA VENTURE CAPITAL
AUTHORITY**

By: _____
Its: Chairperson

INVESTSC, INC.



By: Elliott Franks III
Its: President

(Designated Investor Contract Signature Page)

Designated Investor Contract

Exhibit A – Designation of Funds

Attached.

EXHIBIT A

DESIGNATION OF FUNDS

The Azalea SC Fund, L.P.

Frontier Fund II, L.P.

Nexus Medical Partners SC, L.P.

Noro-Moseley Partners VI, L.P.

Designated Investor Contract

Exhibit B-1 – Form of Initial Tax Credit Certificate

See Tab 9.

Designated Investor Contract

Exhibit B-2 – Form of Blank Tax Credit Certificate

See Tab 10.