**UNITED STATES**
**SECURITIES AND EXCHANGE COMMISSION**
**Washington, D.C. 20549**

# FORM 10-K

**(Mark One)**

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2022
**OR**

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE TRANSITION PERIOD FROM TO**

Commission File Number 001-37788

# WAITR HOLDINGS INC.

(Exact name of Registrant as specified in its Charter)

| | |
|---|---|
| **Delaware** | **26-3828008** |
| (State or other jurisdiction of incorporation or organization) | (I.R.S. Employer Identification No.) |
| **214 Jefferson Street, Suite 200**<br>**Lafayette, Louisiana** | **70501** |
| (Address of principal executive offices) | (Zip Code) |

Registrant's telephone number, including area code: **1-337-534-6881**

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

Securities registered pursuant to Section 12(g) of the Act:

Common Stock, Par Value $0.0001 Per Share
Title of class

Indicate by check mark if the Registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. YES ☐ NO ☒

Indicate by check mark if the Registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act. YES ☐ NO ☒

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

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

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

| | | | |
|---|---|---|---|
| Large accelerated filer | ☐ | Accelerated filer | ☐ |
| Non-accelerated filer | ☒ | Smaller reporting company | ☒ |
| Emerging growth company | ☐ | | |

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

Indicate by check mark whether the registrant has filed a report on and attestation to its management's assessment of the effectiveness of its internal control over financial reporting under Section 404(b) of the Sarbanes-Oxley Act (15 U.S.C. 7262(b)) by the registered public accounting firm that prepared or issued its audit report. ☐

If securities are registered pursuant to Section 12(b) of the Act, indicate by check mark whether the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements. ☐

Indicate by check mark whether any of those error corrections are restatements that required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period pursuant to §240.10D-1(b). ☐

Indicate by check mark whether the Registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). YES ☐ NO ☒

The aggregate market value of the voting and non-voting common equity held by non-affiliates of the Registrant, based on the closing price of the shares of common stock on The Nasdaq Stock Market on June 30, 2022, was $24,737,242.

The number of shares of Registrant's common stock outstanding as of March 15, 2023 was 13,443,697.

DOCUMENTS INCORPORATED BY REFERENCE

None.

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## CAUTIONARY NOTE REGARDING FORWARD-LOOKING STATEMENTS

This annual report on Form 10-K (this "Annual Report" and "Form 10-K") contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended (the "Securities Act"), and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). All statements, other than statements of historical or current facts, that reflect future plans, estimates, beliefs or expected performance are forward-looking statements. In some cases, you can identify forward-looking statements because they are preceded by, followed by or include words such as "may," "can," "should," "will," "goal," "strategy," "estimate," "plan," "project," "forecast," "intend," "expect," "anticipate," "believe," "seek," "target" or similar expressions. These forward-looking statements are based on information available as of the date of this Form 10-K and our management's current expectations, forecasts and assumptions, and involve a number of judgments, risks and uncertainties that may be outside of our control. Accordingly, forward-looking statements should not be relied upon as representing our views as of any subsequent date. We do not undertake any obligation to update forward-looking statements to reflect events or circumstances after the date they were made, whether as a result of new information, future events or otherwise, except as may be required under applicable securities laws. Our actual results could differ materially from those discussed in these forward-looking statements. Factors that could cause or contribute to such differences include, but are not limited to, those set forth under the section entitled "Risk Factors" below.

## PART I

*The following should be read in conjunction with the audited consolidated financial statements and the notes thereto included elsewhere in this Form 10-K. Throughout this document, we make statements that are classified as "forward-looking." Please refer to the "Forward-Looking Statements" section above for an explanation of these types of statements.*

*All references to common stock, share and per share amounts have been retroactively restated to reflect the 1:20 reverse stock split that became effective on November 18, 2022, as if it had taken place as of the beginning of the earliest period presented.*

### Item 1. Business

**Overview**

Waitr Holdings Inc., a Delaware corporation, together with its wholly owned subsidiaries (the "Company," "ASAP," "we," "us" and "our") operates an online ordering technology platform (the "Platform"), providing delivery, carryout and dine-in options, connecting restaurants, merchants, drivers and diners in certain cities in the United States. The Platform uses the "deliver anything ASAP" model making it easy for consumers to order food, alcohol, convenience, grocery, flowers, auto parts and more, and includes proprietary in-stadium mobile ordering technology. Additionally, ASAP facilitates access to third parties that provide payment processing solutions for restaurants and other merchants, a business that we continue to believe has growth potential. We entered into the business of facilitating access to third parties that provide payment processing solutions through the acquisition of ProMerchant LLC, Cape Cod Merchant Services LLC and Flow Payments LLC (collectively referred to herein as the "Cape Payment Companies") in August 2021 (the "Cape Payment Acquisition") (see Part II, Item 8, *Note 5 – Business Combinations*).

Our strategy is to bring in the logistics infrastructure to underserved populations of restaurants, grocery stores and other merchants and establish strong market presence or leadership positions in the markets in which we operate. As of December 31, 2022, we operated in approximately 800 cities in the United States. As of March 15, 2023, we operated in approximately 725 cities in the United States. We recently have exited certain markets where we didn't have a strong presence. Our business has been built with a merchant-first philosophy by providing differentiated and brand-additive services to the restaurants on the Platform. These merchants benefit from the online Platform through increased exposure to consumers for expanded business in the delivery market and carryout sales. The Cape Payment Acquisition is part of our overall growth strategy, positioning the Company to be able to facilitate access to a full suite of third-party payment processing solutions to its current base of restaurants and other merchants in targeted industries.

We generate revenue primarily when diners place an order on the Platform. Our revenue consists primarily of net fees received from restaurants and net diner fees generated on these orders. Revenue is recognized when the delivery service is complete. Additionally, in connection with the Cape Payment Acquisition, the Company generates revenue by facilitating merchant access to third-party payment processing solution providers.

**Segments**

Prior to the three months ended September 30, 2022, the Company concluded that we had one operating segment as the operations related to the facilitation of access to third parties that provide payment processing solutions to merchants and restaurants ("Third-Party Payment Processing Referral Services") were not material to the Company's consolidated operations. During the three months ended September 30, 2022, as Third-Party Payment Processing Referral Services became more significant to the operations of the Company, our chief operating decision maker (the "CODM") began to manage operations and assess the Company's performance based on the operations of the delivery services related to our Platform ("Delivery Services") and Third-Party Payment Processing Referral Services areas separately, and we now have two reportable operating segments. See Part II, Item 8, *Note 17 – Segment Information* for additional information on the Company's segments.

**Going Concern**

The Company has concluded that as a result of recurring losses from operations and declines in cash positions, there exists substantial doubt about the Company's ability to continue as a going concern for a period of at least twelve months from the date of issuance of the financial statements contained in this Form 10-K. The Company's results of operations and cash positions have been adversely impacted primarily by declines in order volumes. In an effort to alleviate these conditions, management is implementing certain initiatives with the goal to improve its cash position, including a consolidation of the Company's technology platforms into a single application and cost reductions. The Company's plans are designed to provide the Company with adequate liquidity to meet its obligations for at least the twelve-month period following the date these financial statements are issued; however, the plans are dependent on conditions and factors, many of which are outside of the Company's control. There can be no assurance that we will be successful in implementing our plans or that we will be able to generate positive cash flow from operations in any future period, nor can there be any assurance that we will be able to raise additional equity capital. The result of such inability, whether individually or in the aggregate, will adversely impact our financial condition and could cause us to curtail or cease operations or to pursue other strategic alternatives, including commencing a case under the U.S. Bankruptcy Code. Accordingly, management could not conclude that it was probable that the plans will sufficiently mitigate the relevant conditions or events that raise substantial doubt about the Company's ability to continue as a going concern. See Part II, Item 7, *Management's Discussion and Analysis of Financial Condition and Results of Operations* - "*Liquidity and Capital Resources*" for additional details.

**Key Business Metrics**

For a description of our key business metrics related to the food delivery business, including Active Diners, Average Daily Orders, Gross Food Sales and Average Order Size, see Part II, Item 7, *Management's Discussion and Analysis of Financial Condition and Results of Operations* of this Form 10-K.

**Our Operations**

We have created a differentiated software Platform, purpose-built to connect restaurants, merchants, drivers and diners. Our business has been built with a focus on quality through providing brand-additive services to restaurants, which in turn benefits diners by providing a diverse restaurant selection and a great customer experience. Additionally, we facilitate mid-sized retail and e-commerce merchant access to payment processing solutions with third parties. We have multiple third-party processing relationships and our goal is to leverage their various options for the benefit of merchants operating in face-to-face, online, MOTO (mail order, telephone order), and other transactional environments.

***Restaurant Benefits***

We believe that we provide restaurants with the following key benefits:

- *Exposure.* Our Platform provides restaurants with access to incremental users and the opportunity to grow their consumer base. Restaurant menus are showcased on the Platform, resulting in diners discovering restaurants they would like to visit in person, not just order on the Platform, further expanding the potential pool of dine-in customers for restaurants.
- *Incremental channels.* Our Platform provides restaurants with additional channels through which they can receive more orders, while building brand awareness, as they are discovered by more diners.

- *Deep integration and customization.* We provide menu onboarding and real-time menu customization that restaurants can manage themselves.
- *Service*. We provide restaurants with in-market team support from our network of regional managers, territory managers and market success associates, and we provide them with a team of partner support representatives, helping to ensure the Platform operates efficiently for the restaurants.
- *Restaurant Software Platform.* The Platform provides restaurants with actionable data on diners' order history and trends, allowing restaurants to offer more tailored dishes and suggest more add-on items, which increases order values.
- *Reliable Delivery.* We connect restaurants with a network of independent contractor drivers through our wholly owned subsidiary, Delivery Logistics, LLC ("Delivery Logistics").

***Diner Benefits***

We believe that we provide diners with the following key benefits:

- *Selection.* The restaurants on our Platform include a mix of local independent restaurants and national chains that represent a wide array of cuisines, price points and local favorites in each market to best serve the diverse tastes of diners.
- *Quality Service.* We have a dedicated customer support team to assist diners, helping to ensure quick and consistent quality service when ordering on the Platform.
- *Discovery.* The Platform is designed to showcase the variety of restaurants inclusive of menus with professional photography, giving diners a rich understanding of restaurants' offerings.
- *Personalized Experience.* We allow diners to tailor their orders to various layers of customization through the easy-to-use Platform. Diners can add frequent restaurants as favorites and keep track of past orders.
- *Convenience.* We provide diners with an intuitive Platform that makes ordering and delivery simple from any connected device. Diners can track their order and know exactly when to expect their food.

***Driver Benefits***

- *Flexibility*. We provide independent contractor drivers with the opportunity to work when and how they want, based upon their individual needs. Our streamlined onboarding process allows drivers to quickly start earning on their own schedule.

***Facilitation of Third-Party Payment Processing Solutions Benefits***

- *Cost Savings*. We believe our strategic partnerships with specific point-of-sale ("POS") systems and other processing solutions allow merchants to take advantage of less expensive options.
- *Expansion of Sales Revenue and Customer Base.* Our strategy is to provide access to attractive third-party payment processing solution options, as well as state-of-the-art POS systems coupled with advanced mobile smart terminals, to better serve our restaurant clients as well as other merchants.

**Business Strategy**

We have historically grown our business by increasing the number of quality restaurants available on the Platform, with the goal of facilitating growth in diners and orders. Leveraging best practices from the launch of prior markets, we continuously refine our processes in onboarding new restaurants, deploying adequate resources to markets, sales and ongoing business development. We have historically focused our efforts on bringing in the logistics infrastructure to underserved populations of restaurants, grocery stores and other merchants and establishing strong market presence or leadership positions in the markets in which we operate. As a result of recurring losses from operations and liquidity challenges, we have recently exited certain markets and had a significant reduction in the workforce involved in the operation of our Delivery Services Segment. The Company has experienced growth in revenue in the Third Party Payment Processing Referral Services Segment since the acquisition of the Cape Payment Companies in the third quarter of 2021 through the third quarter of 2022. Our strategy is to expand our ecosystem, which today is comprised of our restaurants, merchants, diners and independent contractor drivers, through the enhancement of our Platform and providing additional products and services, including the facilitation of access to third-party payment processing services for our ecosystem. We believe that the Third Party Payment Processing Referral Service is a business segment with opportunity for growth. We intend to focus resources on this business segment and pursue the following growth strategies to grow the Platform and our business.

*Development of new products and services and investment in new technology*

Our long-term business strategy includes development of new product offerings and services across our marketplace and investment in new technology, all of which should continue to enhance the user experience and service offerings of the Platform.

*Remain in markets where we have a strong presence*

We plan to focus on existing markets where we have a strong presence, exit markets where we have a weak presence, and continue improving our restaurant offerings and technology platform depth, continuing to enhance the quality of our customer service and increasing our presence in the local communities.

*Pursue Strategic Acquisitions*

We intend to selectively evaluate and pursue opportunities through strategic acquisitions or arrangements to provide complementary offerings of products and services.

*Deliver an excellent diner experience*

We believe that by tailoring experiences on our Platform to the nuances of local or regional markets, we should be able to improve the user experience and drive growth for our restaurant partners. We intend to continue to refine our customer support team to provide a high-quality experience to our diners.

*Leverage relationships with our restaurant partners*

We intend to utilize our existing relationships with diverse, high-quality restaurant partners to expand our presence within our current markets where we have a strong presence. In particular, we view facilitating access to third-party payment processing services as a complimentary offering to both expand and strengthen our relationships with our restaurant partners.

**Marketing**

The Platform is an important extension of restaurant branding. Restaurants promote the Platform as a feature for their diners through in-restaurant advertising collateral such as door stickers, table tents and push cards, and other promotional items. Our remaining sales and marketing initiatives are through paid digital marketing, social media strategies and local sponsorships. Our restaurant relationships also allow us to market third-party payment processing services and solutions.

**Sales**

Our sales team is particularly focused on offering restaurants access to our Third-Party Payment Processing Referral Service. Our sales team is uniquely positioned to facilitate access to third-party payment processing services to these restaurants. We view the existing restaurant relationships as a conduit through which we can engage with our restaurant partners to understand their needs and offer additional services and products as appropriate, such as facilitating access to third-party payment processing services.

**Products and Services**

***Restaurant Products and Services***

*Restaurant Onboarding.* We offer restaurants a streamlined onboarding process that features direct menu management and high levels of customer service from our market level management and restaurant support team.

*Product Features*. We provide restaurants with the ability to offer promotions and tailored daily specials, optimize orders through analytics and manage restaurant menus. The Platform includes a dedicated mobile application for restaurants which simplifies the aggregation of restaurant order and delivery tasks onto a central in-app controller and provides flexibility to edit menus based on inventory or promotions. This can be performed through user-friendly hardware that receives orders on-site and integrates them seamlessly into existing kitchen flow. We also provide integration with certain online ordering and point-of-sale vendors in order to further enhance our restaurant partners' efficiency when fulfilling orders generated on our Platform. The Platform is also able to provide featured placement of certain restaurants within both the mobile and web applications.

*Restaurant Support*. We also provide restaurants with a team of support representatives to ensure timely responses to inquiries, contributing to an overall high-quality restaurant experience.

*Delivery*. We provide an ordering and delivery Platform for restaurants through a network of independent contractor drivers to address the growing demand for delivery services. We also provide delivery services for restaurants and other retailers who have ordering platforms without delivery.

***Diner Products and Services***

*Features*. The Platform simplifies the diner ordering process to a few steps. These include setting location, specifying delivery method, immediate or future order, selecting and customizing menu items and tracking orders until completion. Diners have search capabilities to locate a certain restaurant or search by cuisine type and can easily view their favorite restaurants and past orders.

*Restaurant Selection and Customization.* The restaurants on the Platform offer diners a wide array of cuisine types, both from local independent restaurants and national chain restaurants. Our goal is to create a personalized experience for diners, where they can tailor their orders to several layers of customization – getting what they want, when they want it.

*Customer Support*. We also provide diners with a team of customer support representatives, which can be directly accessed through our mobile and web applications to assist with any inquiries and to ensure a high-quality diner experience.

***Third-Party Payment Processing Solutions***

We facilitate mid-sized retail and e-commerce merchant access to third-party payment processing solutions. We believe that pricing models obtained by merchants are value additive. Our goal is to see merchants access the best processing solution for their specific business type, which should foster growth and avoid unnecessary disruption in services.

**Customers**

During the year ended December 31, 2022, we served approximately 1 million Active Diners. For the years ended December 31, 2022 and 2021, none of the restaurants on the Platform or Active Diners accounted for 1% or more of the Company's total revenue.

We acquired the Cape Payment Companies in August 2021 and receive residual payments from third-party payment processing solution providers in connection with referral services provided. For the year ended December 31, 2022, one payment processing solution provider accounted for approximately 5% of the Company's total revenue and none of the other payment processing solution providers we received residual payments from accounted for more than 1% of the Company's total revenue.

**Competition**

Our primary competition consists of other online ordering and delivery service providers, who compete with us for restaurants, merchants, diners and delivery drivers within the markets we serve. We experience intense competition from well-capitalized national delivery service providers in all of our markets that have much greater management and financial resources than us.

Additionally, we face competition from traditional offline options used by the vast majority of restaurants in our markets, including paper menus, telephone orders for delivery or takeout, and local advertising placed by restaurants. For restaurants, we believe we offer a more targeted marketing opportunity than traditional, offline, local advertising channels, providing exposure to our network of diners, who routinely access our Platform.

We compete with other independent sales organizations in facilitating access to third-party payment processing solutions and many of our competitors have substantially greater financial, technological and marketing resources than we do.

**Impact of Macroeconomic Developments and COVID-19 on our Business**

We are exposed to general economic conditions that are beyond our control, including macroeconomic developments and impacts related to inflation, increased gasoline prices and the ongoing effects of the COVID-19 pandemic, both globally and in the U.S. The inflationary trends that the U.S. is experiencing, as well as increased gasoline prices, affect all constituent groups in our ecosystem, including restaurants, consumers and independent contractor drivers. These groups may be negatively impacted by these economic conditions, which in turn could impact our financial position and results of operations. There is uncertainty of the duration of these macroeconomic conditions.

We have been able to operate effectively during the COVID-19 pandemic. There remains uncertainty as to whether or not the COVID-19 pandemic will continue to impact diner behavior, and if so, in what manner.

To the extent that macroeconomic factors, including inflation, increased gasoline prices and the COVID-19 pandemic adversely impact the Company's business, results of operations, liquidity or financial condition, they may also have the effect of heightening many of the other risks described in the risk factors in this Form 10-K. Management continues to monitor the impact of recent macroeconomic trends and the ongoing impact of new COVID-19 variants and the possible effects on its financial position, liquidity, operations, industry and workforce.

**Seasonality and Holidays**

Our business tends to follow restaurant closure and diner behavior patterns with respect to demand of our service offering. In many of our markets, we have historically experienced variations in order frequency as a result of weather patterns, university summer breaks and other vacation periods. In addition, a significant number of restaurants tend to close on certain major holidays, including Thanksgiving, Christmas Eve and Christmas Day, among others. Further, diner activity may be impacted by unusually cold, rainy, or warm weather. Cold weather and rain typically drive increases in order volume, while unusually warm or sunny weather typically drives decreases in orders. Furthermore, severe weather-related events such as snowstorms, ice storms, hurricanes and tropical storms have adverse effects on order volume, particularly if they cause property damage or utility interruptions to our restaurant partners. The COVID-19 pandemic, as well as the federal government's responses thereto, have historically had an impact on our typical seasonality trends and could impact future periods.

**Technology and Intellectual Property**

Our Platform uses scalable software to provide a consistent and robust user experience as user adoption increases. The internally developed Platform is purpose-built to streamline online ordering and fulfillment for consumers, merchants and restaurants. The Platform is 100% hosted in the cloud. Cloud hosting assists us with addressing potential capacity constraints that we may face as we grow our core applications and provide a level of redundancy, fault tolerance and cost effectiveness.

We protect our intellectual property through a combination of trademarks, trade dress, domain name registrations, trade secrets, patents, and copyrights.

As of December 31, 2022, we had registered trademarks covering "Waitr", "Bite Squad" and "Delivery Dudes" and the stylistic designs associated with our brands. In June 2021, the Company entered into a License, Release and Settlement Agreement to settle all claims related to a lawsuit related to alleged trademark infringement based on the Company's use of the "Waitr" trademark and logo. In connection therewith, the Company agreed to adopt a new trademark or tradename to replace the Waitr trademark. See Item 3, Legal Proceedings for additional details. In February 2023, the Company abandoned the Waitr trademark registration.

In 2021, we registered the domain name ASAP.com, along with several other related domain names, in connection with our comprehensive rebranding. In June 2022, we filed two trademark applications for “ASAP.” In August 2022, we initiated our rebranding initiative and introduced our new “deliver anything ASAP” business model, expanding our food-delivery services to a broader array of products. Our rebranding included the consolidation the Company’s technology platforms into a single application.

As of December 31, 2022, we filed two patent applications in the United States, which seek to cover proprietary inventions relating to our products and services. We may pursue further patents to the extent that management believes it will benefit the Company’s business and be cost effective.

Our employees are required to maintain proprietary and non-public information confidential and to assign any and all inventions or other intellectual property relating to the business to ASAP. The policies and applicable terms of use of the Platform also contain confidentiality and assignment of intellectual property provisions and restrict the distribution or use of the Company’s technology in unauthorized manners. Additionally, we enter into confidentiality agreements with consultants and contractors who are given access to confidential information about the Company.

**Government Regulation**

Our industry and business model are relatively new, have been evolving, and are subject to rapid changes in technology and the adoption and application of regulation. We are subject to a variety of laws, regulations, and local ordinances in the jurisdictions in which we operate and they are also evolving and difficult to predict. These include laws and regulations relating to (i) pricing and fee structures, (ii) food safety, (iii) labor and employment, (iv) acceptance of credit card payments and consumer protection, (v) website and mobile application accessibility, security, and data privacy, (vi) alcoholic beverages, (vii) background checks, (viii) taxes, and (ix) other regulated matters. These laws, regulations, and ordinances can be subject to interpretation and can lack certainty and specificity relative to our business. In many cases, it may be unclear whether certain of these regulatory schemes apply to our business and how best to navigate potential differing standards, interpretations, and even conflicts among the different governmental authorities who adopt and enforce such regulation.

Recent political, financial, and world events may have the effect of increasing scrutiny on technology companies and on gig economy enterprises reliant on an independent contractor workforce. Governmental entities have enacted, and may enact, new measures that are adverse to our business, like measures capping commissions charged to restaurant merchants that have been enacted in response to the COVID-19 pandemic in several state and city jurisdictions. Certain larger cities have enacted permanent regulations capping commissions charged to restaurant merchants and it is unclear whether this is a growing trend. As a result, we may be forced to either increase fees to consumers, if legally permitted, reduce our margins and profitability in such jurisdictions, or cease providing services in such jurisdictions, thereby reducing our geographic footprint and expansion opportunities. We may also be compelled to expend significant resources or discontinue certain services or features which could adversely affect our business.

While we hope to continue to expand and make our technology platform broadly available, these laws, regulations, and ordinances may limit our ability to expand geographically or require us to expend significant resources to modify our platform, systems, or alter our business model in order to do so. Further, if we are unable to comply with regulation imposed upon our business, we could be subject to regulatory proceedings, fines or other penalties, along with potential civil and criminal proceedings. Finally, such proceedings could become the focus of increased media attention or other negative impacts on our brand identity or our public relations initiatives, thereby adversely impacting our business, financial condition, and results of operations.

**Human Capital**

As of December 31, 2022, we had approximately 412 employees and at March 15, 2023, we had approximately 255 employees. We also engage consultants as needed. None of our employees are represented by a labor union with respect to their employment with the Company. We consider our relations with our employees to be satisfactory.

Our success depends upon our ability to identify, attract and retain highly qualified management and other key operating and technology personnel. Factors that may affect our ability to attract and retain qualified employees include employee morale, our reputation, competition from other employers, and availability of qualified individuals. We consider talented management a very important factor in our ability to drive our strategic initiatives and execute our long-term growth strategy and appreciate the importance of retention, growth and development of our employees. We strive to maintain a diverse and inclusive workforce and are committed to a culture which values equality and respect. Our employees are offered competitive compensation and benefits programs, as well as opportunities for career growth and development. We are committed to a safe workplace and an ethical environment in which employees can continually develop their skills and expertise to advance their careers.

The recruitment of qualified independent contractor drivers by Delivery Logistics is an important part of our success. Independent contractor drivers are provided with a streamlined onboarding process and educational opportunities that help to maximize their earnings potential. Maintaining a diverse network of independent contractor drivers is important to us. We are committed to our independent contractor drivers having the tools and resources needed to ensure they provide exceptional customer service.

**Corporate History**

Waitr Incorporated began operations in 2014 in Lake Charles, Louisiana as a restaurant platform for online ordering and delivery services, and grew quickly, connecting restaurants and diners in various markets. Landcadia Holdings, Inc. ("Landcadia") was a special purpose acquisition company ("SPAC") whose business was to effect a business combination. The November 2018 merger between Waitr Incorporated and Landcadia (the "Landcadia Business Combination") provided a platform for Waitr Incorporated to gain access to the U.S. public markets. Prior to the consummation of the Landcadia Business Combination, the common equity of the SPAC was traded on the Nasdaq Stock Market (the "Nasdaq") under the symbol "LCA". Effective November 2018, the Company's common equity began trading on Nasdaq under the ticker symbol "WTRH".

In August 2022, we initiated our rebranding initiative and introduced our new "deliver anything ASAP" business model, expanding our food-delivery services to a broader array of products. Among our new business expansions is the Company's proprietary in-stadium ordering technology, which allows fans to avoid the typical long lines at stadium concession areas. In connection with the Company's rebranding, the Company changed the corporate name of "Waitr Inc." to "ASAP Inc." and its ticker symbol to "ASAP" in November 2022. We have secured an exclusive in-stadium mobile ordering agreement with MetLife Stadium, the New York Giants and the New York Jets. Additionally, we secured a mobile ordering agreement with the Florida Panthers, the first arena deal for the Company with a National Hockey League team. During the third quarter of 2022, we also entered into a partnership with FoodBoss, an industry leading online food delivery search engine.

In January 2019, the Company acquired BiteSquad.com, LLC ("Bite Squad"), an online ordering platform which was based in Minneapolis, Minnesota. The acquisition of Bite Squad (the "Bite Squad Merger") expanded the Company's scale and footprint. In March 2021, the Company completed the acquisition of Delivery Dudes, a third-party delivery business primarily serving the South Florida market (the "Delivery Dudes Acquisition"). In August 2021, the Company completed the acquisition of the Cape Payment Companies, which are in the business of facilitating merchant access to third-party payment processing solution providers (the "Cape Payment Acquisition").

As previously disclosed, on January 26, 2022, we received a letter from The Nasdaq Stock Market LLC ("Nasdaq") indicating that the Company was not in compliance with Nasdaq Listing Rule 5450(a)(1) because the closing bid price per share for the Company's common stock had closed below $1.00 for the previous 30 consecutive business days (the "Bid Price Rule"). The Company was given until July 25, 2022, to regain compliance with the Bid Price Rule. On July 28, 2022, in connection with the transfer of the Nasdaq listing from the Global Select Market to the Capital Market, the Company was granted by Nasdaq an additional 180-day grace period, or until January 23, 2023, to regain compliance with the Bid Price Rule. On January 24, 2023, the Company received written notice (the "Delisting Notice") from the staff of Nasdaq notifying the Company that, as a result of the failure to regain compliance with the Bid Price Rule for continued listing on the Nasdaq Capital Market as set forth in Nasdaq Listing Rule 5550(a)(2), Nasdaq had determined that the Company's common stock will be delisted from the Nasdaq Capital Market. The Company did not appeal this determination. Nasdaq suspended trading of the Company common stock on February 2, 2023 and our common stock concurrently commenced trading on the OTCQB Venture Market ("OTCQB") under the same trading symbol, "ASAP."

**Reverse Stock Split**

In November 2022, the Company filed a Certificate of Amendment to amend the Company's Third Amended and Restated Certificate of Incorporation, which effected a one for twenty (1:20) reverse stock split (the "Reverse Stock Split") of its outstanding common stock. As a result of the Reverse Stock Split, every twenty shares of the Company's common stock issued and outstanding immediately prior to the Reverse Stock Split was combined and reclassified into one share of common stock. No fractional shares were issued in connection with the Reverse Stock Split. Stockholders who would otherwise be entitled to a fractional share of common stock were instead entitled to receive a proportional cash payment. The Reverse Stock Split did not change the par value or authorized number of shares of common stock. All common share and per share amounts presented in this Form 10-K have been retroactively adjusted to reflect the Reverse Stock Split.

**Basis of Presentation**

The Bite Squad Merger, Delivery Dudes Acquisition and Cape Payment Acquisition were considered business combinations, in accordance with generally accepted accounting principles in the United States of America ("GAAP"), and have been accounted for using the acquisition method. Under the acquisition method of accounting, total merger consideration, acquired assets and assumed liabilities are recorded based on their estimated fair values on the acquisition date. The excess of the fair value of merger consideration over the fair value of the assets less liabilities acquired has been recorded as goodwill. The results of operations of the acquired companies are included in our consolidated financial statements since their respective acquisition dates.

## Item 1A. Risk Factors

*An investment in our securities involves a high degree of risk. You should carefully consider the risks described below, together with the other information contained in this Form 10-K, including our financial statements and the related notes and "Management's Discussion and Analysis of Financial Condition and Results of Operations," before making an investment decision. Our business, prospects, financial condition and operating results could be harmed by any of these risks, as well as other risks not currently known to us or that we currently consider immaterial. The trading price of our securities could decline due to any of these risks, and, as a result, you may lose all or part of your investment. As used in the risks described in this subsection, references to "we," "us" and "our" are intended to refer to the Company unless the context clearly indicates otherwise.*

**Risk Factor Summary**

Following is a summary of the principal risk factors to our business, which risks are more fully described below the summary.

*Risks Related to Our Operations*

- inability to finance our operations through the sale or issuance of debt or equity securities or through bank or other financing as a result of the existence of substantial doubt about our ability to continue as a going concern;
- inability to successfully generate or otherwise obtain sufficient funds for our working capital needs, resulting in the need to substantially alter, or possibly discontinue, cease or curtail operations or to pursue other strategic alternatives, including commencing a case under the U.S. Bankruptcy Code;
- risks related to a shift in our business strategy;
- continuing to experience a decrease in the number of diners and number of orders or decrease in order sizes on the Platform;
- declines in our delivery service levels or lack of increases in business for restaurants;
- loss of restaurants on the Platform, including due to changes in our fee structure;
- inability to successfully expand our operations of facilitating the entry into merchant agreements by and between merchants and third-party payment processing solution providers;
- risks related to market closures and employee reductions;
- inability to achieve profitability in the future;
- risks related to our relationships with the independent contractor drivers, including shortages of available drivers, loss of independent contractor drivers, adverse conditions impacting independent contractor drivers, and possible increases in driver compensation;
- inflationary pressures, increased gasoline prices and other macroeconomic factors that are largely beyond our control;

- inability to maintain and enhance our brands, including degradation thereto resulting from our comprehensive rebranding initiative to change our visual identity, or occurrence of events that damage our reputation and brands, including unfavorable media coverage;
- seasonality and the impact of inclement weather, including major hurricanes, tropical cyclones, major snow and/or ice storms in areas not accustomed to them and other instances of severe weather and other natural phenomena;
- inability to manage operations;
- inability to successfully improve the experience of restaurants and diners in a cost-effective manner;
- changes in our products or to operating systems, hardware, networks or standards that our operations depend on;
- dependence of our business on our ability to maintain and scale our technical infrastructure;
- personal data, internet security breaches or loss of data provided by diners or restaurants on our Platform;
- inability of third-party payment processing services, of which we may facilitate the entry into merchant agreements, to comply with applicable state or federal regulations;
- inability to comply with applicable law or standards if we were to become a payment processor at some point in the future;
- risks related to the credit card and debit card payments we accept;
- reliance on third-party vendors to provide products and services;
- substantial competition in technology innovation and distribution and inability to continue to innovate and provide technology desirable to diners, restaurants and merchants;
- failure to pursue and successfully make additional acquisitions;
- failure to comply with covenants in the agreements governing our debt;
- additional impairments of the carrying amounts of goodwill or other indefinite-lived assets;
- dependence on search engines, display advertising, social media, email, content-based online advertising and other online sources to attract diners to the Platform;
- loss of senior management or key operating personnel and dependence on skilled personnel to grow and operate our business;
- inability to successfully integrate and maintain acquired businesses;
- failure to protect our intellectual property;
- patent lawsuits and other intellectual property rights claims;
- potential liability and expenses for existing and future legal claims, including claims that may exceed insurance coverage or are not insured against;
- our use of open source software;
- insufficient capital to pursue business objectives and respond to business opportunities, challenges or unforeseen circumstances;
- unionization of our employees, the magnitude of which increases if our independent contractor drivers were ever reclassified as employees;
- failure to maintain an effective system of disclosure controls and internal control over financial reporting (see Part II, Item 9A for details of the identification of a material weakness in our internal controls as of December 31, 2022); and
- failure to remediate a material weakness in, or inherent limitations associated with, our internal controls (see Part II, Item 9A).

*Risks Related to Our Industry*

- the highly competitive and fragmented nature of our industry;
- dependence on discretionary spending patterns in the areas in which the restaurants on our Platform operate and in the economy at large;

- general economic and business risks affecting our industry that are largely beyond our control;
- COVID-19 variants and continued pandemic concerns, or a similar public health threat that could significantly affect our business, financial condition and results of operations;
- implementation of fee caps by jurisdictions in areas where we operate;
- failure of restaurants in our networks to maintain their service levels;
- slower than anticipated growth in the use of the Internet via websites, mobile devices and other platforms;
- federal and state laws and regulations regarding privacy, data protection, and other matters affecting our business;
- the potential for increased misclassification claims following the change to the U.S. presidential administration;
- risks relating to our relationships with the independent contractor drivers, including shortages of available drivers and possible increases in driver compensation; and
- risks related to the cannabis industry with respect to the business operations of referring merchants to third-party payment processing solution providers.

*Risks Related to Ownership of Our Securities*

- risks related to future sales of a substantial number of shares by existing stockholders which could in turn cause our share price to decline;
- the risk that future offerings of debt or equity securities that rank senior to our common stock may adversely affect the market price of our common stock;
- the risk that the Notes (as defined in Note 11 of the Financial Statements) as well as other derivative securities ("Derivative Securities"), if exercised or converted into shares of our common stock, would increase the number of shares eligible for future resale in the public market and result in dilution to our existing stockholders; and
- the risk that we fail to continue to meet all applicable OTCQB listing requirements in future periods and risks relating to the consequent delisting of our common stock from the OTCQB if we fail to meet continued listing requirements, which could further adversely affect the market liquidity of our common stock, the ability for us to raise capital, and could decrease the market price of our common stock significantly.

**Risks Related to Our Operations**

***As required by ASC 205-40, Going Concern, our management has performed an analysis of our ability to continue as a going concern and has identified substantial doubt about our ability to continue as a going concern and management's plans to alleviate this condition may be unsuccessful.***

Pursuant to the requirements of ASC 205-40, *Going Concern*, management must evaluate whether there are conditions or events, considered in the aggregate, that raise substantial doubt about the Company's ability to continue as a going concern within one year after the date that the financial statements are issued. Based on their assessment, our management has raised concerns about our ability to continue as a going concern within one year after the date that the consolidated financial statements contained in this report are issued. Management has focused its efforts on certain initiatives to improve its cash position, including consolidation of its technology platforms into a single application and cost reductions. For a discussion of these initiatives, see "*Management's Discussion and Analysis of Financial Condition and Results of Operations—Liquidity and Capital Resources*." Additionally, management evaluated its existing cost structure and implemented cost savings initiatives to reduce operating costs and plans to continue to implement further cost saving initiatives where appropriate. While the Company believes that the initiatives described above will result in improved liquidity and cash flow, there can be no assurance that the Company will be able to generate positive cash flow from operations in the future, affecting the Company's ability to continue as a going concern.

The Company's results of operations and cash positions have been adversely impacted primarily by declines in order volumes. Our primary source of liquidity during the year ended December 31, 2022 has been proceeds from the issuance of our common stock. The Company experienced a trend of negative cash flow from operations during 2022. Cash flow used in operations totaled $28.7 million for the year ended December 31, 2022. The Company has had recurring net losses, and as reflected in the accompanying consolidated financial statements, the Company has an accumulated deficit of $575.9 million as of December 31, 2022. During the year ended December 31, 2022, pursuant to our ATM Program (as defined in Part II, Item 5), we sold 3,985,099 shares of the Company's common stock for net proceeds of $12.7 million. The Company was delisted from Nasdaq on February 2, 2023, and as such, our ability to sell shares of common stock using the ATM Program going forward is impaired. The Company's cash position has declined from $60.1 million at December 31, 2021 to $12.1 million as of December 31, 2022 and approximately $6.3 million as of March 31, 2023. We believe that we have sufficient cash on hand to fund operations through at least the second fiscal quarter of 2023.

As substantial doubt about our ability to continue as a going concern exists, our ability to finance our operations through the sale and issuance of debt or equity securities or through bank or other financing could be impaired. Management continues to explore raising additional capital to supplement the Company's capitalization and liquidity and expects that the Company will seek to additionally fund its operations through proceeds from one or more equity raises, but there can be no assurance that such financing will be available on terms commercially acceptable to the Company, or at all. Our ability to continue as a going concern may depend on our ability to obtain additional capital, as there can be no assurance that we will be able to generate positive cash flow from operations in the future. If we raise funds by issuing debt securities or preferred stock, or by incurring loans, these forms of financing would have rights, preferences, and privileges senior to those of holders of our Common Stock. If adequate capital is not available to us when needed, or in the amounts required, we may be forced to terminate, significantly curtail or cease our operations or to pursue other strategic alternatives, including commencing a case under the U.S. Bankruptcy Code. Our consolidated results of operations could be materially adversely affected by these decisions and your investment in the Company could be materially impaired.

***The Company has had recurring net losses, a trend of negative cash flow from operations and a lack of liquidity. We may not experience improvements in our results of operations or liquidity position to the extent we anticipate, or at all.***

The Company is facing liquidity challenges due to recurring operating losses and a trend of negative cash flow from operations. Our results of operations and cash positions have been adversely impacted primarily by declines in order volumes. The Company may not experience improvements in its results of operations or liquidity position in the foreseeable future. Accordingly, our continued operations could be dependent on our ability to raise additional capital. In the event we are unable to improve cash flow or otherwise obtain additional funds for our working capital needs, we may be forced to substantially alter, or possibly even discontinue, cease or curtail operations or to pursue other strategic alternatives, including commencing a case under the U.S. Bankruptcy Code.

***We are implementing a shift in our business strategy, and our efforts may not result in a successful growth strategy. The expansion of operations of our Third Party Payment Processing Referral Services Segment, while reducing operations in the Delivery Services Segment, could have an adverse impact on our results of operations and financial condition.***

Historically, our operations have been related to online ordering technology in our Delivery Services Segment; however, we believe that potential for growth exists in our Third Party Payment Processing Referral Services Segment. As a result of recurring losses from operations and liquidity challenges, the Company has recently exited certain markets and had a significant reduction in the workforce involved in the operation of our Delivery Services Segment. The Company has experienced growth in revenue in the Third Party Payment Processing Referral Services Segment since the acquisition of the Cape Payment Companies in the third quarter of 2021 through the third quarter of 2022. We believe that the Third Party Payment Processing Referral Service is a business segment with opportunity for growth, although there can be no assurance that we will achieve any such growth. We intend to focus resources on this business segment, however, our efforts may not be successful and may not result in positive cash flow, profitable results or sufficient liquidity.

***If we fail to retain existing diners or add new diners, or if our diners continue to decrease in number and number of orders or order sizes decrease on the Platform, our revenue, financial results, and business may be adversely affected.***

Our historical financial performance has been significantly determined by our success in adding, retaining, and engaging Active Diners who make orders for delivery, dine-in or carryout using the Platform. Over the last three years, the number of Active Diners has declined and we have recently exited markets where we lack a strong market presence. To the extent that the number of our Active Diners continues to trend down, our business performance would continue to be adversely affected. If diners do not perceive the Platform to be useful, reliable, and trustworthy, we may not be able to retain diners or otherwise maintain or increase the frequency and amount of orders. A decrease in diner retention, growth, order frequency or overall order price will likely render the Platform less attractive to restaurants, which will have a material and adverse impact on our revenue, business, financial condition, and results of operations. Any number of factors could negatively affect diner retention, growth, and engagement, thereby adversely affecting our revenue, financial results, and future growth potential, including if:

- diners increasingly order through competing products or services;
- we fail to introduce new and improved services or if new services are not favorably received;
- we are unable to successfully maintain our efforts to provide a satisfactory delivery and ordering experience;
- we are unable to continue to develop products for mobile devices that users find engaging, that work with a variety of mobile operating systems and networks, and that achieve a high level of market acceptance;
- there are changes in diner sentiment about the quality or usefulness of the Platform, delivery quality, food quality or other products or concerns related to privacy and sharing, safety, security, or other factors;
- we are unable to manage and prioritize information to ensure diners are presented with menu items that are interesting, useful, and relevant to them;
- there are adverse changes in the Platform, delivery services or restaurant services or products that are mandated by legislation, regulatory authorities, or litigation, including settlements or consent decrees;
- technical or other problems prevent us from delivering food in a rapid and reliable manner or otherwise affect the user experience or enjoyment of food or beverages delivered;
- we adopt policies or procedures related to delivery, ordering or user data that are perceived negatively by our diners or the general public;
- we fail to provide adequate customer service to restaurants, diners, independent contractor drivers, or advertisers;
- we, restaurants on the Platform, or other companies in the mobile food delivery or ordering industry are the subject of adverse media reports, adverse litigation, or long-term governmental regulation such as fee caps, or other negative publicity;
- restaurants develop their own direct-to-consumer applications or online ordering and delivery services; or
- further degradation of our Active Diner base and order frequency or our Average Daily Orders and Gross Food Sales.

***If our delivery service levels decline or if restaurants do not see increases in business, restaurants could leave the Platform, reducing revenue and significantly harming our business.***

Restaurants may not continue to do business with us or may be unwilling to pay service fees if we do not deliver in a timely, professional and friendly manner or if the restaurants do not believe that their investment in the Platform will produce an increase in revenue from delivery, dine-in or carryout orders. Our service fees and commission revenue and the availability of restaurants on the Platform could be negatively impacted by the following factors, among others:

- decreases in the number of Active Diners or Average Daily Orders on the Platform;
- loss of online or mobile food delivery market share to competitors, as we continue to face intense competition in our markets;
- inability to professionally and accurately display menu items to consumers on the Platform;
- adverse media reports or other negative publicity involving the Company, restaurants on our Platform or other companies in our industry; and
- the impact of macroeconomic conditions and conditions in the restaurant industry in general, including restaurant closures.

***We generate a substantial amount of our revenue from restaurants viewed positively by diners. The loss of restaurants to other platforms could seriously harm our business.***

Substantially all of our revenue is derived from items offered by restaurants to diners on the Platform. The number of Active Diners, Average Daily Orders and Gross Food Sales depends on the availability of quality items available on the Platform from restaurants viewed positively by diners. As is typical in our industry, restaurants do not agree to long-term contracts with us, and they are generally free to leave the Platform with minimal notice or to participate on competing platforms. While no single restaurant accounts for more than 10% of our revenue, most of the restaurants on our Platform participate on competing platforms, many of the restaurants on our Platform only recently started providing menu items on the Platform, and many restaurants spend a relatively small portion of their overall budget with us. Restaurants may not continue to do business with us if we do not increase revenues for them or provide delivery, dine-in or carryout ordering for diners in an effective manner, or if they do not believe that the use of the Platform will generate a competitive return relative to other alternatives, especially including from our competitors.

The retention of existing restaurants on the Platform could decline due to a number of factors. First, the cost of retaining existing restaurants on the Platform could increase substantially. Competition to advertise our services to restaurants has been increasing and could continue to increase as a result of increasing competition among similar companies for a finite pool of restaurants. In addition, the number of options available to restaurants may result in downward pressure on the prices that restaurants are willing to pay for our services. As more choices become available for diners to order delivery, dine-in or carryout from restaurants, the number and frequency of our word-of-mouth and/or organic referrals may decline. Our efforts to retain new restaurants in new geographical areas may not be successful.

If we fail to retain existing restaurants, especially those restaurants that are most popular with diners, our financial results could materially suffer.

***The Company has recently exited certain markets and had employee reductions, which could have an adverse impact on our business and results of operations.***

As part of cost reduction actions, the Company has recently exited certain markets where we didn’t have a strong market presence and we have also had a significant reduction in the number of employees involved in the operation of our Delivery Services Segment. A significant part of our revenue has historically been from our Delivery Services Segment. The closure of additional markets could have an adverse impact on our results of operations and liquidity. Additionally, our future success depends to a significant degree on the skills and efforts of not only our executive management, but also other key personnel. The reduction in our employee base or a failure to ensure that our remaining workforce can adequately handle our operating needs could have an adverse impact on our ability to operate our business.

***Our revenues have decreased year-over-year, and we may never achieve profitability.***

Our historical growth rates (including revenue and other key metrics) have declined and may not improve this year. The growth rates of Active Diners and Gross Food Sales have continued to decline over time as the market for our services matures, thereby impacting revenues. As our growth rates decline, investors’ perceptions of our business may be adversely affected and the market price of our common stock could decline further. There can be no assurance of any future profitable results of operations for various reasons, including without limitation insufficient growth, declining numbers of Active Diners or orders, declining revenue, increasing competition, costs to scale our business and technology and other risks described elsewhere in this Form 10-K.

***If we become a payment processor at some point in the future, we would be required to comply with applicable laws and standards. Inability to comply with applicable laws or standards could result in harm to our business.***

Although we currently do not directly store or process payments on behalf of restaurants or diners and use third parties to do so, we may choose to do so in the future. We would need to comply with Payment Card Industry (“PCI”) and Data Security Standard (the “Standard”) if we choose to pursue this possibility. The Standard is a comprehensive set of requirements for enhancing payment account data security that was developed by the PCI Security Standards Council to help facilitate the broad adoption of consistent data security measures. Payment card network rules would require us to comply with the Standard, and our failure to do so may result in fines or restrictions on our ability to accept payment cards if we elected to become a payment processor.

Under certain circumstances specified in the payment card network rules, we could be required in the future to submit to periodic audits, self-assessments or other assessments of our compliance with the Standard. Such activities may reveal that we had failed to comply with the Standard. If an audit, self-assessment or other test determines that we need to take steps to remediate any deficiencies, such remediation efforts may distract our management team and require us to undertake costly and time-consuming remediation efforts. In addition, even if we comply with the Standard, there is no assurance that we will be protected from a security breach. Payment processing businesses involve complex financial, cybersecurity and other factors that may be difficult to us. We cannot ensure that the cost savings or additional revenue from becoming a payment processor would exceed the significant costs associated with that decision. While we are currently PCI compliant on our Platform, there can be no assurance that we will remain compliant.

***We are subject to a variety of risks relating to our relationships with the independent contractor drivers, including shortages of available drivers, loss of independent contractor drivers, adverse conditions impacting independent contractor drivers, and possible increases in driver compensation.***

During the year ended December 31, 2020, we terminated our employee drivers and outsourced our driver function to Delivery Logistics, who provides us with independent contractor drivers. While we implemented this change in a way intended to ensure that the drivers are classified as independent contractors under applicable law and regulation, certain state and local governmental authorities have initiated efforts to classify independent contractors performing driver jobs as employees. In January 2020, California State Assembly Bill 5 ("AB5") came into effect, which codifies an employee-friendly test to determine whether a worker is an employee or independent contractor under California law. However, in November 2020, California voters passed Proposition 22, the App-Based Drivers as Contractors and Labor Policies Initiative. Proposition 22 classifies app-based transportation and delivery drivers as independent contractors and adopts various labor and wage policies specific to this class of workers, which policies will likely increase operating costs. Gig economy companies initially argued that Proposition 22 effectively exempts this class of workers from the reach of AB5. However, in late 2021, a California appellate court ruled that Proposition 22 was unconstitutional and unenforceable. This decision is pending appeal.

While the Company does not operate in California, multiple other states including Illinois, Massachusetts, New Jersey, and New York have attempted to codify employee-friendly language similar to AB5 while other public gig economy companies have attempted to lobby for protective measures similar to Proposition 22 putting the future of classification in the gig economy in limbo. Further, since 2020, numerous lawsuits have been filed against various gig economy companies based on the misclassification of their drivers. Most recently, Uber settled a misclassification suit in New Jersey for over $100 million. These regulatory actions and/or increased scrutiny could result in increased costs and burdens for the Company. The Company has already experienced an increase in misclassification claims since the beginning of the pandemic, particularly from various state unemployment agencies. It is possible that these claims may increase pending the Department of Labor's proposed rule making around employment classification.

The change in composition of our driver base could also result in a degradation of service provided by contracted delivery drivers, and an increase in the turnover rates of delivery drivers. If Delivery Logistics is unable to attract and retain a sufficient number of independent contractor drivers, we could face difficulty meeting consumer order demands or be forced to forego business that would otherwise be available to us, which would adversely affect our financial condition.

***Our operations are affected by macroeconomic factors that are largely beyond our control.***

Inflationary trends that the U.S. is experiencing as well as increased gasoline prices may have a negative impact on restaurants, consumers and independent contractor drivers, which in turn could continue to negatively impact our financial condition and results of operations. Inflationary pressures, increased gasoline prices and other macroeconomic factors have driven restaurant prices higher, which could negatively impact consumer demand and result in a decrease in order volumes. Additionally, operating costs of independent contractor drivers could be negatively impacted by inflationary pressures and increased gasoline prices, which could require us to spend more to procure independent contractor driver services. These macroeconomic factors are largely beyond our control and there is uncertainty as to the duration of these macroeconomic conditions.

***If we are not able to maintain and enhance our brands, or if events occur that damage our reputation and brands, our ability to expand our base of diners and restaurants may be impaired, and our business and financial results may be harmed. Unfavorable media coverage could seriously harm our business.***

Our brands have historically contributed to the success of our business. We believe that maintaining and enhancing our brands is critical to our base of diners and restaurants. Many of our new diners are referred by existing diners, and, therefore, we strive to ensure that our diners remain favorably inclined towards the Platform and our online ordering service. Maintaining and enhancing our brands could depend largely on our ability to continue to provide useful, reliable, trustworthy, and innovative services, which we may not do successfully. We may introduce new services, products or terms of service that diners do not like, which may negatively affect our brands.

Additionally, the actions of restaurants that are on our Platform (or quality and safety of their food), independent contractor drivers and others may negatively affect our brands if consumers do not have a positive experience interacting with those parties after using the Platform. We may experience media, legislative, or regulatory scrutiny of our delivery and food safety record, our delivery experience, privacy matters or other issues, which may adversely affect our reputation and brands. We may also fail to provide adequate customer service, which could erode confidence in our brands. Maintaining and enhancing our brands may require us to make substantial investments and these investments may not be successful. If we fail to successfully promote and maintain our brands, our business and financial results may be adversely affected.

***Seasonality and the impact of inclement weather could adversely affect our operations and profitability.***

We observe that diner behavior patterns and demand for the services we provide generally fluctuate during the year on our Platform. For example, order frequency tends to vary, primarily as a result of weather patterns, university summer breaks and other vacation periods. In addition, orders in cities or towns with college campuses tend to fluctuate with the start and end of the school year, which can comprise a large part of our overall revenue in certain locations. Our revenues fluctuate according to these patterns and due to the timing of certain holidays within each quarter and result in quarterly fluctuations. As a result, diner activity and demand for our services has historically been stronger in our first and fourth fiscal quarters as compared to our second and third fiscal quarters. In addition, other seasonality trends may develop and the existing seasonality and diner behavior that we experience may change or become more extreme, including as a result of factors outside of our control. The COVID-19 pandemic, as well as the federal government's responses thereto, have had an impact on our typical seasonality trends and could impact future periods.

We sometimes experience large influxes of orders during inclement weather when consumers do not wish to leave their homes to eat restaurant food. Such inclement weather events are unpredictable in many cases and may continue to provide disruption in future periods in certain markets. In such events, the availability of independent contractor drivers could be limited due to unsafe driving conditions or the refusal or unwillingness of drivers to work during such weather events. This can result in substantially delayed delivery times and diner frustration with our services, reducing the willingness of consumers to order using the Platform in the future. We have in the past experienced increased order volume during certain holidays, while facing a simultaneous shortage in drivers, which can also result in substantial delivery delays and diner dissatisfaction. In addition, the likelihood of accidents may increase during inclement weather events, thereby increasing the costs to us of each delivery, exposing us to potential litigation or accident claims. Any of these events could substantially impact our revenue and results of operations and our ability to grow and operate our business.

***Our inability to manage operations and meet demand could harm our operations and brands.***

Occasions have arisen in the past in which we were not able to adequately meet surges in orders and consumer demand. We may be required to make substantial investments in the future in technology, customer service, sales and marketing infrastructure in order to adequately handle growth, surges in orders and consumer demands. We may not be able to effectively integrate, develop and motivate our employees. Furthermore, we may not be able to manage our operations effectively. If we do not manage our business and operations effectively, the quality of the Platform and efficiency of our operations could suffer, which could harm our brands, business and results of operations.

***Our efforts to improve the experience of restaurants and diners may not be successful and the related investment may impact our profitability.***

Our culture prioritizes an excellent diner and restaurant experience and loyalty. Our efforts in achieving improved diner and restaurant experience and loyalty may not produce the short-term or long-term benefits that we expect, in which case, our relationships with diners and restaurants, and our business could be materially adversely affected.

***Our operations depend on mobile operating systems, hardware, networks and standards that we do not control. Changes in our products or to those operating systems, hardware, networks or standards may seriously harm our Active Diner retention and engagement.***

A large percentage of our revenues and growth occur on mobile devices using applications for our ordering technology (the "Apps"). Because the Apps are used primarily on mobile devices, the Apps must remain interoperable with popular mobile operating systems, Android and iOS, and related hardware, including but not limited to mobile devices. We have no control over these operating systems or hardware, and any changes to these systems or hardware that degrade the functionality of our products, or give preferential treatment to competitive products, could seriously harm the usage of the

Apps on mobile devices. Our competitors could attempt to make arrangements with Apple or Google to make interoperability of our products with those mobile operating systems more difficult or display their competitive offerings more prominently than ours. Similarly, our competitors could enter into other arrangements with mobile device manufacturers, wireless network carriers or Internet service providers that diminish the functionality of the Apps. We plan to continue to introduce new products regularly and have experienced that it takes time to optimize such products to function with these operating systems and hardware, impacting the popularity of such products, and this trend could continue.

***Our business is dependent on our ability to maintain and scale our technical infrastructure, and any significant disruption in our service could damage our reputation, result in a potential loss of diners and engagement, or adversely affect our financial results.***

Our reputation and ability to attract, retain, and serve diners and restaurants depend upon the reliable performance of the Platform and its underlying technical infrastructure. We have experienced service disruptions, and may experience future disruptions, outages or other performance problems due to a variety of factors. As the Platform grows more complex, stores more information and services higher numbers of diners, its technical infrastructure could suffer. We may not be able to identify causes of performance issues or service disruptions.

Our systems may not be adequately designed with the necessary reliability and redundancy to avoid performance delays or outages that could be harmful to our business. If the Platform is unavailable when diners, independent contractor drivers or restaurants attempt to access it, or if it does not load as quickly as they expect, these key users may not return to the Platform as often in the future, or at all. As the amount and types of information shared on the Platform continue to grow, we will need an increasing amount of technical infrastructure, including network capacity, and computing power, to continue to satisfy the needs of our diners, restaurants on the Platform and the independent contractor delivery drivers. It is possible that we may fail to effectively scale and grow our technical infrastructure to accommodate these increased demands. In addition, our business is subject to interruptions, delays, or failures resulting from natural disasters, terrorism, or other catastrophic events.

A substantial portion of our network infrastructure is provided by third parties. Substantially all of the communications, network and computer hardware used to operate our websites and mobile applications are located in the United States in Amazon Web Services and Google Cloud Platform data centers. We do not own or control the operation of these facilities. In addition, we may not have sufficient protection or recovery plans in certain circumstances. We may not always maintain redundancy for certain hardware. Any disruption or failure in the services we receive from these providers could harm our ability to handle existing or increased traffic and could significantly harm our business. Any financial or other difficulties these providers face may adversely affect our business, and we exercise little control over these providers, which increases our vulnerability to problems with the services they provide.

We expect to continue to make significant investments to maintain and improve the availability of the Platform and to enable rapid releases of new features and products. To the extent that we do not effectively address capacity constraints, respond adequately to service disruptions, upgrade our systems as needed or continually develop our technology and network architecture to accommodate actual and anticipated changes in technology, our business and results of operations would be harmed.

We have spent and expect to continue to spend substantial amounts on technology infrastructure and services to handle the traffic on our websites and mobile applications and to help shorten the length of or prevent system interruptions. The operation of these systems is expensive and complex, and we could experience operational failures.

Although we carry business interruption insurance, it may not be sufficient to compensate us for the potentially significant losses, including the potential harm to the future growth of our business that may result from interruptions in our service as a result of system failures.

***Personal data, internet security breaches or loss of data provided by diners or restaurants on our Platform could violate applicable law and contracts with key service providers and could result in liability to us, damage to our reputation and brands and harm to our business.***

Mobile malware, viruses, hacking, and phishing attacks have become more prevalent in our industry and may occur on our systems in the future. Although it is difficult to determine what, if any, harm may directly result from an interruption or attack, any failure to maintain performance, reliability, security, and availability of our products and technical infrastructure to the satisfaction of restaurants or diners may seriously harm our reputation and our ability to retain and attract diners and restaurants. Moreover, such failure could subject us to legal exposure and the expenditure of capital resources to defend ourselves.

We rely on third-party billing and payment processing providers, many of whom may collect and store sensitive data, including legally protected personal information. Examples include third parties who process diner orders, payroll and other payments, and service providers who collect and store diner, restaurant, merchant or employee information. We may also process and store and use additional third parties to process and store sensitive intellectual property and other proprietary business information, including that of the restaurants on our Platform. While we intend to maintain data privacy and security measures that are compliant with applicable privacy laws and regulations, future security breaches could subject us and/or these third-party service providers to liability for violations of various laws, rules or regulations, civil liability, government-imposed fines, orders requiring that we or these third parties change our or their practices, or criminal charges, which could adversely affect our business. Complying with these various laws could cause us to incur substantial costs or require us to change our business practices, systems and compliance procedures in a manner adverse to our business.

***We have limited operational history and are subject to developmental risks associated with the development of any new business.***

We lack significant operational history by which future performance may be judged or compared. Any future success that we may enjoy will depend upon many factors, several of which may be beyond our control, or which cannot be predicted at this time, and which could have a material adverse effect upon our financial condition, business prospects and operations and the value of an investment in the Company. As a result, our past quarterly financial results do not necessarily indicate solid future performance. Investors should take into account the risks and uncertainties frequently encountered by companies in rapidly evolving markets. Investors should not rely upon our past quarterly financial results as indicators of future performance. The numerous factors, which we are unable to predict or are outside of our control, include the following:

- We may not be able to accurately forecast revenues and plan operating expenses;
- We may be unable to fund our working capital requirements or maintain compliance with our debt covenants, particularly if our forecast regarding the sufficiency of our liquidity is inaccurate or our expenses exceed our expectations;
- We may be unable to scale our technological and operational infrastructure to accommodate any growth in diners, orders or customer support needs;
- Our growth may depend on acquisitions, and we may lack the capital necessary to pursue them;
- The development and introduction of new products or services by us or our competitors is uncertain;
- Competing with traditional ordering methods or delivery services provided directly by restaurants (or third parties) to consumers over the phone or through their own websites or other means could pose a risk to our growth and financial performance;
- Continued increased competition from other third-party delivery companies;
- Our ability to maintain and retain, as well as any growth in the number of, Active Diners, Average Daily Orders, Gross Food Sales and order frequency is not guaranteed;
- Our ability to retain restaurants over long periods of time is uncertain;
- We may prove unable to attract and retain key employees and personnel to support growth;
- Seasonal and weather-related fluctuations in spending by consumers relating to food delivery can be unpredictable;
- The acceptable pricing of our services and commission fees to restaurants and diner fees to consumers is uncertain and has not been tested widely;
- Our ability to increase services, diner fees and other revenue does not enjoy long historical data trends and any increases in our costs may be met with adverse restaurant response that could materially negatively impact revenue as affected restaurants may withdraw from our Platform;

- We have yet to demonstrate our ability to diversify and grow material revenue sources beyond current services and diner fees;
- Increases in marketing, sales, and other operating expenses that we may incur to grow and expand our operations and to remain competitive are unpredictable;
- Our ability to maintain gross margins and operating margins can be difficult to predict and impacted by numerous factors beyond our control (for example, due to transaction charge increases, technology cost increases, competitive pricing and other items);
- We may experience system failures or breaches of security and privacy that could pose a harm on their own and could affect consumers' confidence in our services;
- We may not be able to adequately manage key third-party service providers;
- We may experience changes in diner or restaurant behavior or preferences;
- Payment processing costs could increase and we have not proven that we can grow this business segment;
- Our internal controls may not be able to keep pace with necessary requirements from a business, accounting or legal point of view; and
- We may experience safety hazards or issues with independent contractor drivers or third parties that come into contact with the drivers, which could be difficult to predict and which could impact our operating costs and diner or restaurant use of the Platform.

***We are subject to a number of risks related to the credit card and debit card payments we accept.***

We accept payments through credit and debit card transactions. For credit and debit card payments, we pay interchange and other fees, which may increase over time. An increase in those fees may require us to increase the prices we charge and would increase our operating expenses, either of which could harm our business, financial condition and results of operations.

We currently rely exclusively on one third-party vendor to provide payment processing services, including the processing of payments from credit cards and debit cards, and our business would be disrupted if this vendor becomes unwilling or unable to provide these services to us and we are unable to find a suitable replacement on a timely basis. If we or our processing vendor fails to maintain adequate systems for the authorization and processing of credit card transactions, it could cause one or more of the major credit card companies to disallow our continued use of their payment products. In addition, if these systems fail to work properly and, as a result, we do not charge our customers' credit cards on a timely basis or at all, our business, revenue, results of operations and financial condition could be harmed.

The payment methods that we offer also subject us to potential fraud and theft by criminals, who are becoming increasingly more sophisticated, seeking to obtain unauthorized access to or exploit weaknesses that may exist in the payment systems. If we fail to comply with applicable rules or requirements for the payment methods we or the restaurants accept, or if payment-related data are compromised due to a breach of data, we may be liable for significant costs incurred by payment card issuing banks and other third parties or subject to fines and higher transaction fees, or our ability to accept or facilitate certain types of payments may be impaired. In addition, our customers could lose confidence in certain payment types, which may result in a shift to other payment types or potential changes to our payment systems that may result in higher costs. If we fail to adequately control fraudulent credit card transactions, we may face civil liability, diminished public perception of our security measures, and significantly higher credit card-related costs, each of which could harm our business, results of operations and financial condition.

We are also subject to payment card association operating rules, certification requirements and rules governing electronic funds transfers, which could change or be reinterpreted to make it more difficult for us to comply. We are required to comply with payment card industry security standards. Failing to comply with those standards may violate payment card association operating rules, federal and state laws and regulations, and the terms of our contracts with payment processors. Any failure to comply fully also may subject us to fines, penalties, damages and civil liability, and may result in the loss of our ability to accept credit and debit card payments. Further, there is no guarantee that such compliance will prevent illegal or improper use of our payment systems or the theft, loss or misuse of data pertaining to credit and debit cards, card holders and transactions.

If we fail to maintain our chargeback rate or refund rates at acceptable levels, our processing vendor may increase its transaction fees or terminate its relationship with us. Any increases in applicable credit and debit card fees could harm our results of operations, particularly if we elect not to raise our rates for our service to offset the increase. The termination of our ability to process payments on any major credit or debit card would significantly impair our ability to operate our business.

***We rely on third-party vendors to provide products and services, and we could be adversely impacted if they fail to fulfill their obligations.***

We depend on third-party vendors and partners to provide us with certain products and services, including components of our computer systems, software, data centers, payment processors and telecommunications networks, to conduct our business. For example, we rely on third parties for services such as organizing and accumulating certain daily transaction data on orders. We also rely on third parties for specific software and hardware used in providing our products and services. Some of these organizations and service providers may provide similar services and technology to our competitors, and we do not have long-term or exclusive contracts with them.

Our systems and operations or those of our third-party vendors and partners could be exposed to damage or interruption from, among other things, fire, natural disaster, power loss, telecommunications failure, unauthorized entry, computer viruses, denial-of-service attacks, acts of terrorism, human error, vandalism or sabotage, financial insolvency, bankruptcy and similar events. In addition, we may be unable to renew our existing contracts with our most significant vendors and partners or our vendors and partners may stop providing or otherwise supporting the products and services we obtain from them, and we may not be able to obtain these or similar products or services on the same or similar terms as our existing arrangements, if at all. The failure of our vendors and partners to perform their obligations and provide the products and services we obtain from them in a timely manner for any reason could adversely affect our operations and profitability.

***We may not be able to successfully compete in technology innovation and distribution. If we are unable to continue to innovate and provide technology desirable to diners, restaurants and merchants, our business operations could materially suffer.***

We must continuously innovate to improve our existing Platform technology and ensure that our products and services are well received. Mobile applications, internet-enabled technology and online e-commerce are constantly changing. We face competition from larger and more established companies, and smaller companies also provide similar services and technology. Our competitors may also develop products, features, or services that are similar to ours or that achieve greater market acceptance. These products, features, and services may undertake more far-reaching and successful product development efforts or marketing campaigns or may adopt more aggressive pricing policies.

Our ability to compete effectively in the deployment of innovative products depends on factors outside of our control, including the following:

- usefulness, ease of use, performance and reliability of our products compared to those of our competitors;
- size and composition of base of Active Diners;
- engagement of Active Diners with the Platform;
- the timing and market acceptance of products, including developments and enhancements to the Platform or our competitors' products;
- customer service and support efforts;
- acquisitions or consolidation within our industry, which may result in more formidable competitors; and
- our ability to attract, retain, and motivate talented employees, particularly software engineers.

Developing the Platform, which includes the Apps, websites and other technologies, entails significant technical and business risks. We may use new technologies ineffectively, or we may fail to adapt to emerging industry standards. If we face material delays in introducing new or enhanced products or if our recently introduced products do not perform in accordance with our expectations, the restaurants and diners in our network may forego the use of our products in favor of those of our competitors.

***The terms of the agreements governing our debt contain operating and financial covenants that may restrict our business and financing activities. Our failure to comply with these covenants could result in the acceleration of our outstanding indebtedness.***

We are party to a Credit Agreement and Convertible Notes Agreement (see Part II, Item 8, *Note 11 - Debt*). These agreements include a number of customary covenants that, among other things, limit or restrict the ability of the Company and its subsidiaries to incur additional debt, incur liens on assets, engage in mergers or consolidations, dispose of assets, pay dividends or repurchase capital stock and repay certain junior indebtedness. The aforementioned restrictions are subject to certain exceptions including the ability to incur additional indebtedness, liens, dividends, and prepayments of junior indebtedness subject, in each case, to compliance with certain financial metrics and/or certain other conditions and a number of other traditional exceptions that grant us continued flexibility to operate and develop our business. In certain cases, these covenants may impose limitations or restrictions on the manner in which we conduct our business and could place us at a competitive disadvantage to competitors. While these covenants include an affirmative covenant relating to the deliverance of audited annual financial statements to the administrative agent and lenders, accompanied by a report from an independent public accounting firm, which report shall be unqualified as to going concern and scope of audit, the Credit Agreement and Convertible Notes Agreement were amended in January 2023 to waive the requirement to deliver an audit report unqualified as to going concern with respect to the fiscal year 2022 financial statements.

Our ability to comply with these covenants and other restrictions may be affected by events beyond our control, and we may not be able to meet these covenants. From time to time, we may be required to seek waivers or amendments to the Credit Agreement and Convertible Notes Agreement to maintain compliance with these covenants, and there can be no certainty that any such waiver or amendment will be available. Non-compliance with one or more of these covenants could result in any amounts outstanding under the Credit Agreement and Convertible Notes Agreement becoming immediately due and payable. Additionally, upon the occurrence and during the continuance of an event of default, both the Credit Agreement and Convertible Notes Agreement provide for default interest at a rate that is 2% and 5% higher, respectively, than the interest rates otherwise payable under the agreements. If we are unable to generate sufficient cash available to repay our debt obligations when they become due and payable, either when they mature or in the event of a default, we may need to engage in debt or equity financings to secure additional funds. However, additional funds may not be available when we need them, on terms that are acceptable to us, or at all.

***Additional impairments of the carrying amounts of goodwill or other indefinite-lived assets could negatively affect our financial condition and results of operations.***

We conduct our goodwill and intangible asset impairment test annually as of October 1, or more frequently if indicators of impairment exist, and we review the recoverability of long-lived assets, including acquired technology, capitalized software costs, and property and equipment when events or changes in circumstances occur that indicate that the carrying value of the asset may not be recoverable. As a result of the significant decline in the Company’s common stock price in mid-March 2022 and other macroeconomic and industry factors, thereby contributing to a decline in the Company’s market capitalization, we conducted an impairment test as of March 15, 2022. Additionally, as a result of continued declines in the Company’s common stock price and market capitalization during the third quarter of 2022, we conducted additional impairment tests as of September 30, 2022. As of December 31, 2022, as a result of the significant and sustained decline in the Company’s market capitalization during the fourth quarter of 2022, the Company conducted an impairment test for long-lived assets in the Delivery Services Segment. The impairment tests were conducted in accordance with ASC 360, *Impairment and Disposal of Long-Lived Assets*, and ASC 350, *Intangibles – Goodwill and Other*. As a result of the ASC 360 and ASC 350 analyses, during the year ended December 31, 2022, we recognized non-cash pre-tax goodwill impairment losses totaling $121.1 million and non-cash pre-tax intangible and other asset impairment losses totaling $33.0 million. See Part II, Item 8, *Note 9 – Intangible Assets and Goodwill* for additional details.

Determining the fair value of a reporting unit and intangible assets requires the use of estimates and significant judgments that are based on a number of factors including actual operating results. It is reasonably possible that the judgments and estimates used could change in future periods. There can be no assurance that additional goodwill or intangible assets will not be impaired and that the carrying value of other indefinite-lived assets will be recoverable in future periods, which could adversely affect our financial results and stockholders’ equity.

***Unanticipated changes in effective tax rates or adverse outcomes resulting from examination of our income or other tax returns could adversely affect our financial condition and results of operations.***

We are subject to income taxes in the United States, and our domestic tax liabilities are subject to the allocation of expenses in differing jurisdictions. Our effective tax rates could be subject to volatility or adversely affected by a number of factors, including:

- changes in the valuation of our deferred tax assets and liabilities;
- expected timing and amount of the release of any tax valuation allowances;
- tax effects of stock-based compensation;
- costs related to intercompany restructurings;
- changes in tax laws, regulations or interpretations thereof; and
- lower than anticipated future earnings in jurisdictions where we have lower statutory tax rates and higher than anticipated future earnings in jurisdictions where we have higher statutory tax rates.

In addition, we may be subject to audits of our income, sales and other transaction taxes by U.S. federal and state authorities. Outcomes from these audits could have an adverse effect on our financial condition and results of operations.

***We depend on search engines, display advertising, social media, email, content-based online advertising and other online sources to attract diners to the Platform. If we are unable to attract diners and convert them into Active Diners making orders in a cost-effective manner, our business and financial results may be harmed.***

Our success depends on our ability to attract online diners to the Platform and convert them into orders in a cost-effective manner. We depend, in part, on search engines, display advertising, social media, email, content-based online advertising and other online sources to generate traffic to our websites and downloads of the Apps. We are included in search results as a result of both paid search listings, where we purchase specific search terms that result in the inclusion of our advertisement, and, separately, organic searches that depend upon the content on websites owned and maintained by us.

Search engines, social media platforms and other online sources often revise their algorithms and introduce new advertising products. If one or more of the search engines or other online sources on which we rely for website traffic were to modify its general methodology for how it displays our advertisements, resulting in fewer consumers clicking through to our websites, our business could suffer. In addition, if our online display advertisements are no longer effective or are not able to reach certain diners due to diners' use of ad-blocking software, our business could suffer.

If one or more of the search engines or other online sources on which we rely for purchased listings modifies or terminates its relationship with us, our expenses could rise, we could lose consumers and traffic to our websites could decrease, any of which could have a material adverse effect on our business, financial condition and results of operations.

***The loss of senior management or key operating personnel could adversely affect our operations. We depend on skilled personnel to operate our business, and our failure to hire, retain or attract key personnel could adversely affect our business.***

We depend on our executive officers, senior management team and other key operating and technology personnel. We cannot guarantee that we will continue to attract the personnel we need to execute our business strategy. If for any reason the services of our key personnel were to become unavailable, there could be a material adverse effect on our business, financial condition, results of operations, cash flows and prospects. While we have entered into an employment agreement with our chief executive officer until January 2025, the rest of our executive team has entered into at-will employment arrangements. Our chief sales officer resigned in January 2023. If we are unable to retain or attract key talent or personnel, our operations could suffer, thereby materially adversely affecting our business.

***Major hurricanes, tropical cyclones, major snow and/or ice storms in areas not accustomed to them and other instances of severe weather and other natural phenomena could cause significant losses.***

Our services and operations are subject to interruption, decreases in consumer entertainment spending and damage and destruction to Company property as a result of severe local weather conditions or other natural phenomena. Our headquarters are located in areas that have historically been and could, in the future, be materially and adversely affected by damage resulting from a major tropical cyclone, significant rain event, a hurricane, or other severe weather phenomena. In addition, we rely on third parties for critical infrastructure and services. Any of these third parties could be subject to disruptions due to similar major weather events, which could adversely affect our business and financial results.

We may also suffer from weather-related or other events, such as tornadoes, hurricanes, blizzards, ice storms, floods, fires, widespread computer viruses, terrorist attacks, acts of war and explosions, which may disrupt fuel supplies, increase fuel costs, disrupt freight shipments or routes, affect regional economies, destroy our assets or the assets of our customers or otherwise adversely affect the business or financial condition of our customers (both restaurant and diner), any of which could adversely affect our results or make our results more volatile. In addition, third parties that provide critical technology, services and infrastructure, such as data centers, telecommunications networks and the like remain vulnerable to these types of events, all of which could disrupt critical services for us, adversely affecting our financial results and operations.

Such adverse weather occurrences could materially impact orders on the Platform and delivery capabilities of independent contractor drivers, thus severely decreasing our revenue and increasing costs. Further, in the event of any such weather occurrence, our insurance may not be sufficient to cover the costs of repairing or replacing damaged equipment and we may suffer a significant decline in revenues if any of the restaurants on the Platform are closed for an extended period of time or these events result in significant disruption to telecommunications systems, including the Internet or mobile phone services. Any such events could materially and adversely affect our business and the results of our operations.

***Acquisitions could disrupt our business, dilute our stockholders and harm our business and results of operations.***

As part of our business strategy, we have effected, and may continue to effect, acquisitions to add specialized employees and complementary companies, products, and technologies. Our ability to acquire and successfully integrate larger or more complex companies, products, and technologies is unproven. In the future, we may not be able to find other suitable acquisition candidates, and we may not be able to complete acquisitions on favorable terms, if at all. Our competitors have large cash reserves and aggressive acquisition strategies, and we may not be able to successfully attract acquisition targets to the same degree as our competitors. Our previous and future acquisitions may not achieve our goals, and any future acquisitions we complete could be viewed negatively by diners, restaurants, or investors. In addition, if we fail to close transactions successfully or integrate new teams, or integrate the products and technologies associated with these acquisitions into our company and culture, our business could be seriously harmed. Any integration process may require significant time and resources, and we may not be able to manage the process successfully. We may not successfully evaluate or use the acquired products, technology, and personnel, or accurately forecast the financial impact of an acquisition transaction, including accounting charges. We may also incur unanticipated liabilities that we assume as a result of acquiring companies. We may have to pay cash, incur debt, or issue equity securities to pay for any acquisition, any of which could seriously harm our business. Selling equity to finance any such acquisitions would also dilute our stockholders. Incurring debt would increase our fixed obligations and could also include covenants or other restrictions that would impede our operations.

***If we cannot protect our intellectual property, the value of our brands and other intangible assets may be diminished, and our business may be adversely affected.***

We rely and expect to continue to rely on a combination of confidentiality and license agreements with our employees, consultants, and third parties with whom we have relationships, as well as trademark, copyright, patent, trade secret, and domain name protection laws, to protect our proprietary rights. In the United States and internationally, we have filed various applications for protection of certain aspects of our intellectual property. We do not currently hold any issued patents. In the future, we may acquire patents or patent portfolios, which could require significant cash expenditures. However, third parties may knowingly or unknowingly infringe our proprietary rights, third parties may challenge proprietary rights held by us, and pending and future trademark and patent applications may not be approved. In addition, effective intellectual property protection may not be available in every country in which we operate or intend to operate our business. In any or all of these cases, we may be required to expend significant time and expense in order to prevent infringement or to enforce our rights. Although we have taken measures to protect our proprietary rights, there can be no assurance that others will not offer products or concepts that are substantially similar to ours and compete with our business.

***While we recently settled an intellectual property rights claim, we face the risk of future lawsuits and intellectual property claims that are expensive and time consuming, and, if resolved adversely, could have a significant impact on our business, financial condition and results of operations.***

Companies in the Internet, technology, and mobile application industries own large numbers of patents, copyrights, trademarks, and trade secrets, and frequently enter into litigation based on allegations of infringement, misappropriation, or other violations of intellectual property or other rights. In addition, various “non-practicing entities” that own patents and other intellectual property rights often attempt to aggressively assert their rights in order to extract value from technology companies. Furthermore, from time to time we may introduce new products, including in areas where we currently do not compete, which could increase our exposure to patent and other intellectual property claims from competitors and non-practicing entities. See Item 3, Legal Proceedings, for a discussion of a June 2021 trademark infringement settlement.

As a public company, we may receive letters demanding that we cease and desist using certain intellectual property. Some of these may result in litigation against us. Defending patent and other intellectual property litigation costs large amounts of money and time and can impose a significant burden on management and employees. Favorable final outcomes do not occur in all cases. In addition, plaintiffs may seek, and we may become subject to, preliminary or provisional rulings in the course of any such litigation, including potential preliminary injunctions requiring us to cease some or all of our operations. We may decide to settle such lawsuits and disputes on terms that are unfavorable to us. Similarly, if any litigation to which we are a party is resolved adversely, we may be subject to an unfavorable judgment that may not be reversed upon appeal. The terms of such a settlement or judgment may require us to cease some or all of our operations or pay substantial amounts to the other party. In addition, we may have to seek a license to continue practices found to be in violation of a third party’s rights, which may not be available on reasonable terms, or at all, and may significantly increase our operating costs and expenses. As a result, we may also be required to develop alternative non-infringing technology, names or practices or discontinue the practices.

The development of alternative non-infringing technology, names or practices could require significant effort and expense or may not be feasible. Our business, financial condition and results of operations could be adversely affected as a result of an unfavorable resolution of the disputes and litigation referred to above.

***We are subject to claims, lawsuits, investigations, and various proceedings, and face potential liability and expenses for legal claims from the normal course of business activities.***

We are involved in litigation arising from the normal course of business activities, including, without limitation, vehicle accidents involving employees and independent contractor drivers resulting in claims alleging personal injuries and medical expenses, labor and employment claims, allegations of breach of contract, allegations of intellectual property infringement, allegations of deceptive trade practices, allegations of false advertising, securities laws claims, physical damage and workers’ compensation benefit claims as a result of alleged conduct involving its employees, independent contractor drivers, and third-party negligence. Although we believe that the Company maintains insurance with standard deductibles that generally covers liability for potential damages in many of these matters where coverage is available on acceptable terms (it is not maintained for claims involving intellectual property, deceptive trade practices or false advertising), insurance coverage is not guaranteed, there are limits to insurance coverage, and in certain instances claims are met with denial of coverage positions by the carriers; accordingly, we could suffer material losses as a result of these claims, the denial of coverage for such claims, or damages awarded for any such claim that exceeds coverage. The nature of our business in particular subjects us to potential exposure resulting from vehicular accidents involving independent contractor drivers or our employees; while many of these negligence claims do not involve significant damage, from time to time certain vehicular accidents result in allegations of significant personal injury to, and medical expenses incurred by, third parties, and death. We actively manage claims alleging significant damages resulting from vehicular accidents. Litigation is unpredictable and we may determine in the future that certain existing claims have greater exposure or liability than previously understood. We are also subject to third-party subpoenas as well as potential governmental proceedings, inquiries and claims. These lawsuits and proceedings may be time-consuming, expensive and disruptive to normal business operations.

***Our use of open source software could expose us to “copyleft” claims or otherwise subject us to business or legal risk.***

We use open source software in our products. Our use of open source software in our products may require us to license innovations that are material to our business and may also expose us to increased litigation risk. If the protection of our proprietary rights is inadequate to prevent unauthorized use or appropriation by third parties, the value of our brands and other intangible assets may be diminished and competitors may be able to more effectively mimic our service and methods of operations. Any of these events could have an adverse effect on our business and financial results.

***We may require additional capital to pursue our business objectives and respond to business opportunities, challenges or unforeseen circumstances. Insufficient capital can harm our operating, business and financial results.***

We intend to continue to make investments to support our business and may require additional capital to pursue our business objectives and respond to business opportunities, challenges or unforeseen circumstances, including to increase our marketing expenditures to improve brand awareness, develop new product and service offerings or further improve the Platform and existing product and service offerings, enhance our operating infrastructure and acquire complementary businesses and technologies. Accordingly, we may need to engage in equity or debt financings to secure additional funds. However, additional funds may not be available when we need them, on terms that are acceptable to us, or at all. Volatility in the credit markets also may have an adverse effect on our ability to obtain debt financing.

If we raise additional funds through issuances of equity or convertible debt securities, our existing stockholders could suffer significant dilution, and any new equity securities we issue could have rights, preferences and privileges superior to those of holders of our common stock. If we are unable to obtain adequate financing or financing on terms satisfactory to us, when we require it, our ability to continue to pursue our business objectives and to respond to business opportunities, challenges or unforeseen circumstances could be significantly limited, and our business, operating results, financial condition and prospects could be materially adversely affected.

***If our employees were to unionize, our operating costs could increase and our ability to compete could be impaired.***

None of our employees are currently represented under a collective bargaining agreement. However, we always face the risk that our employees may try to unionize, and if our independent contractors were ever reclassified as employees, the magnitude of this risk would increase. Further, Congress or one or more states could approve legislation and/or the National Labor Relations Board could render decisions or implement rule changes that could significantly affect our business and our relationship with employees and independent contractors, including actions that could substantially liberalize the procedures for union organization. In addition, we can offer no assurance that the National Labor Relations Board will not adopt new regulations or interpret existing regulations in a manner that would favor the agenda of unions.

Any attempt to organize by our employees could result in increased legal and other associated costs and divert management attention, and if we entered into a collective bargaining agreement, the terms could negatively affect our costs, efficiency and ability to generate acceptable returns on the affected operations. In particular, the unionization of our employees could have a material adverse effect on our business, financial condition, results of operations, cash flows and prospects because:

- Restrictive work rules could hamper our efforts to improve and sustain operating efficiency and could impair our service reputation and limit our ability to provide our services;
- A strike or work stoppage could negatively impact our profitability and could damage customer and employee relationships; and
- An election and bargaining process could divert management’s time and attention from our overall objectives and impose significant expenses.

***Failure to maintain an effective system of disclosure controls and internal control over financial reporting could have an adverse effect on our business and results of operations.***

As a public company, we are subject to the requirements of the Sarbanes-Oxley Act of 2002, which requires, among other things, that we maintain effective disclosure controls and procedures and internal control over financial reporting. Management has determined that our internal control over financial reporting was ineffective as of December 31, 2022 due to a material weakness in information technology general controls (“ITGCs”). For more information, see Item 9A within Part II of this Form 10-K. If we fail to adequately establish and maintain effective internal controls over financial reporting, we could lose investor confidence in the accuracy and completeness of our financial statements, which could have an adverse effect on our business, our financial condition, and the trading price of our common stock.

***Failure to remediate a material weakness in, or inherent limitations associated with, internal accounting controls could result in material misstatements in our financial statements.***

As discussed above, management has identified a material weakness in our internal control over financial reporting related to our ITGCs and has concluded that, due to such material weakness, our disclosure controls and procedures were not effective as of December 31, 2022. A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the Company's annual or interim financial statements will not be prevented or detected on a timely basis.

We are taking steps to remediate the identified material weakness, including the implementation of updated controls related to our information technology change management policies and user access. However, we cannot be certain that such measures will remediate the identified material weakness or that we will not identify additional material weaknesses in our internal control over financial reporting in the future. Our efforts to improve our internal controls are ongoing; however, there are inherent limitations in all control systems and no evaluation of controls can provide absolute assurance that all deficiencies have been detected. If we are unable to maintain effective internal control over financial reporting, or after having remediated such material weakness, fail to maintain the effectiveness of our internal control over financial reporting or our disclosure controls and procedures, we could lose investor confidence in the accuracy and completeness of our financial reports, the market price of our common stock could decline, and we could be subject to regulatory scrutiny, civil or criminal penalties or litigation. Continued or future failure to maintain effective internal control over financial reporting could also result in financial statements that do not accurately reflect our financial condition or results of operations and may also restrict our future access to the capital markets. There can be no assurance that we will not conclude in the future that this material weakness continues to exist or that we will not identify any significant deficiencies or other material weaknesses that will impair our ability to report our financial condition and results of operations accurately or on a timely basis.

**Risks Related to Our Industry**

***Our industry is highly competitive and fragmented, and our business and results of operations may suffer if we are unable to adequately address downward pricing and other competitive pressures.***

We compete with many traditional and online and mobile app ordering and general delivery companies of varying sizes, substantially all of which have greater access to restaurants, a wider range of services, a wider range of menu or delivery items, greater capital resources, or other competitive advantages. Competition is intense with competing food delivery companies. Traditional ordering techniques involve advertising by restaurants in low-cost paper publications and through traditional online and offline media channels, with consumers simply calling restaurants or delivery services to place orders. Traditional takeout or delivery services are often lower cost than the Platform and are difficult to disrupt. We also compete with smaller, regional and local companies that cover specific locations with specific restaurants or that offer niche services. We also compete, to a lesser extent, with restaurants that hire their own delivery drivers for online, mobile application or telephone orders. Numerous competitive factors could impair our ability to maintain or improve cash flow. These factors include the following:

- Many of our competitors' periodically reduce or eliminate their delivery charges to consumers or commissions that they charge to restaurants to gain business, especially during times of increased competition or reduced growth in the economy, which may limit our ability to maintain or increase our order commissions and delivery charges, may require us to reduce our order commissions and delivery charges or may limit our ability to maintain or expand our business;
- Some restaurants have reduced or may reduce the number of mobile app or online ordering and delivery services and technologies that they use by selecting a single core company or a limited number of providers as approved service providers and, in some instances, we may not be selected;
- Restaurants could solicit bids from multiple service providers for their mobile application or online ordering and delivery needs, which may depress service fees and commission rates or result in a loss of business to competitors;
- The continuing trend toward consolidation in the online and mobile app ordering and delivery industry could result in larger companies with greater financial resources and other competitive advantages, and we may not be able to compete with them and ultimately lose business and market share to these competitors;

- Advances in technology may require us to increase investments in order to remain competitive, and our restaurant diners and consumers may not be willing to accept higher service fees, commission rates or delivery charges to cover the cost of these investments;
- Higher fuel prices and, in turn, higher fuel surcharges may cause some of the independent contractor drivers to demand higher independent contractor driver rates;
- Intense competition from “gig economy” companies in general may negatively impact independent contractor driver, restaurant customer and/or consumer relationships and service rates;
- Restaurants could develop (and certain restaurants have developed) their own online or mobile app ordering and delivery technology and hire their own drivers to make their own deliveries, which could reduce demand for our services to restaurants and limit choices for consumers, reducing the number and frequency of orders using our technology; and
- Continued debate and uncertainty in various jurisdictions regarding gig economy companies’ treatment of drivers as independent contractors, which could increase our independent contractor expenses in future periods.

***Our business depends on discretionary spending patterns in the areas in which the restaurants on our Platform operate and in the economy at large. Economic downturns or other events (like coronavirus variants or similar widespread health/pandemic outbreaks) impacting the United States and global economy could materially adversely affect our results of operations.***

Purchases at restaurants and food and beverage hospitality services locations are discretionary for consumers and we are therefore susceptible to changes in discretionary spending patterns or economic slowdowns in the geographic areas in which restaurants on our Platform operate and in the economy at large. Discretionary consumer spending can be impacted by general economic conditions, unemployment, consumer debt, inflation, rising gasoline prices, interest rates, consumer confidence, and other macroeconomic factors. We believe that consumers generally are more willing to make discretionary purchases, including delivery, dine-in or carryout of restaurant meals, during favorable economic conditions. Disruptions in the overall economy (including disruptions due to coronavirus or similar health/pandemic events), including high unemployment, inflation, rising gasoline prices, financial market volatility and unpredictability, and the related reduction in consumer confidence, could negatively affect food and beverage sales throughout the restaurant industry, including orders through the Platform. Additionally, merchants on our Platform may be negatively impacted by general economic conditions, supply chain issues, labor shortages, inflation, or other macroeconomic factors, which could negatively impact their ability to fulfill orders. There is also a risk that if uncertain economic conditions persist for an extended period of time or worsen, consumers might make long-lasting changes to their discretionary spending behavior, including ordering food for delivery, dine-in or carryout less frequently. The ability of the U.S. economy to handle this uncertainty is likely to be affected by many national and international factors that are beyond our control. These factors, including national, regional and local politics and economic conditions, continued impact of the COVID-19 pandemic, disposable consumer income and consumer confidence, also affect discretionary consumer spending. If any of these factors cause restaurants to cease operations or cease using the Platform, it could also significantly harm our financial results, for the reasons set forth elsewhere in these risk factors. Continued uncertainty in or a worsening of the economy, generally or in a number of our markets, and diners’ reactions to these trends could adversely affect our business and cause us to, among other things, reduce the number and frequency of new market openings or cease operations in existing markets.

***Our industry is affected by general economic and business risks that are largely beyond our control.***

Our industry is highly cyclical, and our business is dependent on a number of factors, many of which are beyond our control. We believe that some of the most significant of these factors are economic changes that affect supply and demand in dining out in general, such as:

- changes in diners’ dining habits and in the availability of disposable income for ordering food from restaurants;
- excess restaurant capacity in comparison with food order demand;
- downturns in restaurants’ business cycles;
- recessionary economic cycles, downturns or other events (like the COVID-19 or similar widespread health/pandemic outbreaks); and
- closure of restaurants and economic impact on diners as a result of the ongoing COVID-19 pandemic.

The risks associated with these factors are heightened when the U.S. and/or global economy is weakened. Some of the principal risks during such times are as follows:

- We may experience low overall food and beverage order levels because our diners' demand for our services generally correlate with the strength of the U.S. and, to a lesser extent, global economy;
- Certain of the restaurants on our Platform may face credit issues and cash flow problems, particularly if they encounter increased financing costs, decreased access to capital or loss of customers as a result of the COVID-19 pandemic or higher prices due to inflationary pressures, which may decrease diner demand for restaurant prepared food, and such issues and problems may affect the number of orders that occur through the Platform;
- Food ordering and dining out patterns may change as food supply chains are redesigned and customer tastes change, resulting in an imbalance between restaurants' available menu items and the demands of Active Diners;
- Diners may select competitors that offer lower delivery charges, commission rates or other charges from among existing choices in an attempt to lower their costs, and we might be forced to lower our rates or lose restaurants offering food or diners ordering food through the Platform; and
- Disruptive health events or pandemics, such as the ongoing COVID-19 pandemic and the governmental regulatory response in connection therewith, may have significant, negative economic effects on the geographic areas in which we operate, which may include impacts to ordering, carryout, dine-in or delivery habits, availability of independent contractor delivery drivers, and restaurants' ability to receive and prepare food. Additionally, many of our markets include colleges or universities whose populations fluctuate between semesters. Temporary closures or suspension of semesters by colleges and universities in response to the ongoing COVID-19 pandemic or other health events may have a material adverse effect upon our operations and financial results.

We are also subject to cost increases outside of our control that could materially reduce our profitability if we are unable to increase our rates sufficiently. Such cost increases include, but are not limited to, compensation to independent contractor drivers, interest rates, taxes, license and registration fees, insurance, payment processing and other technology related fees, and the costs of healthcare for our employees.

The business levels of restaurants on the Platform also may be negatively affected by adverse economic conditions or financial constraints, which could lead to disruptions in the availability of popular order items, reducing use of the Platform. A significant interruption in our normal order levels could disrupt our operations, increase our costs and negatively impact our ability to serve our diners.

In addition, events outside our control, such as strikes or other work stoppages at our facilities, or actual or threatened armed conflicts or terrorist attacks, efforts to combat terrorism, military action against a foreign state or group located in a foreign state, or heightened security requirements could lead to reduced economic demand, reduced availability of credit or ordering capabilities of the Platform. Such events or enhanced security measures in connection with such events could impair our operations and result in higher operating costs.

***We face risks related to health epidemics and other outbreaks, which could significantly disrupt our operations.***

The Company has thus far been able to operate effectively during the COVID-19 pandemic. However, there remains uncertainty as to whether or not the pandemic will continue to impact diner behavior, and if so, in what manner. To the extent that new COVID-19 variant outbreaks, or a similar public health threat, adversely impacts the Company's business, results of operations, liquidity or financial condition, it may also have the effect of heightening many of the other risks described in the risk factors in this Form 10-K.

***In response to the COVID-19 pandemic, several jurisdictions have implemented or are considering implementing fee caps, fee disclosure requirements and similar measures that could negatively impact the Company's financial results.***

In an attempt to provide relief to restaurants which have been materially and adversely impacted by closures and other governmental limitations placed on restaurant and bar activities because of the COVID-19 pandemic, several jurisdictions across the United States have implemented caps on restaurant fees charged by local food delivery logistics platforms. Thus far, these fee caps have been implemented in relatively few jurisdictions where we have operations. However, certain of these jurisdictions have implemented permanent regulations capping restaurant fees charged by food delivery logistics platforms. In addition, other jurisdictions where we operate are currently considering similar caps and others may decide to implement similar caps. If permanent fee caps, fee disclosure requirements or similar measures are more broadly implemented in jurisdictions in which we operate, our business, financial condition, and results of operations will be adversely affected.

***We may face misclassification claims against the Company.***

During the Trump administration, the U.S. Department of Labor ("DOL") relaxed enforcement of misclassification claims under the Fair Labor Standards Act ("FLSA"). Additionally, just before President Trump left office, the DOL issued a new, company-friendly independent contractor standard via regulation that was set to go into effect in March 2021. However, after President Biden took office, the DOL paused and ultimately rescinded implementation of the regulation in May 2021. The DOL has not yet proposed a substitute regulation, meaning that previous, more worker-friendly standard is still in effect. Some legal experts expect the DOL to issue additional regulations or guidance proposing an even more worker-friendly standard, such as the "ABC" test that was implemented in California. Legal experts also expect the DOL under President Biden to become more aggressive in enforcing misclassification claims against companies, particularly in the gig economy space. The issuance of such additional regulations or guidance, or the increase in such DOL enforcement activity, could adversely affect our operations and profitability.

***We rely on restaurants in our network for many aspects of our business, and their failure to maintain their service levels could harm our business.***

Diners demand quality food at reasonable prices. The ability of diners to obtain such quality food from restaurants they like on a timely basis through the Platform drives the primary value of the Platform. Our ability to provide diners with a high-quality and compelling ordering experience depends, in part, on diners receiving competitive prices, convenience, customer service and responsiveness from restaurants from whom they order. If these restaurants do not meet or exceed diner expectations with competitive levels of convenience, customer service, price and responsiveness, the value of our brands may be harmed, our ability to attract new diners to the Platform may be limited and the number of diners placing orders through the Platform may decline, which could have a material adverse effect on our business, financial condition and results of operations. Likewise, if restaurants face challenges or difficulties set forth elsewhere in these risk factors, the number of restaurants on the Platform could decline, the price of food could increase or customer service levels could suffer, all of which could harm our business and results of operations.

***The nature of our business and content on the Platform exposes us to potential liability and expenses for legal claims that could materially affect our results of operations and business.***

We face potential liability, expenses for legal claims and harm to our business relating to the nature of the delivery, dine-in and carryout food business, including potential claims related to food offerings, delivery and quality. For example, third parties have in the past and could in the future assert legal claims against us in connection with personal injuries related to food poisoning or tampering or accidents caused by the independent contractor delivery drivers. Alternatively, we could be subject to legal claims relating to the sale of alcoholic beverages by restaurants on our Platform to underage diners.

Reports of food-borne illnesses, whether true or not, could adversely impact the results of our operations regardless of whether our diners actually suffer such illnesses from orders on the Platform. Food-borne illnesses and other food safety issues have occurred in the food industry in the past and could occur in the future. In addition, consumer preferences could be affected by health concerns about the consumption of foods provided on the Platform, even if those concerns do not directly relate to food items available on the Platform. A negative report or negative publicity, whether related to a restaurant on our Platform or to a competitor in the industry, may have an adverse impact on demand for the restaurants' food and could result in decreased diner orders on the Platform. A decrease in orders or Active Diners as a result of these health concerns or negative publicity could materially harm our brands, business, financial condition and results of operations.

Furthermore, our reliance on third-party food suppliers and distributors increases the risk that food-borne illness incidents could be caused by factors outside of our control and that multiple markets for our services would be affected rather than a single market. We cannot assure that all food items will be properly maintained during delivery to diners or that the independent contractor drivers will identify food that is problematic upon pickup. If diners become ill from food-borne illnesses, we and/or restaurants on our Platform could be forced to temporarily suspend service. Furthermore, any instances of food contamination, whether or not they are related to us, could subject us or restaurants to litigation and/or regulation by applicable governmental authorities.

We face the prospect of liabilities and expenses relating to the content and other information that we publish on the Platform, third-party sites and/or relating to our marketing efforts. We could face claims based on the violation of intellectual property rights, such as copyright infringement claims based on the unauthorized use of menu content or other items. Although we typically obtain a restaurant's consent to publish their menu items prior to posting them on the Platform, we may not always be successful in obtaining such consent. We could incur significant costs investigating and defending such claims and, if we are found liable, significant damages. If any of these events occur, our business and financial results could be adversely affected.

We have incurred and expect to continue to incur expenses relating to legal claims. The frequency of such claims is unpredictable. We have experienced diversion of attention by management to address these claims, and such claims can result in significant costs to investigate and defend, regardless of the merits of such claims. The potentially significant number and dollar amount of claims could materially affect our results of operations and harm our business.

***Our storage, processing and use of data, some of which contains personal information, subjects us to complex and evolving federal and state laws and regulations regarding privacy, data protection, and other matters. Many of these laws and regulations are subject to change and uncertain interpretation, and could result in investigations, claims, changes to our business practices, increased cost of operations, and declines in user growth, retention, or engagement, any of which could seriously harm our business.***

We are subject to a variety of laws and regulations in the United States that involve matters central to our business, including user privacy, sweepstakes, rewards or coupons, rights of publicity, data protection, content, intellectual property, distribution, electronic contracts and other communications, e-commerce, competition, protection of minors, consumer protection, taxation, libel, defamation, internet or data usage, and online-payment services. These laws and regulations constantly evolve and remain subject to significant change. In addition, the application and interpretation of these laws and regulations are often uncertain, particularly in the new and rapidly evolving industry in which we operate. Because we store, process, and use data, some of which contains personal information, we are subject to complex and evolving federal and state laws and regulations regarding privacy, data protection, and other matters. Many of these laws and regulations are subject to change and uncertain interpretation, and could result in investigations, claims, changes to our business practices, increased cost of operations, and declines in diner and restaurant growth, orders, retention, or engagement, any of which could adversely affect our business.

***In connection with the Cape Payment Acquisition, we receive certain revenue from financial institutions that provide services to customers operating in the cannabis industry, which may expose us to changes related to the enforcement of federal law on cannabis.***

In August 2021, we acquired substantially all of the assets of the Cape Payment Companies with respect to their business operations. As such, we facilitate merchant—including state licensed cannabis businesses—access to third-party payment processing solution providers and/or financial institutions (e.g., payment processors, banks and credit unions) that are willing to service them. For these referral services, we are paid exclusively by the financial institutions and/or Providers—never by the merchants—on a monthly or bi-monthly basis based on the volume of transactions the financial institutions and/or Providers perform for the merchants. Any risks related to the cannabis industry that may adversely affect the clients and potential clients of these Providers and/or financial institutions may, in turn, adversely affect us. Specific risks we might face include, but are not limited to, the following:

*Cannabis remains illegal under United States federal law*

Cannabis is a Schedule-I controlled substance under the Controlled Substances Act, or CSA (21 U.S.C. § 846), and is illegal under federal law. Under U.S. federal law, a Schedule I drug or substance has a high potential for abuse, no accepted medical use in the U.S. and a lack of safety for the use of the drug under medical supervision. The concepts of "medical cannabis" and "adult-use cannabis" do not exist under U.S. federal law. It remains illegal under federal law to grow, cultivate, sell or possess cannabis for any purpose or to assist or conspire with those who do so. Even in those states where the use of cannabis has been authorized, its use remains a violation of federal law. Since federal law criminalizing the use of cannabis is not preempted by state laws that legalize its use, strict enforcement of federal law regarding cannabis could adversely affect our operations and financial performance.

Businesses that are not directly engaged in the cannabis industry, but that transact business with cannabis companies, also face at least a theoretical risk of being prosecuted for a violation of the CSA. In addition, such transactions may result in alleged violations of anti-money laundering and racketeering laws, 18 U.S.C. §§ 1961 et seq., among other federal laws and regulations. In light of our receiving revenue from financial institutions and/or Providers that provide services directly to businesses that violate the CSA—and that such business operations will continue—there is a theoretical risk that we could be prosecuted as a co-conspirator with, or for aiding and abetting, other parties' violations of the CSA.

*Uncertainty of federal enforcement*

On January 4, 2018, Attorney General Sessions rescinded the previously issued memoranda (the "Cole Memoranda") from the U.S. Department of Justice ("DOJ") that had de-prioritized the enforcement of federal law against cannabis businesses that comply with state cannabis laws, adding uncertainty to the question of how the federal government will choose to enforce federal laws, including but not limited to the CSA, regarding cannabis. Under previous administrations, the DOJ indicated that those users and suppliers of cannabis who complied with state laws, which required compliance with certain criteria, would not be prosecuted. Attorney General Sessions issued a memorandum ("Sessions Memorandum") to all United States Attorneys in which the DOJ affirmatively rescinded the previous guidance as to cannabis enforcement, calling such guidance "unnecessary." This one-page memorandum was vague in nature, stating that federal prosecutors should use established principles in setting their law enforcement priorities. Thus, federal prosecutors were free then (and continue to be free) to utilize their prosecutorial discretion to decide whether to prosecute cannabis activities despite the existence of state-level laws that may be inconsistent with federal prohibitions. No direction was given to federal prosecutors in the Sessions Memorandum as to the priority they should ascribe to such cannabis activities, and resultantly it is uncertain how active U.S. federal prosecutors will be in relation to such activities.

On November 7, 2018, Jeff Sessions resigned from his position as Attorney General. Following Mr. Sessions' resignation, William Barr was eventually appointed to the role. During his Senate confirmation hearing, Mr. Barr stated that he disagreed with efforts by states to legalize cannabis, but would not go after cannabis companies in states that legalized it under Obama administration policies. He stated further that he would not upset settled expectations that have arisen as a result of the Cole Memoranda. Federal enforcement of cannabis-related activity remained consistent with the priorities outlined in the Cole Memoranda throughout Attorney General Barr's tenure.

In January 2021, Joseph R. Biden Jr. was sworn in as the new President of the United States. President Biden nominated federal judge Merrick Garland to serve as his Attorney General. During his confirmation hearings in the Senate on February 22, 2021, U.S. Attorney General, Merrick Garland, noted that it "does not seem to me a useful use of limited resources … to be pursuing prosecutions in states that have legalized and that are regulating the use of marijuana, either medically or otherwise." The Senate confirmed Judge Garland as Attorney General on March 10, 2021.

Regarding medical cannabis specifically, it has largely been shielded from federal enforcement actions by acts of the United States Congress in the form of what is commonly called the "Joyce-Blumenauer Amendment," which prevents federal prosecutors from using federal funds to impede the implementation of medical cannabis laws enacted at the state-level, subject to the United States Congress restoring such funding. This amendment has always applied solely to medical cannabis programs, and has no effect on pursuit of recreational cannabis activities. The amendment has historically been passed as an amendment to omnibus appropriations bills, which by their nature expire at the end of a fiscal year or other defined term. A pair of recent stopgap spending bills continued the protections for the medical cannabis marketplace and its lawful participants from interference by the U.S. DOJ, with the most recent extension effective through February 18, 2022. President Biden became the first U.S. President to recommend that the amendment be extended when he proposed continuing it as part of his 2022 budget.

Unless and until the federal government changes the CSA with respect to its treatment of cannabis (and as to the timing or scope of any such potential amendments there can be no assurance), there is a risk that U.S. federal authorities may choose to enforce current federal law that criminalizes cannabis. If the federal government begins to enforce federal laws relating to cannabis in states where the sale and use of cannabis is currently legal, or if existing applicable state laws are repealed or curtailed, our business, results of operations, financial condition and prospects would be materially adversely affected.

Such potential proceedings could involve significant restrictions being imposed upon us, while diverting the attention of key executives. Such proceedings could have a material adverse effect on us, as well as on our reputation, even if such proceedings were concluded successfully in our favor. In the extreme case, such proceedings could ultimately involve the prosecution of our key executives or the seizure of corporate assets; however as of the date hereof, we believe that proceedings of this nature are remote. Moreover, violations of any federal laws and regulations may also result in significant fines, penalties, administrative sanctions, convictions or settlements arising from civil proceedings conducted by either the federal government or private citizens, or criminal charges, including, but not limited to, disgorgement of profits, cessation of business activities or divestiture. This could have a material adverse effect on us, including our reputation and ability to conduct business, our financial position, operating results, profitability or liquidity. In addition, it is difficult for us to estimate the time or resources that would be needed for the investigation of any such matters or its final resolution because, in part, the time and resources that may be needed are dependent on the nature and extent of any information requested by the applicable authorities involved, and such time or resources could be substantial.

There is no certainty as to how the U.S. DOJ, Federal Bureau of Investigation and other government agencies will handle cannabis matters in the future. The Company regularly monitors the activities of the current administration in this regard.

*Banking laws and regulations could limit access to banking services and expose us to risk*

Our receipt of payments from third-party financial institutions and/or Providers providing services for customers engaged in state-legal cannabis operations could also subject those institutions to the consequences of a variety of federal laws and regulations that involve money laundering, financial record keeping and proceeds of crime, including the Bank Secrecy Act (“BSA”), as amended by Title III of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, the Racketeer Influenced and Corrupt Organizations Act, and any related or similar rules, regulations or guidelines, issued, administered or enforced by the federal government.

By receiving payments from these third-party financial institutions and/or Providers based on revenues derived by those institutions from federally illegal cannabis businesses, we arguably are “indirectly” obtaining property derived from unlawful activity. Accordingly, prosecutors could argue that we violate federal anti-money laundering statutes (“MLCA”) in the course of providing services to cannabis-related businesses.

In the event that any of our operations, or any proceeds thereof, any dividends or distributions therefrom, or any profits or revenues accruing from such operations in the U.S. were found to be in violation of money laundering legislation or otherwise, such transactions may be viewed as proceeds of crime under one or more of the statutes noted above or any other applicable legislation. This could restrict or otherwise jeopardize our ability to declare or pay dividends or effect other distributions.

Further, many banks refuse to provide banking services to businesses involved in the cannabis industry due to the present state of federal laws and regulations governing financial institutions. Additionally, some courts have denied cannabis-related businesses bankruptcy protection, thus, making it very difficult for lenders to recoup their investments, which may limit the willingness of banks to lend to us. Accordingly, we may experience difficulties in obtaining and maintaining regular banking and financial services because of the activities of the clients of third-party financial institutions and Providers, which may in turn adversely affect our business.

Regarding the BSA, specifically, the Department of the Treasury, Financial Crimes Enforcement Network, has not rescinded the “FinCEN Memo” dated February 14, 2014. This guidance includes burdensome due diligence expectations and reporting requirements, and does not provide any safe harbors or legal defenses from examination or regulatory or criminal enforcement actions by the U.S. DOJ, FinCEN or other federal regulators. Thus, many banks and other financial institutions in the United States choose not to provide banking services to cannabis-related businesses or rely on this guidance, which can be amended or revoked at any time by the Biden administration.

*Risk of legal, regulatory or other political change*

The success of the business strategy relating to the assets acquired from the Cape Payment Companies depends, in part, on the legality of the cannabis industry. The political environment surrounding the cannabis industry in general can be volatile and the regulatory framework remains in flux. To our knowledge, as of the date hereof, some form of cannabis has been legalized in 36 states, the District of Columbia, and the territories of Guam, U.S. Virgin Islands, Northern Mariana Islands and Puerto Rico; however, the risk remains that a shift in the regulatory or political realm could occur and have a significant impact on the industry as a whole, adversely impacting our business, results of operations, financial condition or prospects.

This growth strategy is contingent, in part, upon certain federal and state regulations being enacted to facilitate the legalization of medical and adult-use cannabis. If such regulations are not enacted, or enacted but subsequently repealed or amended, or enacted with prolonged phase-in periods, our growth in this particular market could be restricted or negatively impacted.

We are unable to predict with certainty when and how the outcome of these complex regulatory and legislative proceedings will affect our business in this particular market.

Further, there is no guarantee that state laws legalizing and regulating the sale and use of cannabis will not be repealed or overturned, or that local governmental authorities will not limit the applicability of state laws within their respective jurisdictions. If the federal government begins to enforce federal laws relating to cannabis in states where the sale and use of cannabis is currently legal under state law, or if existing applicable state laws are repealed or curtailed, our business, results of operations, financial condition and prospects would be materially adversely affected. Federal actions against individuals or entities engaged in the cannabis industry or a repeal or failure to re-authorize laws or protections like the Joyce-Blumenauer Amendment could adversely affect our business, results of operations, financial condition and prospects.

Multiple states and local jurisdictions currently impose special taxes or fees on businesses in the cannabis industry. We are aware that additional jurisdictions are considering adding such taxes. It is a potential yet unknown risk at this time that other states are in the process of reviewing such additional fees and taxation. Should such special taxes or fees be adopted, this could have a material adverse effect upon our business, results of operations, financial condition or prospects.

Overall, the medical and adult-use cannabis industry is subject to significant regulatory change at both the state and federal level. Our inability to respond to the changing regulatory landscape may cause us to not be successful in developing this particular market and could adversely affect us.

*The cannabis industry is a new industry that may not succeed*

The cannabis industry is a new industry subject to extensive regulation, and there can be no assurance that it will grow, flourish or continue to the extent necessary to facilitate our success in this particular market.

*Our operations in the U.S. cannabis market as a result of the assets acquired from the Cape Payment Companies may become the subject of heightened scrutiny*

For the reasons set forth above, these operations in the U.S., and any future operations in this particular market may become the subject of heightened scrutiny by regulators, stock exchanges and other authorities in the U.S. As a result, we may be subject to significant direct and indirect interaction with public officials. There can be no assurance that this heightened scrutiny will not in turn lead to the imposition of certain restrictions on our ability to exploit this acquisition.

Government policy changes or public opinion may also result in a significant influence over the regulation of the cannabis industry in the U.S. or elsewhere. A negative shift in the public's perception of medical and/or adult-use cannabis in the U.S. or any other applicable jurisdiction could affect future legislation or regulation. Among other things, such a shift could cause state jurisdictions to abandon initiatives or proposals to legalize medical and/or adult-use cannabis, thereby limiting the number of new state-legal cannabis markets into which we could expand. Any inability to fully implement such expansion strategy may result in a material adverse effect on this business, as well as the financial condition, results of operations or prospects thereof.

*Regulatory scrutiny of the business comprising the Cape Payment Companies' industry may negatively impact our ability to raise additional capital*

Our business activities relating to the assets acquired from the Cape Payment Companies rely, in part, on newly established and/or developing laws and regulations in the various states in which this business will operate. These laws and regulations are evolving and subject to change with minimal notice. Regulatory changes may adversely affect our results of operations in this regard. Additionally, the cannabis industry may come under the scrutiny or further scrutiny by the U.S. DOJ or other federal, state or non-governmental regulatory authorities or self-regulatory organizations that supervise or regulate the medical and/or adult-use cannabis markets in the U.S. It is impossible to determine the extent of the impact of any new laws, regulations or initiatives that may be proposed, or whether any proposals will become law. The regulatory uncertainty surrounding this industry may adversely affect our business and operations, including without limitation, the costs to remain compliant with applicable laws and the impairment of our ability to raise additional capital.

***Our operations as a result of the Cape Payment Acquisition may expose us to risk under state money transmitter laws and regulations.***

The Cape Payment Companies have not historically obtained state money transmitter licenses in connection with facilitating merchant access to Providers or financial institutions based on the position that the Cape Payment Companies themselves do not engage in the business of money transmission. However, certain state money transmitter licensing laws cover persons that advertise, solicit or hold themselves out as providing money transmission. Governmental authorities may interpret their money transmitter licensing laws overly broad, inquire about the licensing status of the Cape Payment Companies, assert that the Cape Payment Companies should be licensed based on the results of their inquiries, and seek to take enforcement action against the Cape Payment Companies, including assessing monetary fines, for purported past unlicensed activities. In response, the Cape Payment Companies may contest the governmental authority’s assertion or action, obtain the license, or cease doing business in the subject state. Such inquires may adversely affect our business and operations, including, the payments of fines, the cost to comply with state money transmitter laws, the loss of revenue from ceasing business in any state, and the impairment of our ability to raise additional capital.

***The market facilitating the entry into merchant agreements by and between merchants and third-party payment processing solution providers is highly competitive and has relatively low barriers to entry***.

Competitors have established a sizable market share in the merchant acquiring sector and service more clients than we do. Our growth will depend, in part, on a combination of the continued growth of the electronic payment market and our ability to increase our market share. Many of our competitors have substantially greater financial, technological, and marketing resources than we have. Accordingly, if these competitors specifically target our business model, they may be able to offer more attractive third-party solutions. They also may be able to offer and provide third-party products and services that we do not offer. Additionally, larger financial institutions may decide to perform in-house some or all of the services we provide or could provide, which may afford them with a competitive advantage in the market. One or more of these factors could have a material adverse effect on our business, financial condition and results of operations.

In addition, we are also subject to risks as a result of changes in business habits of our vendors and customers as they adjust to the competitive marketplace. Because our standing arrangements and agreements with third-party payment processing solution providers typically contain no purchase or sale obligations and are terminable by either party upon no or relatively short notice, we are subject to significant risks associated with the loss or change at any time in the business habits and financial condition of key vendors as they adapt to changes in the market.

***If we fail to comply with the applicable requirements of the Visa and Mastercard payment networks, those payment networks could seek to fine us, suspend us or terminate our registrations through our bank sponsors.***

We do not directly access the payment card networks, such as Visa and Mastercard. Accordingly, we must rely on banks or other payment processors to process transactions. To provide our merchant acquiring services, we are registered through our bank sponsors with the Visa and Mastercard networks as service providers for member institutions. Accordingly, we, our bank sponsors and many of our clients are subject to complex and evolving payment network rules. The payment networks routinely update and modify requirements applicable to merchant acquirers, including rules regulating data integrity, third-party relationships (such as those with respect to bank sponsors and ISOs), merchant chargeback standards and PCI DSS. The rules of the card networks are set by their boards, which may be influenced by card issuers, some of which offer competing transaction processing services.

If we or our bank sponsors fail to comply with the applicable rules and requirements of the Visa or Mastercard payment networks, Visa or Mastercard could suspend or terminate our member registration or certification.

***Consolidation in the banking and financial services industry could adversely affect our business, results of operations and financial condition.***

Consolidations have been, and continue to be, active in the banking and financial services industry. It is possible that larger financial institutions that result from consolidations will have increased bargaining power when negotiating, which could result in less favorable contractual terms for us. Larger financial institutions resulting from consolidations may also decide to perform in-house some or all of the services we provide or could provide. These foregoing matters could have an adverse effect on our business, result of operations and financial condition.

***We are subject to economic and political risk, the business cycles of third parties and changes in the overall level of consumer and commercial spending, which could negatively impact our business, financial condition and results of operations.***

The electronic payment industry depends heavily on the overall level of consumer and commercial spending. We are exposed to general economic conditions that affect consumer confidence, consumer spending, consumer discretionary income and changes in consumer purchasing habits. A sustained deterioration in general economic conditions, particularly in the United States, continued uncertainty for an extended period of time, due to the ongoing COVID-19 pandemic, increased gasoline prices, inflation and other macroeconomic factors, supply chain disruptions or otherwise, or increases in interest rates, could adversely affect our financial performance by reducing the number or aggregate volume of transactions made using electronic payments. A reduction in the amount of consumer or commercial spending could result in a decrease in our revenue and profits. If merchants make fewer purchases or sales of products and services using electronic payments, or consumers spend less money through electronic payments, there are fewer transactions to process at lower dollar amounts, resulting in lower revenue. Additionally, credit card issuers may reduce credit limits and become more selective in their card issuance practices. Any of these developments could have a material adverse impact on our financial position and results of operations.

***A decline in the use of cards as payment mechanisms for consumers and businesses or adverse developments in the electronic payment industry in general could adversely affect our business, financial condition and operating results.***

If consumers and businesses do not continue to use cards as payment mechanisms for their transactions or if the mix of payments among the types of cards changes in a way that is adverse to us, it could have a material adverse effect on our financial condition and results of operations. Regulatory changes may also result in the charging of additional fees for use of credit or debit cards, thereby impacting use of electronic payments. Additionally, in recent years, increased incidents of security breaches have caused some consumers to lose confidence in the ability of businesses to protect their information, causing certain consumers to discontinue use of electronic payment methods. Security breaches could result in financial institutions canceling large numbers of credit and debit cards, or consumers or businesses electing to cancel their cards following such an incident.

**Risks Related to Ownership of Our Securities**

***We were delisted from the Nasdaq Capital Market in 2023, and the delisting could adversely affect the market liquidity of our common stock and the market price of our common stock could decrease significantly.***

As previously disclosed, on January 26, 2022, we received a letter from Nasdaq indicating that the Company was not in compliance with the Bid Price Rule. The Company was given until July 25, 2022 to regain compliance with the Bid Price Rule. On July 28, 2022, in connection with the transfer of the Nasdaq listing from the Global Select Market to the Capital Market, the Company was granted by Nasdaq an additional 180-day grace period, or until January 23, 2023, to regain compliance with the Bid Price Rule. On January 24, 2023, the Company received the Delisting Notice from the staff of Nasdaq. Trading of the Company common stock was suspended at the opening of business on February 2, 2023 and concurrently commenced trading on OTCQB.

Trading on the OTCQB may impact our ability to raise capital. Moreover, an investor may find it less convenient to sell, or to obtain accurate quotations in seeking to buy, our common stock in an over-the-counter market, and many investors would likely not buy or sell our common stock due to difficulty in accessing over-the-counter markets, policies preventing them from trading in securities not listed on a national exchange or other reasons. In addition, our common stock is considered a “penny stock” under Section 3a51-1 of the Securities Act, which imposes additional disclosure requirements on broker-dealers. The regulations relating to penny stocks, coupled with the typically higher cost per trade to the investor of penny stocks due to factors such as broker commissions generally representing a higher percentage of the price of a penny stock than of a higher-priced stock, further limit the ability of investors to trade in our common stock. For these reasons and others, our recent delisting may affect the liquidity, trading volume and price of our securities, causing the value of an investment in us to decrease and having an adverse effect on our business, financial condition and results of operations, including our ability to attract and retain qualified employees, to raise capital, and execute on a strategic alternative.

***The effective increase in the number of shares of our common stock available for issuance as a result of our Reverse Stock Split could result in further dilution to our existing stockholders.***

The Reverse Stock Split alone had no effect on our authorized capital stock, and the total number of authorized shares remains the same as before the Reverse Stock Split. The Reverse Stock Split of our issued and outstanding shares was effected, increasing the number of shares of our common stock (or securities convertible or exchangeable for our common stock) available for issuance. The additional available shares are available for issuance from time to time at the discretion of the Company's board of directors (the "Board") when opportunities arise, without further stockholder action or the related delays and expenses, except as may be required for a particular transaction by law, the rules of any exchange on which our securities may then be listed, or other agreements or restrictions. Any issuance of additional shares of our common stock would increase the number of outstanding shares of our common stock and (unless such issuance was pro-rata among existing stockholders) the percentage ownership of existing stockholders would be diluted accordingly. In addition, any such issuance of additional shares of our common stock could have the effect of diluting the earnings per share and book value per share of outstanding shares of our common stock.

***The market price of our common stock may be volatile and could decline.***

The market price of our common stock may fluctuate significantly in response to various factors, some of which are beyond our control. In addition to the factors discussed in this "Risk Factors" section and elsewhere in this Form 10-K, the factors that could affect our stock price are:

- trading on the OTCQB rather than the Nasdaq Capital Markets;
- lack of trading volume;
- lack of liquidity;
- industry or general market conditions;
- domestic and international political and economic factors unrelated to our performance;
- actual or anticipated fluctuations in our quarterly operating results;
- changes in or failure to meet publicly disclosed expectations as to our future financial performance;
- changes in securities analysts' estimates of our financial performance or lack of research and reports by industry analysts;
- action by institutional stockholders or other large stockholders, including sales of large blocks of common stock;
- lack of institutional investors;
- speculation in the press or investment community;
- changes in investor perception of us and our industry;
- changes in market valuations or earnings of similar companies;
- announcements by us or our competitors of significant products, contracts, acquisitions or strategic partnerships;
- changes in our capital structure, such as future sales of our common stock or other securities;
- changes in applicable laws, rules or regulations, regulatory actions affecting us and other dynamics; and
- additions or departures of key personnel.

The stock markets have experienced extreme volatility over time that has been unrelated to the operating performance of particular companies. From January 1, 2022 to March 15, 2023, the closing price of our common stock has ranged from a high of $15.60 per share to a low of $0.24 per share. These fluctuations may or may not be based upon any business or operating results. Our common stock may experience similar or even more dramatic price and volume fluctuations in the future. These broad market fluctuations may adversely affect the trading price of our common stock. In the past, following periods of volatility in the market price of a company's securities, class action litigation has sometimes been instituted against such company. Any litigation of this type brought against us could result in substantial costs and a diversion of our management's attention and resources, which would harm our business, operating results and financial condition.

***The market for our common stock may become limited, sporadic and volatile. Any failure to develop or maintain an active trading market could negatively affect the value of our shares and make it difficult or impossible for you to sell your shares.***

Our common stock is currently traded on the OTCQB. Although our common stock is traded on the OTCQB, a regular trading market for our securities may not be sustained in the future. Quotes for stocks traded on the OTCQB generally are often difficult to obtain, and coverage of securities quoted solely on the OTCQB may be difficult to obtain. In addition, stocks quoted solely on the OTCQB tend to have a limited number of market makers and a larger spread between the bid and ask prices than those listed on an exchange. All of these factors may cause holders of our common stock to be unable to resell their securities at any price. This limited trading also could decrease or eliminate our ability to raise additional funds through issuances of our securities.

Failure to maintain an active trading market could negatively affect the value of our shares and make it difficult for you to sell your shares or recover any part of your investment in us. Even if an active market for our common stock continues, the market price of our common stock may be highly volatile. In addition to the uncertainties relating to our future operating performance and any profitability of our operations, factors such as variations in our interim financial results, or various, as yet unpredictable factors, many of which are beyond our control, may have a negative effect on the market price of our common stock. Accordingly, there can be no assurance as to the liquidity of our common stock, the ability of holders of our common stock to sell our common stock, or the prices at which holders may be able to sell our common stock.

***A low market price may severely limit the potential market for our common stock.***

An equity security that trades below a certain price per share is subject to SEC rules requiring additional disclosures by broker-dealers. These rules generally apply to any equity security that is not traded on a recognized national exchange, and that has a market price of less than $5.00 per share, subject to certain exceptions (a “penny stock”). Such rules require the delivery, prior to any penny stock transaction, of a disclosure schedule explaining the penny stock market and the risks associated therewith and impose various sales practice requirements on broker-dealers who sell penny stocks to persons other than established customers and institutional or wealthy investors. For these types of transactions, the broker-dealer must make a special suitability determination for the purchaser and have received the purchaser’s written consent to the transaction prior to the sale. The broker-dealer also must disclose the commissions payable to the broker-dealer, current bid and offer quotations for the penny stock and, if the broker-dealer is the sole market maker, the broker-dealer must disclose this fact and the broker-dealer’s presumed control over the market. Such information must be provided to the customer orally or in writing before or with the written confirmation of trade sent to the customer. Monthly statements must be sent disclosing recent price information for the penny stock held in the account and information on the limited market in penny stocks. Since our common stock trades at a price of less than $5.00 per share, the additional burdens imposed upon broker-dealers by such requirements could discourage broker-dealers from effecting transactions in our common stock. As a result, an investor may find it difficult to dispose of, or to obtain accurate quotations of the price of, our common stock. Accordingly, investors must assume they may have to bear the economic risk of an investment in our common stock for an indefinite period of time, and may lose their entire investment. There can be no assurance that a more active market for our common stock will develop, or if one should develop, there is no assurance that it will be sustained. This severely limits the liquidity of our common stock and would likely have a material adverse effect on the market price of our common stock and on our ability to raise additional capital.

***We do not currently intend to pay cash dividends.***

We have not paid any cash dividends or declared any stock dividends on our common stock since incorporation. The payment of future cash dividends will be dependent upon our revenues and earnings, if any, capital requirements and general financial condition. The payment of any cash or stock dividends will be at the discretion of the Board and is limited by restrictive covenants in our credit agreements. Our present policy is to retain all available funds for use in our operations and the expansion of our business. As such, the Board is not currently contemplating nor does it anticipate paying any dividends in the foreseeable future. Accordingly, investors will only see a return on their investment if the value of our securities appreciates.

***Future sales of a substantial number of shares by existing stockholders could cause our share price to decline.***

Sales of substantial amounts of our common stock in the public market or the perception that these sales could occur, could cause the market price of our common stock to decline. Substantially all of our outstanding shares of common stock are eligible to be sold into the public market without restrictions, subject to compliance by employees and directors with the Company's insider trading policy for such parties that are covered thereby. Significant sales of our common stock could cause our share price to decline.

In the future, we may issue additional shares of common stock or other equity or fixed maturity securities convertible into common stock in connection with a financing, acquisition, and litigation settlement or employee arrangement or otherwise. Any of these issuances could result in substantial dilution to our existing stockholders and could cause the trading price of our common stock to decline.

***Future offerings of debt or equity securities that rank senior to our common stock may adversely affect the market price of our common stock.***

If, in the future, we decide to issue debt or equity securities that rank senior to our common stock, it is likely that such securities will be governed by an indenture or other instrument containing covenants restricting our operating flexibility. Additionally, any convertible or exchangeable securities that we issue in the future may have rights, preferences and privileges more favorable than those of our common stock and may result in dilution of the percentage ownership of the holders of our common stock. We and, indirectly, our stockholders, will bear the cost of issuing and servicing such securities. Because our decision to issue debt or equity securities in any future offering will depend on market conditions and other factors beyond our control, we cannot predict or estimate the amount, timing or nature of our future offerings. Thus, holders of our common stock will bear the risk of our future offerings reducing the market price of our common stock and diluting the value of their shareholdings in us.

***Anti-takeover provisions in our third amended and restated certificate of incorporation as currently in effect (the "Charter") discourage, delay or prevent a change in control of our company and may affect the trading price of our common stock.***

Our Charter includes a number of provisions that may discourage, delay or prevent a change in our management or control over us. For example, our Charter includes the following provisions:

- a staggered board providing for three classes of directors, which limits the ability of a stockholder or group to gain control of our Board;
- the ability of our Board to issue preferred stock, which could contain features that delay or prevent a change of control;
- no cumulative voting in the election of directors, which limits the ability of minority stockholders to elect director candidates;
- the right of our Board to elect a director to fill a vacancy created by the expansion of our Board or the resignation, death or removal of a director in certain circumstances, which prevents stockholders from being able to fill vacancies on our Board;
- a prohibition on stockholder action by written consent, which forces stockholder action to be taken at an annual or special meeting of our stockholders;
- a prohibition on stockholders calling a special meeting and the requirement that a meeting of stockholders may only be called by members of our Board, which may delay the ability of our stockholders to force consideration of a proposal or to take action, including the removal of directors;
- the requirement that the removal of directors by the stockholders be approved by the affirmative vote of holders of at least 75% of the voting power of all then outstanding shares of capital stock entitled to vote generally in the election of directors, which limits the ability of stockholders to remove directors;
- the requirement that the adoption, amendment, alteration or repeal of the bylaws by stockholders be approved by the affirmative vote of at least 75% of the voting power of all then outstanding shares of capital stock entitled to vote generally in the election of directors and the requirement that the amendment or repeal of certain provisions of our certificate of incorporation be approved by the affirmative vote of at least 75% of the outstanding shares entitled to vote thereon, which limit the ability of stockholders to effect corporate governance changes; and
- advance notice procedures that stockholders must comply with in order to nominate candidates to our Board or to propose matters to be acted upon at a meeting of stockholders, which may discourage or

deter a potential acquirer from conducting a solicitation of proxies to elect the acquirer's own slate of directors or otherwise attempting to obtain control of the Company.

These provisions may prevent our stockholders from receiving the benefit from any premium to the market price of our common stock offered by a bidder in a takeover context. Even in the absence of a takeover attempt, the existence of these provisions may adversely affect the prevailing market price of our common stock if the provisions are viewed as discouraging takeover attempts in the future.

Our Charter may also make it difficult for stockholders to replace or remove our management. These provisions may facilitate management entrenchment that may delay, deter, render more difficult or prevent a change in our control, which may not be in the best interests of our stockholders.

***The Charter designates the Court of Chancery of the State of Delaware and federal court within the State of Delaware as the exclusive forum for certain types of actions and proceedings that the Company's stockholders may initiate, which could limit a stockholder's ability to obtain a favorable judicial forum for disputes with the Company or its directors, officers or employees.***

Our Charter provides that, subject to limited exceptions, the Court of Chancery of the State of Delaware and federal court within the State of Delaware will be exclusive forums for any:

- derivative action or proceeding brought on the Company's behalf;
- action asserting a claim of breach of a fiduciary duty owed by any of the Company's directors, officers or other employees to the Company or its stockholders;
- action asserting a claim against the Company arising pursuant to any provision of the Delaware General Corporation Law, our Charter or our Bylaws; or
- other action asserting a claim against the Company that is governed by the internal affairs doctrine.

Any person or entity purchasing or otherwise acquiring any interest in shares of the Company's capital stock shall be deemed to have notice of and to have consented to the provisions of the Company's Charter described above. These choice of forum provisions may limit a stockholder's ability to bring a claim in a judicial forum that it finds favorable for disputes with the Company or its directors, officers or other employees, which may discourage such lawsuits against the Company and its directors, officers and employees. Alternatively, if a court were to find these provisions of the Charter inapplicable to, or unenforceable in respect of, one or more of the specified types of actions or proceedings, the Company may incur additional costs associated with resolving such matters in other jurisdictions, which could adversely affect the Company's business and financial condition.

***The Notes and other Derivative Securities are exercisable/convertible into shares of our common stock, which would increase the number of shares eligible for future resale in the public market and result in dilution to our stockholders.***

The Notes are convertible into up to 324,555 shares of common stock. In 2020, we issued our chief executive officer an option to purchase 478,620 shares of common stock at an exercise price of $7.40 per share, and in 2021 we issued him 156,716 performance-based restricted stock units and 175,000 time-based vesting restricted stock units. The shares of common stock issued upon exercise of these Derivative Securities (and restricted stock grants) and/or conversion of the Notes will result in dilution to the then existing holders of common stock of the Company and increase the number of shares eligible for resale in the public market. Sales of substantial numbers of such shares in the public market could adversely affect the market price of our common stock. Other equity-based awards were issued in 2021 that also could result in dilution and increased shares also eligible for resale in the public market. See Part II, Item 8, *Note 11 - Debt*, for the definition of Notes, and Part II, Item 8, *Note 14 – Stock-Based Awards and Cash-Based Awards* for a description of Mr. Grimstad's option and other awards.

***We may issue shares of preferred stock in the future, which could make it difficult for another company to acquire us or could otherwise adversely affect holders of our common stock, which could depress the price of our common stock.***

Our Charter authorizes us to issue one or more series of preferred stock. Our Board has the authority to determine the preferences, limitations and relative rights of the shares of preferred stock and to fix the number of shares constituting any series and the designation of such series, without any further vote or action by our shareholders. Our preferred stock could be issued with voting, liquidation, dividend and other rights superior to the rights of our common stock. The potential issuance of preferred stock may delay or prevent a change in control of us, discourage bids for our common stock at a premium to the market price, and materially and adversely affect the market price and the voting and other rights of the holders of our common stock.

**Item 1B. Unresolved Staff Comments**

None.

**Item 2. Properties**

Our properties consist of leased facilities for key administrative, operational and technology functions. Our corporate headquarters are located in Lafayette, Louisiana. We consider our current facilities, which are used by both of our reportable segments, suitable for their purpose and adequate to support our business. Additional information relative to lease obligations is included in Part II, Item 8, of this Form 10-K.

**Item 3. Legal Proceedings**

In July 2016, Waiter.com, Inc. filed a lawsuit against Waitr Inc. in the United States District Court for the Western District of Louisiana, alleging trademark infringement based on the Company's use of the "Waitr" trademark and logo, Civil Action No.: 2:16-CV-01041. The plaintiff sought injunctive relief and damages relating to the Company's use of the "Waitr" name and logo. During the third quarter of 2020, the trial date was rescheduled to June 2021. On June 22, 2021, the Company entered into a License, Release and Settlement Agreement (the "Settlement") to settle all claims related to this lawsuit. Pursuant to the Settlement, the Company paid the plaintiff $4.7 million in cash on July 1, 2021. In connection with the Settlement, we agreed to adopt a new trademark or tradename to replace the Waitr trademark and to discontinue use of the Waitr trademark in connection with the marketing, sale or provision of any web-based or mobile app-based delivery, pick-up, carry-out or dine-in services using the Waitr trademark by June 22, 2022, which was extended by eight additional months in exchange for a one-time payment of $800,000. During the three months ended March 31, 2022, the Company accrued an $800,000 reserve in connection with its option to extend the license period by an additional eight months. The $800,000 legal reserve and $4.7 million legal settlement are included in other expense in the consolidated statement of operations for the years ended December 31, 2022 and 2021, respectively.

In April 2019, the Company was named as a defendant in a class action complaint filed by certain current and former restaurant partners, captioned *Bobby's Country Cookin', LLC, et al. v. Waitr Holdings Inc.,* which is currently pending in the United States District Court for the Western District of Louisiana. The plaintiffs assert claims for breach of contract and violation of the duty of good faith and fair dealing, and they seek recovery on behalf of themselves and two separate classes. Based on the current class definitions, as many as 10,000 restaurant partners could be members of the two separate classes at issue. In February 2022, the parties reached a proposed settlement in principle to resolve the litigation in its entirety and requested a stay of the pending litigation. Ultimately, no settlement agreement was executed by the parties nor was District Court approval obtained. Consequently, the stay of the litigation was briefly lifted until the District Court certified its ruling on a motion for summary judgment for immediate appeal. The litigation is currently stayed while the matter proceeds on appeal. Based on the settlement negotiations, the Company accrued a $1.25 million reserve in connection with this lawsuit during the three months ended December 31, 2021. The accrued legal contingency is included in other current liabilities in the consolidated balance sheet at December 31, 2022.

In September 2019, Christopher Meaux, David Pringle, Jeff Yurecko, Tilman J. Fertitta, Richard Handler, Waitr Holdings Inc. f/k/a Landcadia Holdings Inc., Jefferies Financial Group, Inc. and Jefferies, LLC were named as defendants in a putative class action lawsuit entitled *Walter Welch, Individually and on Behalf of all Others Similarly Situated vs. Christopher Meaux, David Pringle, Jeff Yurecko, Tilman J. Fertitta, Richard Handler, Waitr Holdings Inc. f/k/a Landcadia Holdings Inc., Jefferies Financial Group, Inc. and Jefferies, LLC*. The case was filed in the Western District of Louisiana, Lake Charles Division. In the lawsuit, the plaintiff asserts putative class action claims alleging, inter alia, that various defendants made false and misleading statements in securities filings, engaged in fraud, and violated accounting and securities rules, seeking damages based upon these allegations. A similar putative class action lawsuit, entitled *Kelly Bates, Individually and on Behalf of all Others Similarly Situated vs. Christopher Meaux, David Pringle, Jeff Yurecko, Tilman J. Fertitta, Richard Handler, Waitr Holdings Inc. f/k/a Landcadia Holdings Inc., Jefferies Financial Group, Inc. and Jefferies, LLC*, was filed in that same court in November 2019. These two cases were consolidated, and an amended complaint was filed in October 2020. The Company filed a motion to dismiss in February 2021. The Court assigned that motion to the Magistrate Judge, who issued her Report and Recommendation to the District Court Judge that the motion to dismiss be granted in all respects. On August 10, 2022, the Court ruled in favor of the Company and its former officers and directors on all claims and dismissed the case with prejudice. The deadline for appeal has passed with no action from plaintiffs; the judgment dismissing the case with prejudice is now final.

In November 2022, the Company was named as a defendant in *Jenson et al. v. Bitesquad.com, LLC*, No. 22-cv-03044 (NEB), filed in Minnesota state court. The plaintiffs, three customers purporting to represent a class, allege that the Company's advertising is false and misleading in that the Company's "free delivery" promotions violate the Minnesota Uniform Deceptive Practices Act and the Minnesota False Statement in Advertising Act as a result of the Company charging "other fees" on such orders that plaintiffs assert constitute a "delivery charge." The plaintiffs seek unspecified damages as well as injunctive and declaratory relief. The Company removed the case to the United States District Court for the District of Minnesota under the Class Action Fairness Act. Based on the existence of an arbitration provision in the BiteSquad website "terms and conditions" section, the Company then moved to compel arbitration under the Federal Arbitration Act. The parties briefed and presented arguments on this motion to the court on March 8, 2023 and are waiting on the court's ruling. The Company believes that this lawsuit lacks merit and that it has strong defenses to all claims alleged. The Company continues to vigorously defend the lawsuit.

In October, 2017, the Company was named as a defendant in the matter of *Michael Boone and Jennifer Walters, individually and on behalf of their minor child Grace Boone, vs. Waitr Inc.*, pending in the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana. The action arises from a pedestrian/vehicle collision that occurred in November 2016, and the alleged substantial damages as a result thereof. This matter was not resolved through mediation. A trial date has not been set and discovery is ongoing. The Company intends to vigorously defend this lawsuit.

In May 2020, the Company was named as a defendant in *Mary Ritchey, Individually and as Conservator for A.M., a minor, vs. Kristi Rando, Waitr Holdings, Inc., et al., Civil No. 1CCV-20-0722 LWC*, and *Robert P. McPherson vs. Kristi Rando, Waitr Holdings, Inc., et al., Civil No. 1CCV-20-0764 LWC*, consolidated and which is currently pending in the Circuit Court of the First Circuit, State of Hawaii. This action is a result of an automobile accident that occurred in October 2018 involving an employee of a Company subsidiary and the alleged substantial injuries and damages as a result thereof. Discovery is ongoing, as well as the motion practice. The court recently granted plaintiffs' motion to continue trial, and the trial has been rescheduled for June 2024. The Company intends to vigorously defend this lawsuit.

In May 2020, the Company was named as a defendant in *Jessie Stewart, Bradley Stewart & Sheila Ludwig vs. Waitr Inc. of LA., Waitr Holdings, Inc., Delivery Logistics, LLC, et al*, in the 22nd Judicial District Court, St. Tammany Parish, Louisiana. This action is a result of an automobile accident that occurred in April 2020 involving an independent contractor and the mother of the three plaintiffs, alleging substantial damages based on the injuries sustained in the accident and the ultimate death of the mother subsequent to the automobile accident. Discovery is ongoing and no trial date has been set. The Company intends to vigorously defend this lawsuit.

In addition to the lawsuits described above, the Company is involved in other litigation arising from the normal course of business activities, including, without limitation, vehicle accidents involving employees and independent contractor drivers resulting in claims alleging personal injuries and medical expenses, labor and employment claims, allegations of intellectual property infringement, and workers' compensation benefit claims as a result of alleged conduct involving its employees, independent contractor drivers, and third-party negligence. Although the Company believes that it maintains insurance with standard deductibles that generally covers liability for potential damages in many of these matters where coverage is available on acceptable terms (it is not maintained for claims involving intellectual property), insurance coverage is not guaranteed, there are limits to insurance coverage and in certain instances claims are met with denial of coverage positions by the carriers; accordingly, we could suffer material losses as a result of these claims, the denial of coverage for such claims, or damages awarded for any such claim that exceeds coverage. Litigation is unpredictable and we may determine in the future that certain existing claims have greater exposure or liability than previously understood. See Risk Factors – "*We are subject to claims, lawsuits, investigations, and various proceedings, and face potential liability and expenses for legal claims from the normal course of business activities*."

**Item 4. Mine Safety Disclosures**

Not applicable.

# PART II

## Item 5. Market for Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities

### Market Information

The Company’s common stock began trading on Nasdaq under the symbol “WTRH” on November 16, 2018. In connection with the Company’s rebranding, the Company’s common stock began trading on Nasdaq under the new trading symbol “ASAP” effective as of November 22, 2022. On February 2, 2023, the Company common stock was delisted from Nasdaq and began trading on the OTCQB under the same symbol, “ASAP”.

As of the close of business on March 15, 2023, there were approximately 5,742 stockholders of record of the Company’s common stock. The number of holders of record is based upon the actual number of holders registered at such date and does not include holders of shares in “street name” or persons, partnerships, associates, corporations or other entities in security position listings maintained by depositories. The market for our common stock is volatile and subject to fluctuations, as the closing bid price between January 1, 2022 through March 15, 2023 has ranged from a high of $15.60 per share to a low of $0.24 per share.

### Reverse Stock Split

On November 18, 2022, the Company filed a Certificate of Amendment to amend the Company’s Third Amended and Restated Certificate of Incorporation, which effected a one for twenty (1:20) Reverse Stock Split of its outstanding common stock. As a result of the Reverse Stock Split, every twenty shares of the Company’s common stock issued and outstanding immediately prior to the Reverse Stock Split was combined and reclassified into one share of common stock. No fractional shares were issued in connection with the Reverse Stock Split. Stockholders who would otherwise be entitled to a fractional share of common stock were instead entitled to receive a proportional cash payment. The Reverse Stock Split did not change the par value or authorized number of shares of common stock. All common share and per share amounts presented in this Form 10-K have been retroactively adjusted to reflect the Reverse Stock Split.

### Dividends

The Company has not historically paid any cash dividends or declared any stock dividends on its common stock. The payment of cash dividends in the future will be dependent upon the Company’s revenues and earnings, if any, capital requirements and general financial condition. The payment of any cash or stock dividends will be within the discretion of the Board at such time. The Board is not currently contemplating and does not anticipate paying any cash dividends or declaring any stock dividends in the foreseeable future. Further, the Company’s ability to declare dividends is limited by restrictive covenants in its credit agreements.

### Issuer Purchases of Equity Securities

During the three months and year ended December 31, 2022, the Company did not repurchase any of its common stock.

### Recent Sales of Unregistered Securities; Use of Proceeds from Registered Securities

***ATM Offerings***

In November 2021, the Company entered into a third amended and restated open market sale agreement with respect to an at-the-market offering program (the “ATM Program”) under which the Company could offer and sell, from time to time at its sole discretion, shares of its common stock having an aggregate offering price of up to $50 million, through Jefferies LLC as its sales agent. There were no sales of common stock pursuant to the third amended and restated open market sale agreement after April 12, 2022. In August 2022, the Company entered into a fourth amended and restated open market sale agreement with respect to the ATM Program under which the Company may offer and sell, from time to time at its sole discretion, shares of its common stock having an aggregate offering price of up to $50 million. The issuance and sale of shares by the Company under the open market sales agreements were made pursuant to the Company’s effective registration statements on Form S-3. Details of sales pursuant to the ATM Program are included in the table below. As of December 31, 2022, approximately $44.3 million remained unsold under the August 2022 ATM Program.

See Part II, Item 8, *Note 20 - Subsequent Events* for details regarding sales pursuant to the ATM Program in January 2023. The Company doesn't anticipate effecting any further sales under its fourth amended and restated open market sales agreement in 2023.

| | Sales during the year ended December 31, 2022 | | |
|---|---|---|---|
| | November 2021 ATM Program | August 2022 ATM Program | Total |
| Total shares sold | 603,749 | 3,381,350 | 3,985,099 |
| Average sales price per share | $ 11.94 | $ 1.67 | $ 3.23 |
| Gross proceeds (in thousands) | $ 7,211 | $ 5,660 | $ 12,871 |
| Net proceeds (in thousands) | $ 7,120 | $ 5,545 | $ 12,665 |

***Unregistered Sales of Equity Securities***

None.

## Item 6. [Reserved]

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

*The following Management's Discussion and Analysis of Financial Condition and Results of Operations should be read in conjunction with the consolidated financial statements and related notes thereto included elsewhere in this Form 10-K. The following discussion contains forward-looking statements that reflect future plans, estimates, beliefs and expected performance. The forward-looking statements are dependent upon events, risks and uncertainties that may be outside of our control. Our actual results could differ materially from those discussed in these forward-looking statements. Factors that could cause or contribute to such differences include, but are not limited to, those identified below and those discussed elsewhere in this Form 10-K, particularly in Part I, Item 1A, Risk Factors. The Company does not undertake any obligation to publicly update any forward-looking statements except as otherwise required by applicable law.*

*Dollar amounts in Item 7, Management's Discussion and Analysis of Financial Condition and Results of Operations, are expressed in thousands, except as otherwise noted.*

*All references to common stock, share and per share amounts have been retroactively restated to reflect the 1:20 Reverse Stock Split that became effective on November 18, 2022, as if it had taken place as of the beginning of the earliest period presented.*

### Overview

ASAP.com, the on-demand delivery brand for Waitr Holdings Inc., operates an online ordering technology platform (the "Platform") using the "deliver anything ASAP" model, making it easy to order food, alcohol, convenience, grocery, flowers, auto parts and more. The Platform also includes proprietary in-stadium mobile ordering technology, providing an enhanced fan experience at sports and entertainment venues. The Platform provides delivery, carryout and dine-in options, connecting restaurants, merchants, drivers and diners in certain cities in the United States. Additionally, the Company facilitates access to third parties that provide payment processing solutions for restaurants and other merchants. Our strategy is to bring in the logistics infrastructure to underserved populations of restaurants, grocery stores and other merchants and establish strong market presence or leadership positions in the markets in which we operate.

Prior to the three months ended September 30, 2022, the Company concluded that we had one operating segment as the operations related to the facilitation of access to third parties that provide payment processing solutions to merchants and restaurants were not material to the Company's consolidated operations. During the three months ended September 30, 2022, as Third-Party Payment Processing Referral Services became more significant to the operations of the Company, our CODM began to manage operations and assess the Company's performance based on the operations of the Delivery Services and Third-Party Payment Processing Referral Services areas separately, and we now have two reportable operating segments. See Part II, Item 8, *Note 17 – Segment Information* for additional information on the Company's segments.

In August 2022, we initiated our rebranding initiative and introduced our new "deliver anything ASAP" business model, expanding our food-delivery services to a broader array of products. Among our new business expansions is the Company's proprietary in-stadium ordering technology, which allows fans to avoid the typical long lines at stadium concession areas. We have secured an exclusive in-stadium mobile ordering agreement with MetLife Stadium, the New York Giants and the New York Jets. Additionally, we secured a mobile ordering agreement with the Florida Panthers, the first arena deal for the Company with a National Hockey League team. During the third quarter of 2022, we also entered into a partnership with FoodBoss, an industry leading online food delivery search engine.

At December 31, 2022, our Platform included restaurants in approximately 800 cities and at March 15, 2023, our Platform included restaurants in approximately 725 cities. Average Daily Orders for the years ended December 31, 2022 and 2021 were approximately 16,559 and 32,859, respectively, and revenue was $111,801 and $182,194, respectively.

***Going Concern***

The Company has concluded that as a result of recurring losses from operations and declines in cash positions, there exists substantial doubt about the Company's ability to continue as a going concern for a period of at least twelve months from the date of issuance of these financial statements. The Company's results of operations and cash positions have been adversely impacted primarily by declines in order volumes. In an effort to alleviate these conditions, management is implementing certain initiatives with the goal to improve its cash position, including a consolidation of the Company's technology platforms into a single application and cost reductions. The Company's plans are designed to provide the Company with adequate liquidity to meet its obligations for at least the twelve-month period following the date these financial statements are issued; however, the plans are dependent on conditions and factors, many of which are outside of the Company's control. There can be no assurance that we will be successful in implementing our plans or that we will be able to generate positive cash flow from operations in any future period, nor can there be any assurance that we will be able to raise additional equity capital. The result of such inability, whether individually or in the aggregate, will adversely impact our financial condition and could cause us to curtail or cease operations or to pursue other strategic alternatives, including commencing a case under the U.S. Bankruptcy Code. Accordingly, management could not conclude that it was probable that the plans will sufficiently mitigate the relevant conditions or events that raise substantial doubt about the Company's ability to continue as a going concern. See "*Liquidity and Capital Resources*" below for additional details.

***Impact of COVID-19 on our Business***

We have thus far been able to operate effectively during the COVID-19 pandemic. In response to economic hardships experienced during the COVID-19 pandemic, the U.S. federal government rolled out stimulus payments in the first quarter of 2021 which we believe had a positive impact on order volumes during such period. However, we also believe the stimulus payments resulted in increased driver labor costs as we were faced with challenges in maintaining an appropriate level of driver supply. In addition, early in the COVID-19 pandemic, we experienced an increase in revenue and orders due to increased consumer demand for delivery and more restaurants using our platform to facilitate both delivery and take-out. During the second quarter of 2021 and thereafter, we believe the impact of the stimulus payments on our order volumes began to decrease.

There remains uncertainty as to whether or not the pandemic will continue to impact diner behavior, and if so, in what manner. To the extent that the COVID-19 pandemic adversely impacts the Company's business, results of operations, liquidity or financial condition, it may also have the effect of heightening many of the other risks described in the risk factors in the Company's 2022 Form 10-K. Management continues to monitor the impact of the COVID-19 outbreak and the possible effects on its financial position, liquidity, operations, industry and workforce.

***Nasdaq Delisting***

On January 24, 2023, the Company received the Delisting Notice from the staff of Nasdaq notifying the Company that, as a result of the failure to regain compliance with the Bid Price Rule for continued listing on the Nasdaq Capital Market as set forth in Nasdaq Listing Rule 5550(a)(2), Nasdaq had determined that the Company's common stock will be delisted from the Nasdaq Capital Market. The Company did not appeal this determination. Trading of the Company common stock was suspended from Nasdaq at the opening of business on February 2, 2023 and concurrently commenced on the OTCQB under the same trading symbol, "ASAP".

**Smaller Reporting Company and Filer Status**

As a result of our aggregate worldwide market value of our common stock held by non-affiliates being less than $60,000 as of the last business day of our second quarter ended June 30, 2022, the Company qualified as a smaller reporting company for the filing of the Form 10-Q for the three months ended June 30, 2022. Management has elected to reflect the smaller reporting company status with the filing of this Form 10-K for the fiscal year ended December 31, 2022 and is following the reporting requirements with respect to smaller reporting companies commencing with this Form 10-K for the fiscal year ended December 31, 2022 and continuing with quarterly reports on Form 10-Q for fiscal 2023.

Additionally, the aggregate worldwide market value of our common stock held by non-affiliates as of the last business day of our second quarter ended June 30, 2022 is used in the determination of our filer status for the filing of our Form 10-K for the year ended December 31, 2022 and for our quarterly reports on Form 10-Q for 2023. Based on the aggregate worldwide market value of our common stock held by non-affiliates as of the last business day of the second quarter ended June 30, 2022, we are a non-accelerated filer for the filing of this Form 10-K for the year ended December 31, 2022 and will be a non-accelerated filer for the filing of our quarterly reports on Form 10-Q for fiscal 2023.

**Significant Accounting Policies and Critical Accounting Estimates**

The preparation of financial statements in accordance with GAAP requires us to make estimates and assumptions that affect the reported amounts of assets and liabilities, the disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period, along with related disclosures. We regularly assess these estimates and record changes to estimates in the period in which they become known. We base our estimates on historical experience and various other assumptions believed to be reasonable under the circumstances. Changes in the economic environment, financial markets, and any other parameters used in determining these estimates could cause actual results to differ from estimates. For a description of our significant accounting policies, see Part II, Item 8, *Note 2 – Basis of Presentation and Summary of Significant Accounting Policies*, to our consolidated financial statements in this Form 10-K. Significant accounting policies including critical accounting estimates and judgements relied upon in preparing these consolidated financial statements include the following:

***Revenue recognition***

We recognize revenue in accordance with ASC Topic 606, *Revenue from Contracts with Customers*. Revenue recognition involves judgement in determining whether we are the principal or the agent in the transaction. The majority of our revenue includes transaction fees from restaurants and fees from diners when diners place an order on the Platform. We have determined that the Company is an agent of the restaurant and the diner in the transaction and accordingly, we recognize transaction fees earned on a net basis. The Company acts as an agent for the restaurant in facilitating the sale of products to the diners through our Platform and the diner uses our Platform to identify restaurants and place an order from the restaurant. The Company has no control over the items prior to them being transferred to the diner, and only facilitates the order by the diner from the restaurant. The assessment of whether we are considered principal or agent could impact the accounting for certain payments to restaurants and diners and change the amount of revenue recognized.

In connection with revenue generated from services for facilitating access to third-party payment processing solution providers, we have determined that the Company is an agent in these arrangements and accordingly, we recognize revenue earned from third-party payment processing referral fees on a net basis. The Company acts as an agent of the third-party payment processor in establishing the relationship between the payment processor and merchant. The third-party payment processor is considered the customer of the Company as no direct contract exists with between the merchant and the Company.

***Business combinations***

The Company accounts for business combinations under the acquisition method of accounting, in accordance with ASC Topic 805, *Business Combinations.* Accordingly, we allocate the purchase price of acquired companies to the tangible and intangible assets acquired and liabilities assumed based upon their respective fair values at the acquisition date. Any excess of the fair value of purchase consideration over the fair value of the net assets acquired is recorded as goodwill.

In determining the fair value of assets acquired and liabilities assumed in a business combination, the Company uses various recognized valuation methods and makes certain assumptions, including projections of future events and operating performance. Valuations are performed by management or independent valuation specialists under management's supervision, where appropriate. We believe that the estimated fair values assigned to the net assets acquired are based on reasonable assumptions that marketplace participants would use. However, such assumptions are inherently uncertain and actual results could differ from those estimates.

***Goodwill and other long-lived assets, including valuation and recoverability***

Goodwill represents the excess purchase price over tangible and intangible assets acquired, less liabilities assumed arising from business combinations. Determining the fair value of goodwill and intangible assets requires the Company to make significant assumptions, including projections of future events and operating performance. Estimates of fair value are inherently uncertain, and as a result, actual results may differ from estimates. The Company conducts its goodwill impairment test annually as of October 1, or more frequently if indicators of impairment exist. Additionally, the Company reviews the recoverability of its long-lived assets, including acquired technology, capitalized software costs, and property and equipment, when events or changes in circumstances occur that indicate that the carrying value of the asset may not be recoverable.

The Company had a significant amount of goodwill at December 31, 2021 associated with previous acquisitions, including $106,734 from the Bite Squad Merger, $14,343 from the Delivery Dudes Acquisition and $9,547 from the Cape Payment Acquisition. During the year ended December 31, 2022, we recognized non-cash goodwill impairment charges totaling $121,088 to write down the carrying value of goodwill to its implied fair value. The primary factor contributing to a reduction in the fair value was the significant decline in the Company's stock price in mid-March 2022, continuing through the third quarter of 2022, resulting in a market capitalization that was lower than the carrying value of the Company's consolidated stockholders' equity. Significant inputs and assumptions in the ASC 350 analysis included forecasts (e.g., revenue, operating costs and capital expenditures), discount rate, long-term growth rate and tax rates for the reporting unit under the Income Approach and market-based enterprise value to revenue multiples under the Market Approach.

At December 31, 2021, the Company had intangible assets with a net carrying value of $43,126 and property and equipment with a net carrying value of $3,763. As a result of the significant and sustained decline in the Company's market capitalization during the fourth quarter of 2022, the Company conducted an impairment test of intangible and other long-lived assets for the Delivery Services Segment at December 31, 2022. During the year ended December 31, 2022, we recognized non-cash intangible and other asset impairment charges totaling $32,957 to write-down the carrying value of the assets to their estimated fair value. Trade names were valued using the Income Approach, specifically, the relief from royalty rate method, which measures the cash flow streams attributable to the trade names in the form of royalty payments that would be paid to the owner of the trade names in return for the rights to use the trade names. As management did not envision a clear path to profitability in the foreseeable future, the customer relationships and developed technology intangible assets were valued using an Income Approach with consideration given to liquidation values. Such assets were determined to have minimal value and were fully impaired. As the Company's property and equipment assets were not supported by cash flows from operating activities, the fair value measurements were determined using cost and market approaches, along with consideration of orderly liquidation values (OLV). On an asset-by-asset basis, estimated values for property and equipment were based on the lower of the estimated OLV and the assets' initial net carrying value as of the valuation date of December 31, 2022.

***Useful lives of tangible and intangible assets***

Estimating the useful lives of tangible and intangible assets requires judgment. For example, different types of assets will have different useful lives, influenced by the nature of the asset, competitive environment, and rate of change in the industry. Additionally, certain assets may even be considered to have indefinite useful lives. All of these judgments and estimates can significantly impact the determination of the amortization period of the asset, and thus net income.

***Stock-based compensation***

The Company measures compensation expense for all stock-based awards in accordance with ASC Topic 718, *Compensation — Stock Compensation*. Stock-based compensation is measured at fair value on grant date and recognized as compensation expense ratably over the course of the requisite service period for awards expected to vest. In the case of an award pursuant to which a performance condition must be met for the award to vest, no stock-based compensation cost is recognized until such time as the performance condition is considered probable of being met, if at all. The fair value of restricted shares is typically determined based on the closing price of the Company's stock on the date of grant. The Company uses an option-pricing model to determine the fair value of stock options. The determination of the grant date fair value of options using an option-pricing model requires judgment and is affected by the Company's estimated common stock value, as well as assumptions regarding a number of other complex and subjective variables, including risk-free rate and volatility of the Company's stock price and expected term. If any of the assumptions used in the option-pricing model change significantly, stock-based compensation for future awards may differ materially compared to the awards granted.

The Company recognized total stock-based compensation expense of $5,703 for the year ended December 31, 2022. As of December 31, 2022, there was $10,166 of unrecognized stock-based compensation expense related to unvested time-based restricted stock units, which is expected to be recognized over a weighted-average period of approximately 2.1 years.

***Loss contingencies***

The Company is involved in various legal proceedings that arise from the normal course of business activities. Certain of these matters include speculative claims for substantial or indeterminate amounts of damages. The Company records a liability when the Company believes that it is both probable that a loss has been incurred and the amount of the loss or a range of loss can be reasonably estimated. Significant judgment is required to determine both probability and the estimated amount of loss. The outcome of legal matters and litigation is inherently uncertain. As a result, the outcome of matters in which we are involved could result in unexpected expenses and liability that could adversely affect our operations.

***Income taxes***

The Company provides for income taxes using an asset and liability approach under which deferred income taxes are provided for based upon enacted tax laws and rates applicable to periods in which the taxes become payable. The calculation of income tax liabilities involves significant judgment in estimating the impact of uncertainties and complex tax laws. The Company's tax returns are subject to examination by the various federal and state income-taxing authorities in the normal course of business. Such examinations may result in future assessments of additional tax, interest, and penalties.

***Insurance reserves***

The Company maintains insurance coverage for business risks in customary amounts believed to be sufficient for our operations, including, but not limited to, workers' compensation, auto and general liability. These plans contain various self-insured retention levels for which we provide accruals based on the aggregate of the liability for claims incurred and an estimate for claims incurred but not reported. We review our estimates of claims costs at each reporting period and adjust our estimates when appropriate. Ultimate loss results may differ from our estimates, which could result in losses over our reserved amounts. We use third-party actuarial specialists to assist in estimating our claims costs. As of December 31, 2022 and 2021, $7,349 and $4,305, respectively, in outstanding workers' compensation and auto policy reserves are included in the consolidated balance sheet.

***Loss exposure related to claims***

The Company had an outstanding medical contingency claim at December 31, 2021 (the "Medical Contingency") which was measured at fair value using various unobservable inputs reflecting the Company's assumptions used in developing the fair value estimate. The Company engaged third-party actuaries to assist in estimating the fair value of the Medical Contingency. The inputs used in the measurement, particularly life expectancy and projected medical costs, were sensitive inputs to the measurement and changes to either could have resulted in significantly higher or lower fair value measurements. See Part II, Item 8, *Note 13 – Commitments and Contingent Liabilities* and *Note 16 – Fair Value Measurements* for additional details. During the three months ended September 30, 2021, as a result of the death of the individual associated with the Medical Contingency, there was a change in accounting estimate of the total outstanding liability. The estimated loss exposure was updated to reflect the liability for remaining unpaid medical expenses and dependent death benefits and reflects the Company's assumptions regarding such expenses. The change in estimate of the Medical Contingency totaled $16,715 and was recognized as other income in the consolidated statement of operations for the year ended December 31, 2021.

At March 31, 2022, management no longer deemed the Medical Contingency a liability requiring fair value measurement estimation as the remaining liability at such time consisted entirely of discrete costs related to certain unpaid medical expenses. Accordingly, the Medical Contingency was transferred out of the Level 3 fair value hierarchy. As of

December 31, 2022, the Medical Contingency totaled $366 and was included in other current liabilities in the consolidated balance sheet.

**Recently Adopted Accounting Standards and Pending Standards**

For a description of accounting standards adopted during the year ended December 31, 2022, see Part II, Item 8, *Note 2 – Basis of Presentation and Summary of Significant Accounting Policies*, to our consolidated financial statements in this Form 10-K. Also described in Note 2 are pending standards and their estimated effect on our consolidated financial statements.

Through year-end 2020, we qualified as an "emerging growth company" pursuant to the provisions of the JOBS Act. As an emerging growth company, we were able to take advantage of certain exemptions from various reporting requirements that are applicable to other public companies that are not "emerging growth companies", including not being required to comply with the auditor attestation requirements of Section 404(b) of the Sarbanes-Oxley Act. Effective January 1, 2021, we were no longer an emerging growth company. Accordingly, for fiscal year 2021, we were required to include an opinion from our independent registered public accounting firm on the effectiveness of our internal control over financial reporting. As a result of our aggregate worldwide market value of our common stock held by non-affiliates being less than $60,000 as of the last business day of our second quarter ended June 30, 2022, the Company now qualifies as a smaller reporting company and management has elected to reflect the smaller reporting company status with the filing of this Form 10-K for the fiscal year ended December 31, 2022. As a smaller reporting company, we are not required to obtain an attestation report from our independent registered public accounting firm regarding internal controls over financial reporting for this Form 10-K for the year ended December 31, 2022.

**Factors Affecting the Comparability of Our Results of Operations**

***Acquisitions.*** The Bite Squad Merger, Delivery Dudes Acquisition and Cape Payment Acquisition were considered business combinations in accordance with ASC 805 and have been accounted for using the acquisition method. Under the acquisition method of accounting, total purchase consideration, acquired assets, assumed liabilities and contingent consideration are recorded based on their estimated fair values on the acquisition date. For each of these acquisitions, the excess of the fair value of purchase consideration over the fair value of the assets less liabilities acquired (and contingent consideration when applicable) was recorded as goodwill on our consolidated balance sheet as of December 31, 2021. The results of operations of Bite Squad, Delivery Dudes and Cape Payment Companies are included in our consolidated financial statements beginning on the acquisition dates, January 17, 2019, March 11, 2021 and August 25, 2021, respectively.

In connection with the Delivery Dudes Acquisition and Cape Payment Acquisition, the Company incurred direct and incremental costs during the year ended December 31, 2021 of approximately $1,614, consisting of legal and professional fees, which are included in general and administrative expenses in the consolidated statement of operations in such period.

We continue to evaluate potential acquisition targets and may pursue acquisitions in the future. These potential business acquisitions may impact the comparability of our results in future periods relative to prior periods.

***Goodwill and Long-Lived Asset Impairments.*** During the year ended December 31, 2022, we recognized non-cash goodwill impairment charges totaling $121,088 to write down the carrying value of goodwill to its implied fair value. Additionally, we recognized non-cash impairment charges on intangible and other assets totaling $32,957. Determining the fair value of a reporting unit and intangible and other assets requires the use of estimates and significant judgments that are based on a number of factors including actual operating results. It is reasonably possible that the judgments and estimates used could change in future periods. There can be no assurance that additional goodwill or long-lived assets will not be impaired in future periods. Significant goodwill and intangible and other asset impairments may impact the comparability of our results from period to period.

***Changes in Fee Structure.*** Our fee structure has changed at various times since our inception. We continue to review and update our current rate structure, as necessary, as we look to offer new and enhanced value-adding services to our restaurant partners. Any changes to our fee structure (whether externally to comply with governmental imposed caps or as a result of internal decision-making) could affect the comparability of our results of operations from period to period.

***Seasonality and Holidays.*** Our business tends to follow restaurant closure and diner behavior patterns with respect to demand of our service offering. In many of our markets, we have historically experienced variations in order frequency as a result of weather patterns, university summer breaks and other vacation periods. In addition, a significant number of restaurants tend to close on certain major holidays, including Thanksgiving, Christmas Eve and Christmas Day, among others. Further, diner activity may be impacted by unusually cold, rainy, or warm weather. Cold weather and rain typically drive increases in order volume, while unusually warm or sunny weather typically drives decreases in orders. Furthermore, severe weather-related events such as snowstorms, ice storms, hurricanes and tropical storms have adverse effects on order volume, particularly if they cause property damage or utility interruptions to our restaurant partners. The COVID-19 pandemic, as well as the federal government's responses thereto, have had an impact on our typical seasonality trends and could impact future periods.

**Key Factors Affecting Our Performance**

***Efficient Market Penetration.*** Our competition has negatively impacted our recent cash flow, which is dependent on successful restaurant, merchant, diner and driver penetration of our markets. Failure in achieving our targeted scale could adversely affect our working capital, which in turn, would continue to negatively impact our financial condition.

***Our Restaurant, Diner and Driver Network.*** A significant part of our strategy is to maintain our network of restaurants, merchants, diners and independent contractor drivers using the Platform. If we fail to retain existing restaurants, merchants, diners and independent contractor drivers using the Platform, or to add merchants, diners and independent contractor drivers to the Platform, our revenue, financial results and business may be adversely affected.

**Key Business Metrics**

Defined below are the key business metrics that we use to analyze our business performance, determine financial forecasts, and help develop long-term strategic plans for our Delivery Services Segment. We currently do not have any defined key business metrics related to our Third-Party Payment Processing Referral Services Segment.

***Active Diners.*** We count Active Diners as the number of unique diner accounts from which an order has been completed through the Platform during the past twelve months (as of the end of the relevant period) and consider Active Diners an important metric because the number of diners using our Platform is a key revenue driver and a valuable measure of the size of our engaged diner base.

***Average Daily Orders.*** We calculate Average Daily Orders as the number of completed orders during the period divided by the number of days in that period, including holidays. Average Daily Orders is an important metric for us because the number of orders processed on our Platform is a key revenue driver and, in conjunction with the number of Active Diners, a valuable measure of diner activity on our Platform for a given period.

***Gross Food Sales.*** We calculate Gross Food Sales as the total food and beverage sales, sales taxes, prepaid gratuities, and diner fees processed through the Platform during a given period. Gross Food Sales are different than the order value upon which we charge our fee to restaurants, which excludes gratuities and diner fees. Prepaid gratuities, which are not included in our revenue, are determined by diners and may differ from order to order. Gratuities other than prepaid gratuities, such as cash tips, are not included in Gross Food Sales. Gross Food Sales is an important metric for us because the total volume of food sales transacted through our Platform is a key revenue driver.

***Average Order Size.*** We calculate Average Order Size as Gross Food Sales for a given period divided by the number of completed orders during the same period. Average Order Size is an important metric for us because the average value of food sales on our Platform is a key revenue driver.

| | Year Ended December 31, | |
|---|---|---|
| **Key Business Metrics**[(1)] | **2022** | **2021** |
| Active Diners (as of period end) | 959,882 | 1,671,437 |
| Average Daily Orders | 16,559 | 32,859 |
| Gross Food Sales (dollars in thousands) | $ 316,521 | $ 542,447 |
| Average Order Size (in dollars) | $ 52.37 | $ 45.23 |

(1) The key business metrics include the operations of Delivery Dudes beginning on the acquisition date, March 11, 2021.

**Basis of Presentation**

***Revenue***

We generate revenue primarily when diners place an order on the Platform. We recognize revenue from diner orders when orders are delivered. Our revenue consists primarily of net Delivery Transaction Fees. Additionally, effective August 25, 2021, we generate revenue by facilitating merchant access to third-party payment processing solution providers.

***Cost and Expenses:***

***Operations and Support.*** Operations and support expense consists primarily of salaries, benefits, stock-based compensation and bonuses for employees engaged in operations and customer service, as well as territory managers, market success associates, restaurant onboarding, and driver logistics personnel, and payments to independent contractor drivers for delivery services. Operations and support expense also includes payment processing costs incurred on customer orders and the cost of software and related services providing support for diners, restaurants and drivers.

***Sales and Marketing.*** Sales and marketing expense consists primarily of salaries, commissions, benefits, stock-based compensation and bonuses for personnel supporting sales and marketing efforts, including restaurant business development managers, marketing employees and contractors, and third-party marketing expenses such as social media and search engine marketing, online display advertisements, sponsorships and print marketing. Sales and marketing expense also includes referral agent commissions related to the facilitation of merchant access to third-party payment processing solution providers.

***Research and Development.*** Research and development expense consists primarily of salaries, benefits, stock-based compensation and bonuses for employees and contractors engaged in the design, development, maintenance and testing of the Platform, net of costs capitalized for the development of the Platform. This expense also includes such items as software subscriptions that are necessary for the upkeep and maintenance of the Platform.

***General and Administrative.*** General and administrative expense consists primarily of salaries, benefits, stock-based compensation and bonuses for executive, finance and accounting, human resources and other administrative employees as well as third-party legal, accounting, and other professional services, insurance (including workers' compensation, auto liability and general liability), travel, facilities rent, and other corporate overhead costs.

***Depreciation and Amortization.*** Depreciation and amortization expense consists primarily of amortization of capitalized costs for software development, trademarks and customer relationships and depreciation of leasehold improvements and equipment, primarily tablets deployed in restaurants. We do not allocate depreciation and amortization expense to other line items.

***Other Expenses (Income) and Losses (Gains), Net.*** Other expenses (income) and losses (gains), net, includes interest expense on outstanding debt, as well as any other items not considered to be incurred in the normal operations of the business, including accrued legal settlements and contingencies, expense related to the induced conversion of the Notes and income related to the change in estimate of the Medical Contingency.

**Results of Operations**

The following table sets forth our consolidated statements of operations for the periods indicated, with line items presented in thousands of dollars and as a percentage of our revenue:

| (in thousands, except percentages(1)) | Year Ended December 31, 2022 | % of Revenue | 2021 | % of Revenue |
|---|---|---|---|---|
| **Revenue** | **$ 111,801** | **100 %** | **$ 182,194** | **100 %** |
| **Costs and expenses:** | | | | |
| Operations and support | 60,055 | 54 % | 108,599 | 60 % |
| Sales and marketing | 29,388 | 26 % | 19,198 | 11 % |
| Research and development | 4,454 | 4 % | 4,156 | 2 % |
| General and administrative | 38,010 | 34 % | 45,042 | 25 % |
| Depreciation and amortization | 13,296 | 12 % | 12,429 | 7 % |
| Goodwill impairment | 121,088 | 108 % | — | — % |
| Intangible and other asset impairments | 32,957 | 29 % | 186 | — % |
| Loss on disposal of assets | 288 | — % | 158 | — % |
| **Total costs and expenses** | **299,536** | 268 % | **189,768** | 104 % |
| **Loss from operations** | **(187,735)** | (168 %) | **(7,574)** | (4 %) |
| **Other expenses (income) and losses (gains), net:** | | | | |
| Interest expense | 5,664 | 5 % | 7,074 | 4 % |
| Other expense (income) | 13,310 | 12 % | (9,443) | (5 %) |
| **Net loss before income taxes** | **(206,709)** | (185 %) | **(5,205)** | (3 %) |
| Income tax expense | 80 | — % | 24 | — % |
| **Net loss** | **$ (206,789)** | (185 %) | **$ (5,229)** | (3 %) |

(1) Percentages may not foot due to rounding.

The following section includes a discussion of our results of operations for the years ended December 31, 2022 and 2021. The results of operations of Delivery Dudes and the Cape Payment Companies are included in our consolidated financial statements beginning on the acquisition dates of March 11, 2021 and August 25, 2021, respectively (see Part II, Item 8, *Note 5 – Business Combinations* of this Form 10-K).

***Revenue***

| | Year Ended December 31, 2022 | 2021 | Percentage change 2021 to 2022 |
|---|---|---|---|
| | (dollars in thousands) | | |
| Revenue | $ 111,801 | $ 182,194 | (39 %) |

See Part II, Item 8, *Note 4 – Revenue* for details of revenue by operating segment. Revenue decreased for the year ended December 31, 2022 compared to the year ended December 31, 2021, primarily as a result of decreased order volumes in our Delivery Services Segment. Partially offsetting the impact of decreased order volumes was an increase in the Average Order Size in the year ended December 31, 2022 compared to the year ended December 31, 2021. The Average Order Size was $52.37 for the year ended December 31, 2022, compared to $45.23 for the year ended December 31, 2021, an improvement of 16%.

Revenue for our Third-Party Payment Processing Referral Services Segment includes revenue from the Cape Payment Companies beginning on the acquisition date of August 25, 2021.

***Operations and Support***

| | Year Ended December 31, | | Percentage change |
|---|---|---|---|
| | 2022 | 2021 | 2021 to 2022 |
| | (dollars in thousands) | | |
| Operations and support | $ 60,055 | $ 108,599 | (45 %) |
| As a percentage of revenue | 54 % | 60 % | |

Operations and support expenses decreased in dollar terms and as a percentage of revenue in the year ended December 31, 2022 compared to the year ended December 31, 2021, primarily due to lower driver operations costs in our Delivery Services Segment as a result of decreased order volumes.

***Sales and Marketing***

| | Year Ended December 31, | | Percentage change |
|---|---|---|---|
| | 2022 | 2021 | 2021 to 2022 |
| | (dollars in thousands) | | |
| Sales and marketing | $ 29,388 | $ 19,198 | 53 % |
| As a percentage of revenue | 26 % | 11 % | |

Sales and marketing expense increased in dollar terms and as a percentage of revenue in the year ended December 31, 2022 compared to the year ended December 31, 2021, primarily attributable to our Delivery Services Segment due to increased marketing spend, increased marketing support fees and the payment of stadium sponsorship agreement fees.

There was also an increase in referral agent commission expense related to our Third-Party Payment Processing Referral Services Segment. Referral agent commission expense for the year ended December 31, 2021 represents results during the partial period beginning on the acquisition date of August 25, 2021.

***Research and Development***

| | Year Ended December 31, | | Percentage change |
|---|---|---|---|
| | 2022 | 2021 | 2021 to 2022 |
| | (dollars in thousands) | | |
| Research and development | $ 4,454 | $ 4,156 | 7 % |
| As a percentage of revenue | 4 % | 2 % | |

Research and development expense is primarily related to costs associated with our Delivery Services Segment. The expense increased in dollar terms and as a percentage of revenue in the year ended December 31, 2022 compared to the year ended December 31, 2021, primarily due to the hiring of product and engineering personnel in early 2022 to further develop and refine our Platform.

***General and Administrative***

| | Year Ended December 31, | | Percentage change |
|---|---|---|---|
| | 2022 | 2021 | 2021 to 2022 |
| | (dollars in thousands) | | |
| General and administrative | $ 38,010 | $ 45,042 | (16 %) |
| As a percentage of revenue | 34 % | 25 % | |

General and administrative expense decreased in dollar terms in the year ended December 31, 2022 compared to December 31, 2021, primarily due to decreased stock-based compensation expense and decreased recruiting costs, partially offset by an increase in insurance expense. Decreased order volumes during the year ended December 31, 2022 resulted in an increase in general and administrative expenses as a percentage of revenue for the year ended December 31, 2022 compared to the year ended December 31, 2021.

***Depreciation and Amortization***

| | Year Ended December 31, | | Percentage change |
|---|---|---|---|
| | 2022 | 2021 | 2021 to 2022 |
| | (dollars in thousands) | | |
| Depreciation and amortization | $ 13,296 | $ 12,429 | 7 % |
| As a percentage of revenue | 12 % | 7 % | |

Depreciation and amortization expense increased in dollar terms and as a percentage of revenue in the year ended December 31, 2022 compared to the year ended December 31, 2021, driven by an increase in amortization expense on intangible assets acquired in the Delivery Dudes Acquisition and Cape Payment Acquisition.

***Goodwill Impairment***

During the year ended December 31, 2022, we recognized non-cash goodwill impairment charges totaling $121,088 to write down the carrying value of goodwill to its implied fair value. The primary factor contributing to a reduction in the fair value was the significant decline in the Company's stock price in mid-March 2022, continuing through the third quarter of 2022, resulting in a market capitalization that was lower than the carrying value of the Company's consolidated stockholders' equity. See Part II, Item 8, *Note 9 – Intangible Assets and Goodwill* for additional details.

***Intangible and Other Asset Impairments***

During the year ended December 31, 2022, the Company recognized intangible and other asset impairment charges totaling $32,957 to write down the carrying value of intangible assets and other long-lived assets to fair value. The impairment charges related to our Delivery Services Segment and were primarily a result of the significant and sustained decline in the Company's market capitalization through the fourth quarter of 2022. See *Note 9 – Intangible Assets and Goodwill* and *Note 8 – Property and Equipment, Net* for additional details.

***Other Expenses (Income) and Losses (Gains), Net***

| | Year Ended December 31, | | Percentage change |
|---|---|---|---|
| | 2022 | 2021 | 2021 to 2022 |
| | (dollars in thousands) | | |
| Other expenses (income) and losses (gains), net | $ 18,974 | $ (2,369) | (901 %) |
| As a percentage of revenue | 17 % | (1)% | |

For the year ended December 31, 2022, other expenses (income) and losses (gains), net primarily consisted of $9,499 of induced conversion expense for the Notes (see Part II, Item 8, *Note 11 – Debt)* and $5,559 of interest expense associated with the Term Loan and Notes. Other expenses (income) and losses (gains), net for the year ended December 31, 2021 primarily consisted of $16,715 of income from the change in estimate of the Medical Contingency, $4,700 of other expense for a legal settlement, $1,250 of other expense for an accrued legal contingency and $6,917 of interest expense associated with the Term Loan and Notes. See Part II, Item 8, *Note 11 – Debt* for definitions of Term Loan and Notes, *Note 13 – Commitments and Contingent Liabilities* for additional details on the accrued legal contingency and *Note 16 – Fair Value Measurements* for the additional details on the Medical Contingency.

***Income Tax Expense***

Income tax expense for the years ended December 31, 2022 and 2021 was $80 and $24, respectively, entirely related to state taxes in various jurisdictions. We have historically generated net operating losses; therefore, a valuation allowance has been recorded on our net deferred tax assets.

**Segments Adjusted EBITDA**

The CODM evaluates segment performance primarily based on segment adjusted EBITDA. Segment adjusted EBITDA is defined as revenue less the following expenses: operations and support, sales and marketing, research and development, general and administrative and certain non-operating expenses associated with our segments. Excluded from segment adjusted EBITDA are non-cash items and other items that do not reflect our core operations. The following table presents information about our segments, with a reconciliation of total segments adjusted EBITDA to net loss from continuing operations of the consolidated Company (in thousands):

| | Year Ended December 31, | |
|---|---|---|
| | 2022 | 2021 |
| **Segments adjusted EBITDA:** | | |
| Delivery Services Segment | $ (15,995) | $ 14,800 |
| Third-Party Payment Processing Referral Services Segment | 447 | 756 |
| **Total segments adjusted EBITDA** | (15,548) | 15,556 |
| **Reconciling items:** | | |
| Interest expense | (5,664) | (7,074) |
| Income taxes | (80) | (24) |
| Depreciation and amortization expense | (13,296) | (12,429) |
| Goodwill impairment | (121,088) | — |
| Stock-based compensation expense | (5,703) | (7,974) |
| Loss on disposal of assets | (288) | (158) |
| Intangible and other asset impairments | (32,957) | (186) |
| Induced conversion expense related to Notes | (9,499) | — |
| Change in fair value of contingent consideration liability | 1,939 | (253) |
| Medical contingency change in estimate | — | 16,715 |
| Transaction related expenditures and other non-recurring adjustments | (3,805) | (3,452) |
| Accrued legal contingency and reserve | (800) | (5,950) |
| **Net loss from continuing operations** | $ (206,789) | $ (5,229) |

See **Results of Operations** above for a discussion of operational results by segment.

**Liquidity and Capital Resources**

***Overview***

Pursuant to the requirements of ASC 205-40, *Going Concern*, management must evaluate whether there are conditions or events, considered in the aggregate, that raise substantial doubt about the Company's ability to continue as a going concern within one year after the date that the financial statements are issued. This evaluation initially does not take into consideration the potential mitigating effect of management's plans that have not been fully implemented as of the date the financial statements are issued. When substantial doubt exists under this methodology, management evaluates whether the mitigating effect of its plans sufficiently alleviates substantial doubt about the Company's ability to continue as a going concern. The mitigating effect of management's plans, however, is only considered if both (1) it is probable that the plans will be effectively implemented within one year after the date that the financial statements are issued, and (2) it is probable that the plans, when implemented, will sufficiently mitigate the relevant conditions or events that raise substantial doubt about the entity's ability to continue as a going concern within one year after the date that the financial statements are issued.

The Company has concluded that as a result of recurring losses from operations and declines in cash positions, there exists substantial doubt about the Company's ability to continue as a going concern for a period of at least twelve months from the date of issuance of these financial statements. The Company's results of operations and cash positions have been adversely impacted primarily by declines in order volumes. Our primary source of liquidity during the year ended December 31, 2022 has been proceeds from the issuance of our common stock. The Company has had a trend of negative cash flow from operations during 2022. Cash flow used in operations totaled $28,716 for the year ended December 31, 2022. During the second quarter of 2022, the Company's cash position was impacted by the utilization of $20,000 in cash to pay down debt in consideration for an extension of the debt maturity for each credit facility by six months to May 15, 2024. The Company has had recurring net losses, and as reflected in the accompanying consolidated financial statements, the Company has an accumulated deficit of $575,924 as of December 31, 2022. During the year ended December 31, 2022, pursuant to our ATM Program, we sold 3,985,099 shares of the Company's common stock for net proceeds of $12,665. The Company's cash position has declined from $60,111 at December 31, 2021 to $12,066 as of December 31, 2022 and approximately $6,300 as of March 31, 2023. We believe that we have sufficient cash on hand to fund operations through at least the second fiscal quarter of 2023.

In an effort to alleviate these conditions, management is evaluating its existing cost structure and implementing cost saving initiatives to reduce operating costs and plans to continue to implement further cost saving initiatives where appropriate. Management may seek to to raise additional equity capital, although there can be no assurance that we will be able to raise additional capital on commercially acceptable terms, or at all. The Company doesn't anticipate utilizing its ATM Program in fiscal 2023.

The Company's plans are designed to provide the Company with adequate liquidity to meet its obligations for at least the twelve-month period following the date these financial statements are issued; however, the plans are dependent on conditions and factors, many of which are outside of the Company's control. There can be no assurance that we will be able to generate positive cash flow from operations in any future period, nor can there be any assurance that we will be able to raise additional equity capital; the result of such inability, whether individually or in the aggregate, will adversely impact our financial condition. Accordingly, management could not conclude that it was probable that the plans will sufficiently mitigate the relevant conditions or events that raise substantial doubt about the Company's ability to continue as a going concern. As such, the Company has concluded that substantial doubt exists about the Company's ability to continue as a going concern for a period of at least twelve months from the date of issuance of these financial statements.

We are continuously reviewing our liquidity and anticipated working capital needs based on overall market and economic factors. Market conditions, future financial performance or other factors may make it difficult or impractical for us to access sources of capital on favorable terms, if at all. The failure to successfully implement our strategy to raise capital while also achieving cost savings will adversely impact our financial condition, which impact could be material, could reduce the period of time for which our anticipated working capital needs will be sufficient, and could result in the Company terminating, curtailing or ceasing operations or pursuing other strategic alternatives, including commencing a case under the U.S. Bankruptcy Code.

The accompanying consolidated financial statements have been prepared assuming the Company will continue as a going concern, which contemplates the realization of assets and satisfaction of liabilities in the ordinary course of business for the twelve-month period following the date the financial statements are issued. The financial statements do not include any adjustments relating to the recoverability and classification of recorded asset amounts or the amounts and classification of liabilities that might result should the Company be unable to continue as a going concern.

***Sponsorship Agreements***

In July 2022, the Company entered into a multi-year sponsorship agreement pursuant to which the Company will be the exclusive mobile ordering platform used at MetLife Stadium (see Part II, Item 8, *Note 13 – Commitments and Contingent Liabilities*). The term of the MetLife Sponsorship Agreement is five Contract Years (as defined below) and will expire on March 31, 2027. In connection with the MetLife Sponsorship Agreement, the Company committed to pay an aggregate of $9,128 in sponsorship fees which will be amortized over the performance period on a straight-line basis. The sponsorship fees are generally payable in quarterly installments. Remaining commitments under the MetLife Sponsorship Agreement as of December 31, 2022 include the following amounts payable in fiscal years 2023 through 2026, respectively: $1,732, $1,820, $1,920 and $2,006.

In September 2022, the Company entered into a multi-year sponsorship agreement with the National Hockey League's Florida Panthers pursuant to which the Company will serve as the official mobile ordering platform used at the FLA Live Arena. The term of the agreement with the Florida Panthers is approximately four years and will expire on June 30, 2026. Remaining commitments under the agreement as of December 31, 2022 include the following amounts payable is fiscal years 2023 through 2026, respectively: $282, $296, $311, and $159.

***Debt***

In May 2022, the Company used $20,000 in cash to pay down a portion of the Term Loan in consideration for an extension of the debt maturity of the Term Loan and Notes by six months to May 15, 2024. Additionally, pursuant to a provision in the May 2022 amended loan agreement, the Company made a $1,676 prepayment on the Term Loan on October 5, 2022, representing 50% of the net proceeds received by the Company for sales under the August 2022 ATM. The Company made prepayments totaling $1,269 on the Term Loan from November 11, 2022 through December 31, 2022, representing 60% of the net proceeds received by the Company for sales under the August 2022 ATM during that period.

During the second and third quarters of 2022, the lenders under the Convertible Notes Agreement (Luxor Capital Partners, LP, Luxor Capital Partners Offshore Master Fund, LP, Luxor Wavefront, LP and Lugard Road Capital Master Fund, LP, herein referred to as the “Luxor Entities”) converted $750 and $6,750, respectively, of the outstanding principal amount of the Notes into 220,575 shares and 1,350,000 shares, respectively, of Company common stock.

The Company elected to pay certain portions of the interest payments on the Term Loan and Notes due on September 30, 2022 and December 31, 2022 in-kind pursuant to provisions in the respective agreements governing the debt. During the year ended December 31, 2022, interest paid in-kind on the Term Loan and Notes totaled $517 and $518, respectively. Such amounts were added to the principal balance of the respective loans.

The aggregate principal amount of outstanding long-term debt totaled $55,102 as of December 31, 2022, consisting of $12,579 for the Term Loan and $42,523 of Notes. As of December 31, 2022, the Company had $1,892 of outstanding short-term loans for insurance premium financing.

In January 2023, the Company entered into an amendment to the Credit Agreement (the “January 2023 Amended Credit Agreement”) and an amendment to the Convertible Notes Agreement (the “January 2023 Amended Convertible Notes Agreement”). The January 2023 Amended Credit Agreement and January 2023 Amended Convertible Notes Agreement provide that (i) Section 5.1(c) of each of the agreements is amended to waive the requirement for the audit report to be unqualified as to going concern with respect to the fiscal year 2022 financial statements and (ii) the requirement of Section 5.1(i) of each of the agreements that the financial plan demonstrate adequate liquidity through the final maturity date is amended to waive such requirement with respect to the financial plan to be delivered within 30 days of the end of fiscal year 2022.

In March 2023, the Company entered into an amendment to the Credit Agreement (the “March 2023 Amended Credit Agreement”) and an amendment to the Convertible Notes Agreement (the “March 2023 Amended Convertible Notes Agreement”). The March 2023 Amended Credit Agreement and March 2023 Amended Convertible Notes Agreement extend the due date from March 31, 2023 to April 17, 2023 for submission of the fiscal year 2022 audited financial statements of the Company to the lenders. Additionally, the March 2023 Amended Convertible Notes Agreement allows the Company to pay-in-kind one hundred percent of the accrued interest for the fiscal quarter ending March 31, 2023 due on March 31, 2023.

***Capital Expenditures***

Our main capital expenditures relate to investments in the development and maintenance of the Platform. Our future capital requirements and the adequacy of available funds will depend on many factors, including those set forth under Part I, Item 1A, *Risk Factors* in this Form 10-K.

***Cash Flow***

The following table sets forth our summary cash flow information for the periods indicated (in thousands):

| | Year Ended December 31, | |
|---|---|---|
| **(in thousands)** | **2022** | **2021** |
| Net cash used in operating activities | $ (28,716) | $ (2,341) |
| Net cash used in investing activities | (7,688) | (37,939) |
| Net cash (used in) provided by financing activities | (11,641) | 15,685 |

*Cash Flows Used In Operating Activities*

For the year ended December 31, 2022, net cash used in operating activities was $28,716, compared to net cash used in operating activities of $2,341 for the year ended December 31, 2021. The decrease in cash flows from operating activities in the year ended December 31, 2022 from the comparable 2021 period was primarily driven by a decrease in revenue and an increase in sales and marketing expenses, partially offset by a decrease in operating and support expenses. During the year ended December 31, 2022, the net change in operating assets and liabilities decreased net cash provided by operating activities by $6,397, primarily consisting of a decrease in other current liabilities of $3,939 and a decrease in accounts payable of $1,329, partially offset by a decrease in prepaid expenses and other current assets of $2,709. During the year ended December 31, 2021, the net change in operating assets and liabilities decreased net cash provided by operating activities by $4,508, primarily consisting of a decrease in accrued payroll of $2,602 and an increase in capitalized contract costs of $2,151.

*Cash Flows Used In Investing Activities*

For the year ended December 31, 2022, net cash used in investing activities consisted primarily of $7,439 of costs for internally developed software. Net cash used in investing activities for the year ended December 31, 2021 consisted primarily of $25,435 for the acquisition of Delivery Dudes and the Cape Payment Companies and related intangible assets, $8,752 of costs for internally developed software and $3,006 for the acquisition of domain names during the fourth quarter of 2021 in connection with our rebranding.

*Cash Flows (Used In) Provided By Financing Activities*

For the year ended December 31, 2022, net cash used in financing activities consisted primarily of $22,945 of payments on the Term Loan, partially offset by $12,665 of net proceeds from the sales of common stock under the Company's ATM Program. Additionally, during the year ended December 31, 2022, net cash from financing activities included $4,968 of proceeds from short-term loans for insurance financing and $6,218 of payments on such loans. For the year ended December 31, 2021, net cash provided by financing activities included $30,895 of net proceeds from the sales of common stock under the Company's ATM Program and $8,671 of proceeds from short-term loans for insurance financing, less a $14,472 principal prepayment on the Term Loan and $8,256 of payments on short-term loans for insurance financing.

**Contractual Obligations and Other Commitments**

At December 31, 2022, our long-term debt obligations totaled $55,102, with a maturity date of May 15, 2024, and short-term loans for insurance financing totaled $1,892. See Part II, Item 8, *Note 11 – Debt* for additional details regarding our outstanding debt and related interest rates.

The Company has sponsorship fees payable over five Contract Years (as defined below) in connection with the MetLife Sponsorship Agreement which was entered into on July 23, 2022 (the "Effective Date"). The term "Contract Year" under the MetLife Sponsorship Agreement refers to each year of the agreement with the first Contract Year beginning on the Effective Date and ending on March 31, 2023, and each subsequent Contract Year beginning on April 1 and ending on the last day of the following March. The Company has commitments totaling approximately $1,732 in 2023, $1,820 in 2024, $1,920 in 2025 and $2,006 in 2026.

In September 2022, the Company entered into a multi-year sponsorship agreement with the National Hockey League's Florida Panthers pursuant to which the Company will serve as the official mobile ordering platform used at the FLA Live Arena. The term of the agreement with the Florida Panthers is approximately four years and will expire on June 30, 2026. Remaining commitments under the agreement as of December 31, 2022 include the following amounts payable is fiscal years 2023 through 2026, respectively: $282, $296, $311, and $159.

Additionally, at December 31, 2022, we had operating lease agreements for office facilities in various locations in the United States, which expire on various dates through August 2026. See Part II, Item 8, *Note 13 – Commitments and Contingent Liabilities* for additional details on office leases and the MetLife Sponsorship Agreement.

**Item 7A. Quantitative and Qualitative Disclosures about Market Risk**

We are exposed to interest rate risk and certain other market risks in the ordinary course of our business.

***Interest Rate Risk***

As of December 31, 2022, we had outstanding interest-bearing long-term debt totaling $55.1 million, consisting of the Term Loan in the principal amount of $12.6 million and the Notes in the principal amount of $42.5 million, both of which bear interest at fixed rates. As a result, we were not exposed to interest rate risk on our outstanding debt at December 31, 2022. If we enter into variable-rate debt in the future, we may be subject to increased sensitivity to interest rate movements.

**Item 8. Financial Statements and Supplementary Data**

Information concerning this Item begins on Page F-1.

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

There have been no disagreements with our independent registered public accounting firm on our accounting or financial reporting that would require our independent registered public accounting firm to qualify or disclaim its report on our financial statements or otherwise require disclosure in this Form 10-K.

**Item 9A. Controls and Procedures**

***Evaluation of Disclosure Controls and Procedures***

As required by Rule 13a-15(b) of the Exchange Act, we have evaluated, under the supervision and with the participation of our management, including our principal executive officer and principal financial officer, the effectiveness of the design and operation of our disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) of the Exchange Act) as of the end of the period covered by this Form 10-K. Our disclosure controls and procedures are designed to provide reasonable assurance that the information required to be disclosed by us in reports that we file or submit under the Exchange Act is accumulated and communicated to our management, including our principal executive officer and principal financial officer, as appropriate, to allow timely decisions regarding required disclosure and is recorded, processed, summarized and reported within the time periods specified in the rules and forms of the SEC. Based upon the evaluation, our principal executive officer and principal financial officer have concluded that as of December 31, 2022, our disclosure controls and procedures were not effective because of the material weakness in our internal control over financial reporting described below under "*Management's Report on Internal Control Over Financial Reporting*". Our management, including our principal executive officer and principal financial officer, has concluded that, notwithstanding the material weakness in our internal control over financial reporting, the consolidated financial statements in this Annual Report on Form 10-K present fairly, in all material respects, our financial position, results of operations and cash flows for the periods presented in conformity with U.S. GAAP.

***Changes in Internal Control Over Financial Reporting***

Other than the material weakness described below, there has not been any change in our internal control over financial reporting that occurred during the quarter ended December 31, 2022 that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

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

Our management is responsible for establishing and maintaining adequate internal control over financial reporting as defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act. Internal control over financial reporting should be designed under the supervision and with the participation of our management, including our principal executive officer and principal financial officer, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and include those policies and procedures that:

- pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of our company;

- provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that our receipts and expenditures are being made only in accordance with authorizations of our management and directors; and

- provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of our assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect errors or misstatements in our financial statements. Projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate. Management assessed the effectiveness of our internal control over financial reporting at December 31, 2022 using the criteria established in Internal Control - Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) (2013 framework).

As of December 31, 2022, we had a material weakness in our internal control over financial reporting, as described below. A “material weakness” is a deficiency, or combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company’s annual or interim financial information will not be prevented or detected on a timely basis.

We identified a material weakness in internal control related to the ineffective design and operation of information technology general controls (“ITGCs”) in the areas of program change management and user access over certain information technology (“IT”) systems that support the Company’s financial reporting processes. The Company did not adequately design and maintain user access and program change management controls to ensure that IT program and data changes affecting the Company’s online ordering technology systems are authorized and implemented appropriately. The IT systems involved generate data that impacts the Company’s revenue process. As a result, the Company’s revenue process controls were also deemed ineffective because they could have been adversely impacted. The material weakness did not result in any identified misstatements to the financial statements and there were no changes in previously released financial results.

The ITGC material weakness may have an impact to the Company’s financial reporting process which creates a reasonable possibility that a material misstatement to the consolidated financial statements will not be prevented or detected on a timely basis and represents a material weakness in the Company’s internal control over financial reporting. Our management, including our principal executive officer and principal financial officer, has concluded that, notwithstanding the material weakness in our internal control over financial reporting, the consolidated financial statements in this Annual Report on Form 10-K present fairly, in all material respects, our financial position, results of operations and cash flows for the periods presented in conformity with U.S. GAAP.

***Remediation plan***

Management has taken steps with the intention of remediating the material weakness described above, including updated program change management policies and user access reviews. As part of the remediation plan, management has implemented a control which includes a monthly review of activity logs from affected IT applications to identify instances in which a user has developed and implemented a code change, bypassing the standard application rules that require review of code changes prior to implementation. Under the updated policy, each instance identified in the monthly review of the code change log will be reviewed by management for authorization and approval. Additionally, we have implemented monthly user access reviews over our affected IT development applications. The remediation of the material weakness described above is among our highest priorities. Our Audit Committee will continually assess the progress and sufficiency of these initiatives and make adjustments as and when necessary. While significant progress has been made, the material weakness cannot be considered remediated until the applicable remedial controls operate for a sufficient period of time and we have concluded, through testing, that these controls are designed and operating effectively.

***Auditor Attestation Report on Internal Control***

As a smaller reporting company, we are not required to obtain an attestation report from our independent registered public accounting firm regarding internal controls over financial reporting.

**Item 9B. Other Information**

None.

**Item 9C. Disclosure Regarding Foreign Jurisdictions that Prevent Inspections**

None.

# PART III

## Item 10. Directors, Executive Officers and Corporate Governance

### Directors and Executive Officers

The following is a list of our directors and executive officers as of April 14, 2023.

| Name | Age | Position(s) Held |
|---|---|---|
| Carl A. Grimstad | 55 | Chief Executive Officer and Chairman of the Board |
| Armen Yeghyazarians | 47 | Chief Financial Officer and Chief Accounting Officer |
| Thomas C. Pritchard | 63 | General Counsel |
| David Cronin | 70 | Chief Engagement Officer |
| Timothy Newton | 48 | Chief Technology Officer |
| Jonathan Green | 45 | Director |
| Buford H. Ortale | 61 | Director |
| Steven L. Scheinthal | 61 | Director |
| J. Daniel Schmidt | 68 | Director |

***Carl A. Grimstad***, 55, has been our Chief Executive Officer and a member of our Board since January 2020, and Chairman of the Board since March 3, 2020. Mr. Grimstad is currently the chief manager of C. Grimstad Associates, LLC, a family private investment entity formed in 2006, and the managing partner of GS Capital, LLC, a family private investment company formed in 1995. In 1999, he co-founded iPayment Inc. ("iPayment"), a provider of credit and debit card payment processing services to small and medium-sized merchants across the United States and Canada. He acted as the President of iPayment until 2011, when he became the Chairman and Chief Executive Officer until 2016. Under his leadership, iPayment closed an initial public offering in 2003 and then went private in 2006. He graduated with a B.A. in Economics from Boston University in 1989. We believe that Mr. Grimstad is qualified to serve on our Board based on his deep understanding of the industry in which the Company operates, his leadership skills and industry experience.

***Armen Yeghyazarians***, 47, has served as our Chief Accounting Officer since September 2021 and our Chief Financial Officer since June 2022. Mr. Yeghyazarians has over 20 years of finance and accounting experience and has held senior management roles at various public and private companies. Mr. Yeghyazarians served as director of accounting for 99 Cents Only from February 2019 through September 2021, and prior to that as vice president/controller of a subsidiary of Paysafe, from October 2015 through December 2018. Mr. Yeghyazarians is an active CPA in the state of California and holds a Bachelor of Science from California State University, Northridge.

***Thomas C. Pritchard***, 63, has served as our General Counsel since July 2020. Mr. Pritchard has been engaged in the private practice of law for over 37 years, with extensive experience in advising public and private corporations and individuals engaged in a variety of financial and business transactions, including merger and acquisition transactions, private and public offerings of debt and equity securities, SEC regulatory compliance, board and special committee representation, and a wide variety of business advice. Mr. Pritchard holds a Juris Doctor from Southern Methodist University School of Law and a Bachelor of Arts from Northwestern University.

***David Cronin***, 70, has served as our Chief Engagement Officer since July 2020. Mr. Cronin previously served as an HR consultant to Mainsail Group, Inc. from 2018 through June 2020 and as executive vice president and chief human resources officer at iPayment, Inc. from 2011 to 2018 where he focused on human resource matters. Mr. Cronin also served as vice president of human resources at Caritas Christi Health Care from 2009 to 2010 and Cape Cod Healthcare, Inc. from 2005 to 2009, and served as a principal at The WellSpring Group, an HR consulting firm, from 2001 to 2005. Mr. Cronin holds a Master of Science from Northeastern University and a Bachelor of Science from the United States Military Academy at West Point.

***Timothy Newton***, 48, has served as our Chief Technology Officer since January 2022. Mr. Newton served as chief technology officer at Fat Tuesday & New Orleans Original Daiquiris from June 2021 to December 2021 where he was responsible for strategic direction and execution of the company's technology modernization efforts and standards. He also spearheaded the evaluation, selection and implementation of a new point-of-sale solution across 40 corporate locations, providing needed visibility to key store operational metrics. While at Papa John's International from August 2012 to December 2020, Mr. Newton served as vice president, global technology operations, heading the tactical direction and deployment of mission critical technology infrastructure across 3200+ domestic and 1200+ international restaurants.

***Jonathan Green***, 45, has served as a member of our Board since the closing of the Landcadia Business Combination (the "Closing") in November 2018. Mr. Green is a partner at Luxor Capital Group, LP ("Luxor Capital") , and a principal at its affiliate, Lugard Road Capital GP, LLC. Luxor Capital is a New York-based hedge fund. He has served as a board member for a number of public and private Internet technology companies, including Delivery Hero. Prior to joining Luxor Capital in 2004, Mr. Green worked at Wasserstein Perella and the spinoff of its financial restructuring group, Miller Buckfire & Co., where he represented clients in complex reorganizations. Mr. Green received B.A. degrees in Psychology and Economics from Brown University. We believe Mr. Green is qualified to serve on our Board based on his leadership and industry experience.

***Buford H. Ortale***, 61, has served as a member of our Board since April 2020. Mr. Ortale is a principal of Sewanee Ventures, a private investment firm he founded in 1996. He is a partner in NTR, a private equity firm focused on the energy sector, as well as a partner in Armour Capital Management, LP, the external manager of a $7+ billion asset mortgage REIT. Mr. Ortale serves on the board of and is chairman of the audit committee of Benefit Street Realty Partners, a multi billion asset commercial mortgage REIT, and serves on the board of Broadtree Residential, a multi-family REIT. Mr. Ortale also serves on the boards of Intrensic, an evidence management software company, and Remote Care Partners, a software-based platform for remote health monitoring. He is a board advisor to Western Express, a privately held nationwide truckload carrier. Mr. Ortale began his career with Merrill Lynch's Merchant Banking Group in New York in 1987. He was subsequently a Founder and Managing Director of NationsBanc's (Bank of America) High Yield Bond Group. Mr. Ortale received his B.A. from Sewanee: The University of the South in 1984, and his M.B.A. from Vanderbilt in 1987. We believe that Mr. Ortale is qualified to serve on our Board based on his financial and managerial experience.

***Steven L. Scheinthal***, 61, has served as a member of our Board since the Closing in November 2018. Mr. Scheinthal has served as the vice president, general counsel and secretary of Landcadia Holdings IV, Inc. since February 2021. Mr. Scheinthal served as the vice president, general counsel and secretary of Landcadia Holdings II, Inc. from February 2019 through December 2020 and Mr. Scheinthal has served as a director of Golden Nugget Online Gaming since December 2020. Mr. Scheinthal has served as the vice president, general counsel and secretary of Landcadia Holdings III, Inc. from August 2020 through the closing of its business combination in July 2021. Mr. Scheinthal was the vice president, general counsel and secretary of Landcadia from September 2015 until the Closing in November 2018. Mr. Scheinthal has served as a member of the board of directors of Landry's, Inc. since 1993 and as its executive vice president or vice president of administration, general counsel and secretary since September 1992. He also serves as a member of the board of directors, executive vice president and general counsel of Fertitta Entertainment, Inc. which is the holding company for Landry's, Inc., the Golden Nugget Hotels and Casinos and other assets owned and controlled by Tilman J. Fertitta. He devotes a substantial amount of time on behalf of all Fertitta companies, including Landry's and Golden Nugget, on acquisitions, financings, human resources, risk, benefit and litigation management, union, lease and contract negotiations, trademark oversight and licensing and is primarily responsible for compliance with all federal, state and local laws. He was also primarily responsible for Landry's corporate governance and SEC compliance from its IPO in 1993 and during the 17-plus years Landry's operated as a public company. The foregoing experience provides the Company with valuable insight, skills and perspective. Prior to joining Landry's, he was a partner in the law firm of Stumpf & Falgout in Houston, Texas. Mr. Scheinthal represented Landry's, Inc. for approximately five years before becoming part of the organization. He has been licensed to practice law in the State of Texas since 1984. We believe that Mr. Scheinthal is qualified to serve on our Board based on his leadership and industry experience.

***J. Daniel Schmidt,*** 68, has served as a member of our Board since April 2022. Mr. Schmidt has been primarily engaged in private business endeavors and investments for over 30 years through his wholly owned entity, JDS Management, Inc. and related entities (the "JDS Companies"), generating approximately $250 million in recurring annual revenue during each of the last 5 years. During his business career, Mr. Schmidt has served as dealer principal in over 20 automotive ventures with locations in Ohio, Tennessee, Alabama, Michigan, and Colorado. Mr. Schmidt's real estate activities have included over $1 billion worth of acquisition and development of Class A office, medical office, multi-family apartments, luxury condominiums, single-family developments, and student housing for over the last 30 years. Mr. Schmidt, through the JDS Companies, has also purchased nonperforming real estate assets from lenders and repositioned these assets for his own portfolio or management of the foreclosure and liquidation process. Mr. Schmidt served as a board member of several non-profit community and economic development authorities in the Columbus, Ohio region. Mr. Schmidt has been a member of the board and executive committee of several cultural organizations. Mr. Schmidt received his Bachelor of Arts degree from Vanderbilt University in 1976. We believe that Mr. Schmidt is qualified to serve on the Board based on his leadership, financial and industry experience.

**Classified Board of Directors**

Our Board is divided into three classes with only one class of directors being elected in each year and each class serving a three-year term. The Board presently has five members and four vacancies. The term of our Class II directors, consisting of Carl A. Grimstad and Buford Ortale, will expire at the 2023 annual meeting of stockholders; the term of our Class III directors, consisting of Jonathan Green and J. Daniel Schmidt, will expire at our 2024 annual meeting of stockholders; and the term of our Class I director, Steven L. Scheinthal, will expire at our 2025 annual meeting of stockholders, or in each case until their respective successors are elected and qualified, or until their earlier resignation, removal or death.

**Luxor Nomination Rights**

Pursuant to the debt commitment letter entered into among the Company, Luxor Capital, on behalf of Lugard Road Capital Master Fund, LP, and one or more of its funds and/or affiliates (collectively, “Luxor”) and the other parties thereto in connection with the acquisition by the Company of Waitr Incorporated pursuant to the agreement and plan of merger, dated as of May 2018, by and among the Company, Waitr Inc. (f/k/a Landcadia Merger Sub, Inc.), and Waitr Incorporated, Luxor nominated Jonathan Green as a member of our Board and will thereafter have nomination rights with respect to one director for so long as it satisfies a minimum ownership threshold as agreed by the parties.

**Director Independence**

We are subject to continued listing requirements of the OTCQB which has requirements that the board of directors have two “independent” directors and an Audit Committee with the majority of members being independent.

Our Board has undertaken a review of the independence of each director. Based on information provided by each director concerning his background, employment, and affiliations, our Board has affirmatively determined that each of Messrs. Ortale, Scheinthal and Schmidt do not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director and is “independent” (as that term is defined under the applicable rules and regulations of the SEC and within the definition of independence provided by the OTC Markets Group Inc.). Our Board has also determined that each member of the Audit Committee is independent for purposes of serving on our Audit Committee, as determined in accordance with Rule 10A-3 promulgated under the Exchange Act. Our Board has determined that each member of the Compensation Committee is independent for purposes of serving on our Compensation Committee, as determined in accordance with Rule 10C promulgated under the Exchange Act. In making these determinations, the Board considered the current and prior relationships that each non-employee director has with our Company and all other facts and circumstances the Board deemed relevant in determining independence, including the beneficial ownership of our common stock by each non-employee director, and the transactions involving them, if any, described in “Item 13. Certain Relationships and Related Transactions, and Director Independence.”

**Committees of the Board**

Our Board currently has three standing committees. The current composition and responsibilities of each of the committees is described below. Members serve on these committees until their resignation or until otherwise determined by our Board. Each of our Board committees operates under a written charter adopted by the Board. The committee charters are available on the Investor Relations section of our website, http://asap.com, under Corporate Governance/Governance Highlights. A printed copy of each charter is available upon request. The information on our website is not part of this Form 10-K.

### *Audit Committee*

Our Audit Committee is responsible for, among other things: (i) appointing, retaining and evaluating the Company's independent registered public accounting firm and approving all services to be performed by it; (ii) overseeing the Company's independent registered public accounting firm's qualifications, independence and performance; (iii) overseeing the financial reporting process and discussing with management and the Company's independent registered public accounting firm the interim and annual financial statements that the Company files with the SEC; (iv) reviewing and monitoring the Company's accounting principles, accounting policies, financial and accounting controls and compliance with legal and regulatory requirements; (v) establishing procedures for the confidential anonymous submission of concerns regarding questionable accounting, internal controls or auditing matters; and (vi) reviewing and approving related person transactions.

Messrs. Ortale, Scheinthal and Schmidt are members of our Audit Committee, with Mr. Ortale serving as chair. All members of our Audit Committee are independent within the meaning of Rule 10A-3 of the Exchange Act. Each member of our Audit Committee meets the requirements for financial literacy under the applicable rules and regulations of the SEC, and our Board has determined that Mr. Ortale is an "audit committee financial expert," as that term is defined by the applicable rules of the SEC.

### *Compensation Committee*

Our Compensation Committee is responsible for, among other things: (i) reviewing key employee compensation goals, policies, plans and programs; (ii) reviewing and approving the compensation for the Company's directors, chief executive officer and other executive officers; (iii) reviewing and approving employment agreements and other similar arrangements between the Company and the Company's executive officers; and (iv) administering the Company's stock plans and other incentive compensation plans. The Compensation Committee may delegate its authority to one or more subcommittees, consisting of one or more of its members, when the Compensation Committee deems it appropriate to do so to carry out its responsibilities.

Messrs. Ortale and Schmidt are members of the Compensation Committee, with Mr. Schmidt serving as chair. Each member of our Compensation Committee qualifies as an independent director according to the rules and regulations of the SEC with respect to compensation committee membership.

### *Corporate Governance and Nominating Committee*

The Corporate Governance and Nominating Committee is responsible for, among other things, considering and making recommendations to our Board on matters relating to the selection and qualification of directors of the Company and candidates nominated to serve as directors of the Company, as well as other matters relating to the duties of directors of the Company, the operation of our Board and corporate governance. There have been no material changes to the procedures by which stockholders may recommend nominees to the Board.

Messrs. Ortale and Schmidt are members of the CGN Committee, with Mr. Schmidt serving as chair.

## Code of Ethics and Corporate Governance Guidelines

We have adopted a Code of Business Conduct and Ethics that applies to all officers, directors and employees, including those officers responsible for financial reporting. We have also adopted Corporate Governance Guidelines, which, in conjunction with our Charter, Bylaws and charters of the committees of the Board, form the framework for our corporate governance. Our Code of Business Conduct and Ethics is available on the Investor Relations section of our website, http://asap.com, under Corporate Governance/Governance Highlights. The information on our website is not part of this Form 10-K. As required by law and in accordance with the requirements of Item 5.05 of Current Report on Form 8-K, we intend to disclose on our website any amendments to our Code of Business Conduct and Ethics as well as any waivers of its requirements.

## Delinquent Section 16(a) Reports

Section 16(a) of the Exchange Act requires the Company's officers, directors, and persons who beneficially own more than 10% of the Company's common stock, to file reports of ownership and changes in ownership with the SEC. Based solely on our review of the copies of such forms received by us, or written representations from certain reporting persons, the Company believes that during the fiscal year ended December 31, 2022 the filing requirements applicable to its officers, directors and greater than 10% beneficial owners were complied with, except that Timothy Newton did not file Form 4 filings within the two business day requirement with respect to two transactions and such late filing was filed on March 16, 2022. Additionally, J. Daniel Schmidt did not file a Form 3 within the ten calendar day requirement and such late filing was filed on May 6, 2022.

## Item 11. Executive Compensation

### Our Named Executive Officers

For the year ended December 31, 2022, our chief executive officer and our two other most highly compensated executive officers, who we refer to as our named executive officers ("NEOs"), were:

- Carl A. Grimstad, Chief Executive Officer;
- Thomas C. Pritchard, General Counsel; and
- Mark D'Ambrosio, Chief Sales Officer prior to his resignation from the Company on February 10, 2023.

### Summary Compensation Table

The following table summarizes the total compensation paid to or earned by each of the NEOs for the fiscal years ended December 31, 2022 and 2021, as well as the grant date fair values of stock-based compensation awarded to such officers during such fiscal years, calculated in accordance with Financial Accounting Standards Board Accounting Standards Codification Topic 718 ("FASB ASC Topic 718").

| Name and Principal Position | Year | Salary ($) | Bonus ($)(a) | Stock Awards ($)(b) | Option Awards ($) | Non-Equity Incentive Plan Compensation ($) | Total ($) |
|---|---|---|---|---|---|---|---|
| Carl A. Grimstad | 2022 | $ 999,996 | $ 4,000,000 | $ 1,228,000 | $ — | $ — | $ 6,227,996 |
| *Chairman of the Board and Chief Executive Officer* | 2021 | 1,000,000 | 1,000,000 | 8,960,000 | — | — | 10,960,000 |
| Thomas C. Pritchard | 2022 | 240,000 | 300,000 | 59,865 | — | — | 599,865 |
| *General Counsel* | 2021 | 240,000 | — | 440,000 | — | — | 680,000 |
| Mark D'Ambrosio | 2022 | 320,000 | 150,000 | 49,120 | — | — | 519,120 |
| *Chief Sales Officer* | 2021 | 320,000 | 40,000 | 365,200 | — | — | 725,200 |

(a) For Mr. Grimstad, the 2022 amount reflects a $3,000,000 cash bonus paid in January 2022 pursuant to his employment agreement, described below under "*Employment Agreements and Performance Bonus Agreements with Named Executive Officers*", and a discretionary $1,000,000 cash bonus paid in April 2022. For Mr. Pritchard, this reflects a discretionary $300,000 cash bonus paid in April 2022. For Mr. D'Ambrosio, the 2022 amount represents a discretionary $150,000 cash bonus paid in April 2022.

(b) Reflects the grant date fair value of RSUs granted to the named executive officer in accordance with FASB ASC Topic 718. For these RSU awards, the fair value is equal to the underlying value of the stock and is calculated using the closing price of our common stock on the award date.

### Outstanding Equity Awards at Fiscal Year-End

The following table contains information concerning equity awards outstanding as of December 31, 2022 for each of the NEOs.

| | Option Awards | | | | | Stock Awards | | |
|---|---|---|---|---|---|---|---|---|
| Name | Number of Securities Underlying Unexercised Options (#) Exercisable | Number of Securities Underlying Unexercised Options (#) Unexercisable | Equity Incentive Plan Awards: Number of Securities Underlying Unexercised Options (#) Unearned | Option Exercise Price ($) | Option Expiration Date | Number of Shares or Units of Stock that have not Vested (#) | | Market Value of Shares or Units of Stock that have not yet Vested (a)($) |
| Carl A. Grimstad | 478,619 | — | — | $7.40 | 1/3/2025 | 156,716 | (b) | $54,537 |
| | — | — | — | — | — | 175,000 | (c) | $60,900 |
| | — | — | — | — | — | 200,000 | (d) | $69,600 |
| Thomas C. Pritchard | — | — | — | — | — | 6,666 | (e) | $2,320 |
| | — | — | — | — | — | 13,333 | (f) | $4,640 |
| | — | — | — | — | — | 9,750 | (g) | $3,393 |
| Mark D’Ambrosio | — | — | — | — | — | 5,550 | (h) | $1,931 |
| | — | — | — | — | — | 11,066 | (h) | $3,851 |
| | — | — | — | — | — | 8,000 | (h) | $2,784 |

(a) Amounts represent the market value of unvested RSUs, based on the closing price of our common stock on December 30, 2022, the last trading day of the last completed fiscal year, of $0.348 per share.

(b) The restricted stock unit award held by Carl A. Grimstad vests in full upon a Corporate Change, subject to Mr. Grimstad’s continuous employment with the Company through the date of a Corporate Change; provided, however, that such RSUs shall fully vest in the event that Mr. Grimstad terminates his employment for Good Reason or he is terminated by the Company for reason other than Misconduct (as such terms are defined in Mr. Grimstad’s Employment Agreement).

(c) The restricted stock unit award held by Carl A. Grimstad vests in three substantially equal installments on each of the first three anniversaries of January 3, 2022 (the first installment vested on January 3, 2023), with accelerated vesting upon a change of control; provided, further, that such RSUs shall fully vest in the event that Mr. Grimstad terminates his employment for Good Reason or he is terminated by the Company for reason other than Misconduct (as such terms are defined in Mr. Grimstad’s Employment Agreement).

(d) The restricted stock unit award held by Carl A. Grimstad vests in three substantially equal installments on each of the first three anniversaries of April 11, 2022, with accelerated vesting upon a change of control; provided, further, that such RSUs shall fully vest in the event that Mr. Grimstad terminates his employment for Good Reason or he is terminated by the Company for reason other than Misconduct (as such terms are defined in Mr. Grimstad’s Employment Agreement).

(e) The restricted stock unit award held by Thomas C. Pritchard vests on July 1, 2023, with accelerated vesting upon a change of control.

(f) The restricted stock unit award held by Thomas C. Pritchard vests as follows: 6,667 on August 19, 2023 and 6,666 on August 19, 2024, with accelerated vesting upon a change of control.

(g) The restricted stock unit award held by Thomas C. Pritchard vests in three substantially equal installments on each of the first three anniversaries of April 11, 2022, with accelerated vesting upon a change of control.

(h) The restricted stock unit awards held by Mark D’Ambrosio were forfeited on February 10, 2023 upon Mr. D'Ambrosio’s resignation from the Company.

**Employment Agreements and Performance Bonus Agreements with Named Executive Officers**

*Carl A. Grimstad*

On April 23, 2021, the Company amended and restated the Grimstad Employment Agreement, as originally dated January 3, 2020, pursuant to which Mr. Grimstad will continue to serve as the Chief Executive Officer of the Company. The amendment extends Mr. Grimstad's employment term under the same base salary for three years and provides for an award of 175,000 RSUs to vest pro-rata on an annual basis over three years, commencing on January 3, 2023. The term of the Grimstad Employment Agreement, previously expiring on January 3, 2022, now expires on January 3, 2025 (the "Term"), unless earlier terminated by either party. The Grimstad Employment Agreement includes customary obligations related to confidentiality, non-competition and intellectual property right protection and provides Mr. Grimstad indemnification rights concerning his service as the Chief Executive Officer of the Company.

The Grimstad Employment Agreement provides for the following compensation to Mr. Grimstad:

- a base salary of $83,333 per month (the "Monthly Compensation");

- a bonus of $3,000,000 (the "Bonus") to be paid if Mr. Grimstad served through January 3, 2022, which he satisfied, and such bonus was paid in January 2022;

- an option (the "Grimstad Option"), issued under the Incentive Plan pursuant to an option agreement dated January 3, 2020 (the "Option Agreement"), exercisable for 478,619 shares of our common stock (the "Common Stock") at an exercise price of $7.40 per share, which is fully exercisable; and

- an award of 175,000 RSUs (the "Grimstad 2021 RSUs"), issued under the Incentive Plan, pursuant to a Restricted Stock Unit Award Agreement between the Company and Mr. Grimstad dated April 23, 2021. Upon vesting, Mr. Grimstad will be issued one share of Common Stock for each RSU. The Grimstad 2021 RSUs will vest in three equal installments on the first, second and third anniversaries of January 3, 2022 (the first installment vested on January 3, 2023), subject to Mr. Grimstad's continued employment through the applicable vesting date, and shall fully vest upon the consummation of a Corporate Change, subject to Mr. Grimstad's continued employment through the closing of such Corporate Change, or the termination of the Grimstad Employment Agreement by Mr. Grimstad for Good Reason or by the Company for other than Misconduct.

Additionally, upon the closing of a Corporate Change, Mr. Grimstad will receive (i) the Monthly Compensation through the Term and (ii) Accrued Amounts (as defined below), if any, and the Company may terminate the Grimstad Employment Agreement.

If the Grimstad Employment Agreement is terminated by Mr. Grimstad other than for Good Reason or by the Company in the event of Mr. Grimstad's Misconduct, Mr. Grimstad shall not be entitled to further compensation other than payment for (i) any unpaid Monthly Compensation through the date of termination, (ii) any unpaid expenses incurred prior to the date of termination, subject to the Company's expense reimbursement rules and policies as in effect from time to time, and (iii) any vested portion of equity or non-equity bonus awards through the date of termination pursuant to any award documentation (the "Accrued Amounts").

If the Grimstad Employment Agreement is terminated by the Company other than for Misconduct or by Mr. Grimstad for Good Reason, the Company shall pay Mr. Grimstad (i) the Monthly Compensation through the Term, (ii) the unvested equity and non-equity awards (whether pursuant to the Grimstad Employment Agreement or otherwise) shall accelerate and be vested in full pursuant to their respective award documentation, and (iii) Accrued Amounts, if any.

A "Corporate Change," as defined in the Grimstad Employment Agreement, shall occur if: (i) the Company (A) shall not be the surviving entity in any merger or consolidation (or survives only as a subsidiary of an entity other than a previously wholly-owned subsidiary of the Company) other than a merger or consolidation (1) that results in the voting securities of the Company outstanding immediately prior thereto continuing to represent (either by remaining outstanding or by being converted into voting securities of the surviving entity) at least fifty percent (50%) of the combined voting power of the voting securities of the Company (or such surviving entity or, if the Company or the entity surviving such merger is then a subsidiary, the ultimate parent thereof) outstanding immediately after such merger or consolidation, and (2) immediately following which the individuals who comprise the Board immediately prior thereto constitute at least a majority of the Board of the entity surviving such merger or consolidation or, if the Company or the entity surviving such merger is then a subsidiary, the ultimate parent thereof, or (B) is to be dissolved and liquidated, and, as a result of or in connection with such transaction, the persons who were directors of the Company before such transaction shall cease to constitute a majority of the Board; (ii) any person or entity, including a "group" as contemplated by Section 13(d)(3) of the Securities Exchange Act of 1934, as amended, acquires or gains ownership or control (including, without limitation, power to vote) of 50% or more of the outstanding shares of the Company's voting stock (based upon voting power), excluding any person, entity or group who acquires or gains such ownership or control directly from the Company; or (iii) the Company sells all or substantially all of the assets of the Company to any other person or entity (other than a wholly-owned subsidiary of the Company) in a transaction that requires shareholder approval pursuant to applicable corporate law, other than a sale by the Company of all or substantially all of the assets of the Company to an entity, at least fifty percent (50%) of the combined voting power of the voting securities of which are owned directly or indirectly by stockholders of the Company following the completion of such transaction in substantially the same proportions as their ownership of the Company immediately prior to such sale.

"Misconduct," as defined in the Grimstad Employment Agreement, means a material breach of any of Mr. Grimstad's obligations under the Grimstad Employment Agreement without the Company's express written consent, Mr. Grimstad's willful misconduct or gross negligence in performing his duties under the Grimstad Employment Agreement, or conviction of (including a plea of guilty or nolo contendere) a felony or crime involving moral turpitude; provided, that the Company has provided a notice of termination to Mr. Grimstad of the Company's intention to terminate the Grimstad Employment Agreement for Misconduct, and Mr. Grimstad has failed to cure, to the extent curable, such circumstance within fifteen (15) days of receipt of the notice of termination given in respect thereof.

"Good Reason," as defined in the Grimstad Employment Agreement, means a material breach of any of the Company's obligations under the Grimstad Employment Agreement without Mr. Grimstad's express written consent; provided, that, Mr. Grimstad has provided a notice of termination to the Company of his intention to terminate the Grimstad Employment Agreement for Good Reason, and the Company has failed to cure, to the extent curable, such circumstance within fifteen (15) days of receipt of the notice of termination given in respect thereof.

On April 23, 2020, the Company entered into the Grimstad Bonus Agreement, which was extended through January 3, 2025 pursuant to the Grimstad Employment Agreement, whereby, upon the occurrence of a Corporate Change in which the holders of the Company's common stock receive per share consideration that is equal to or greater than $40.00, the Company shall pay Mr. Grimstad an amount equal to $5,000,000 (the "Performance Bonus"). In order to receive the Performance Bonus, Mr. Grimstad must remain continuously employed with the Company through the date of the Corporate Change; provided, however, that in the event Mr. Grimstad terminates his employment for Good Reason or the Company terminates his employment other than for Misconduct, Mr. Grimstad will be entitled to receive the Performance Bonus provided the Corporate Change occurs on or before January 3, 2025. The Grimstad Bonus Agreement shall terminate automatically upon the termination of the Grimstad Employment Agreement by the Company for Misconduct or by Mr. Grimstad for other than Good Reason prior to the consummation of a Corporate Change.

On April 23, 2020, the Company entered into a Restricted Stock Unit Award Agreement with Mr. Grimstad (the "Grimstad 2020 RSU Agreement") pursuant to which the Company granted Mr. Grimstad 156,716 RSUs subject to the terms and conditions of the Incentive Plan and the Grimstad 2020 RSU Agreement. Upon vesting, Mr. Grimstad will be issued one share of Common Stock for each RSU. In order for the RSUs to vest, Mr. Grimstad must remain continuously employed with the Company through the date of a Corporate Change; provided, however, that in the event Mr. Grimstad terminates his employment for Good Reason or the Company terminates his employment other than for Misconduct prior to a Corporate Change, the RSUs will vest in full. The number of shares of Common Stock issuable upon the vesting of the RSUs are subject to certain adjustments as provided for in the Incentive Plan.

On April 11, 2022, the Company entered into a Restricted Stock Unit Award Agreement with Mr. Grimstad (the "Grimstad 2022 RSU Agreement") pursuant to which the Company granted Mr. Grimstad 200,000 RSUs subject to the terms and conditions of the Incentive Plan and the Grimstad 2022 RSU Agreement. Upon vesting, Mr. Grimstad will be issued one share of Common Stock for each RSU. The Grimstad 2022 RSUs will vest in three equal installments on the first, second and third anniversaries of April 11, 2022, subject to Mr. Grimstad's continued employment through the applicable vesting date, and shall fully vest upon the consummation of a change of control, subject to Mr. Grimstad's continued employment through the closing of such change of control or the termination of the Grimstad Employment Agreement by Mr. Grimstad for Good Reason or by the Company for other than Misconduct. Additionally, on April 11, 2022, the Company paid Mr. Grimstad a discretionary bonus of $1,000,000.

On January 31, 2023, the Company agreed to pay a retention bonus to Mr. Grimstad in the amount of $1,000,000, of which $750,000 is payable immediately and the balance of $250,000 is to be paid upon the satisfaction of certain conditions. In the event Mr. Grimstad terminates his employment, other than for good reason (as defined in his employment agreement), or is terminated by the Company for misconduct (as defined in his employment agreement), in each case prior to January 31, 2024, Mr. Grimstad is required to repay the Company an amount of cash equal to the after-tax amount of the retention compensation actually paid.

*Thomas C. Pritchard*

On July 1, 2020, the Company entered into an Employment Agreement with Thomas C. Pritchard (the “Pritchard Employment Agreement”), pursuant to which Mr. Pritchard serves as the General Counsel of the Company. The Pritchard Employment Agreement provides for an annual base salary of $240,000 and customary employee benefits. Additionally, the Pritchard Employment Agreement provided for an award under the Incentive Plan of 20,000 RSUs, which Mr. Pritchard received on July 1, 2020 (the “Pritchard Award”). The Pritchard Award will vest in three equal installments on the first, second and third anniversaries of the grant date, subject to Mr. Pritchard’s continued employment through the applicable vesting date, and will vest in full upon a change of control, subject to Mr. Pritchard’s continued employment through the closing of such change of control.

On August 19, 2021, Mr. Pritchard received an award under the Incentive Plan of 20,000 RSUs (the “Pritchard 2021 Award”). The Pritchard 2021 Award will vest in three equal installments on the first, second and third anniversaries of the grant date, subject to Mr. Pritchard’s continued employment through the applicable vesting date, and will vest in full upon a change of control, subject to Mr. Pritchard’s continued employment through the closing of such change of control.

On April 11, 2022, Mr. Pritchard received an award under the Incentive Plan of 9,750 RSUs (the “Pritchard 2022 Award”). The Pritchard 2022 Award will vest in three equal installments on the first, second and third anniversaries of the grant date, subject to Mr. Pritchard’s continued employment through the applicable vesting date, and will vest in full upon a change of control, subject to Mr. Pritchard’s continued employment through the closing of such change of control. Additionally, on April 11, 2022, the Company paid Mr. Pritchard a discretionary bonus of $300,000.

On January 31, 2023, the Company agreed to pay a $300,000 retention bonus to Mr. Pritchard. The retention bonus is payable immediately in the amount of 75% of such retention bonus, with the balance of 25% of such retention bonus to be paid upon the satisfaction of certain conditions. In the event that Mr. Pritchard terminates his at-will employment agreement for any reason, other than the Company’s failure to timely pay salary, or the Company terminates such employment for Mr. Pritchard’s willful misconduct, gross negligence, failure to perform required duties or due to a felony conviction, in each case prior to January 31, 2024, Mr. Pritchard is required to repay the Company an amount of cash equal to the after-tax amount of the retention compensation actually paid.

Mr. Pritchard is employed on an “at-will” basis, meaning that his employment may be terminated by either him or the Company at any time and for any reason, with no entitlement to any additional compensation and benefits from the Company post-termination date. The Pritchard Employment Agreement includes customary obligations related to confidentiality, non-competition and intellectual property right protection and provides Mr. Pritchard indemnification rights concerning his service as an executive officer of the Company.

Additionally, the Pritchard Employment Agreement provides that any incentive-based compensation, or any other compensation, paid to Mr. Pritchard, whether pursuant to his Employment Agreement or any other agreement or arrangement with the Company which is subject to recovery under any law, government regulation, or stock exchange listing requirement, will be subject to such deductions and clawback as may be required to be made pursuant to such law, government regulation, or stock exchange listing requirement (or any policy adopted by the Company pursuant to any such law, government regulation, or stock exchange listing requirement).

*Mark D’Ambrosio*

On May 28, 2020, the Company entered into an Employment Agreement with Mark D’Ambrosio (the “D’Ambrosio Employment Agreement”), pursuant to which Mr. D’Ambrosio served as the Chief Sales Officer of the Company. On October 24, 2022, the Company entered into an amendment to the D’Ambrosio Employment Agreement (the “Amended D’Ambrosio Employment Agreement”) which replaced the performance bonus provision in his original employment agreement with the eligibility to receive an annual bonus, in the sole discretion of the Board. Mr. D’Ambrosio resigned from the Company effective February 10, 2023.

The D'Ambrosio Employment Agreement provided for an annual base salary of $320,000 and customary employee benefits. Additionally, the D'Ambrosio Employment Agreement provided for an award under the Incentive Plan of 16,650 RSUs, which Mr. D'Ambrosio received on May 28, 2020 (the "D'Ambrosio Award"). The D'Ambrosio Award was scheduled to vest in three equal installments on the first, second and third anniversaries of the grant date, subject to Mr. D'Ambrosio's continued employment through the applicable vesting date, and would have vested in full upon a change of control, subject to his continued employment through the closing of such change of control. At the time of Mr. D'Ambrosio's resignation, 5,550 unvested RSUs under the D'Ambrosio Award were forfeited.

The D'Ambrosio Employment Agreement also provided for a $50,000 signing bonus, which was paid to Mr. D'Ambrosio in May 2020, and an $80,000 agreed upon bonus for 2020. Starting in fiscal 2021, through the date of the Amended D'Ambrosio Employment Agreement, he was entitled to a performance bonus up to an aggregate of 50% of his base salary, to be based upon the attainment of certain performance metrics established by the Company's Chief Executive Officer, Board or Compensation Committee, of which $40,000 was paid as a performance bonus in fiscal 2021.

On August 19, 2021, Mr. D'Ambrosio received an award under the Incentive Plan of 16,600 RSUs (the "D'Ambrosio 2021 Award"). The D'Ambrosio 2021 Award was scheduled to vest in three equal installments on the first, second and third anniversaries of the grant date, subject to Mr. D'Ambrosio's continued employment through the applicable vesting date, and would have vested in full upon a change of control, subject to Mr. D'Ambrosio's continued employment through the closing of such change of control. At the time of Mr. D'Ambrosio's resignation, 11,066 unvested RSUs under the D'Ambrosio 2021 Award were forfeited.

On April 11, 2022, Mr. D'Ambrosio received an award under the Incentive Plan of 8,000 RSUs (the "D'Ambrosio 2022 Award"), all of which were forfeited at the time of Mr. D'Ambrosio's resignation. The D'Ambrosio 2022 Award was scheduled to vest in three equal installments on the first, second and third anniversaries of the grant date, subject to Mr. D'Ambrosio's continued employment through the applicable vesting date, and would have vested in full upon a change of control, subject to Mr. D'Ambrosio's continued employment through the closing of such change of control. Additionally, on April 11, 2022, the Company paid Mr. D'Ambrosio a discretionary bonus of $150,000.

Mr. D'Ambrosio was employed on an "at-will" basis and with no entitlement to any additional compensation and benefits from the Company post-termination date.

**Potential Payments upon Termination or Change-in-Control**

The following table sets forth the estimated potential payments that would be received by our named executive officers upon termination of their employment following a change in control or in other termination scenarios as applicable. The information assumes, in each case, that the officer's termination was effective as of December 31, 2022. There can be no assurance that a triggering event would produce the same or similar results as those estimated if such event were to occur on any other date, when the market price of our common stock price was different. See "*Employment Agreements and Performance Bonus Agreements with Named Executive Officers*" above for a more detailed description of potential payments and benefits to our named executive officers upon a termination of employment and/or a change in control.

| Name | Termination Scenario | Base Salary | Cash Bonus | Accelerated Vesting of Stock Options | Accelerated Vesting of Restricted Stock Awards | Total |
|---|---|---|---|---|---|---|
| Carl A. Grimstad | Termination without cause or for good reason | $2,000,000 (a) | $5,000,000 (b) | $ — | $185,037 | $7,185,037 |
| | Change in control | $2,000,000 (a) | $5,000,000 (b) | — | $185,037 | $7,185,037 |
| | Termination for misconduct or other than good reason | — | — | — | — | — |
| | Death or disability | — | — | — | — | — |
| Thomas C. Pritchard | Termination without cause or for good reason | — | — | — | — | — |

| | | | | | | |
|---|---|---|---|---|---|---|
| | Change in control | — | — | — | $10,353 | $10,353 |
| | Termination for misconduct or other than good reason | — | — | — | — | — |
| | Death or disability | — | — | — | — | — |
| Mark D’Ambrosio | Termination without cause or for good reason | — | — | — | — | — |
| | Change in control | — | — | — | $8,566 (c) | $8,566 |
| | Termination for misconduct or other than good reason | — | — | — | — | — |
| | Death or disability | — | — | — | — | — |

(a) Represents a base salary of $83,333 per month through January 3, 2025, assuming a change in control on December 31, 2022.

(b) Includes the Performance Bonus.

(c) Unvested RSUs held by Mr. D’Ambrosio at December 31, 2022 were forfeited upon his resignation from the Company on February 10, 2023.

**Director Compensation for the Year Ended December 31, 2022**

In April 2022, the Compensation Committee and Board adopted a policy to compensate each of the non-employee Board members (other than Mr. Green) for board services from and after the date of the 2022 annual meeting through the 2023 annual meeting comprised of RSUs to be valued at $150,000 on the date of grant (2022 annual meeting) that would vest upon the earlier to occur of (i) the one-year anniversary of the 2022 annual meeting, (ii) the 2023 annual meeting, or (iii) a change of control, provided such director continuously served on the Board through the vesting date. Subsequently, in June 2022, the Compensation Committee and Board re-evaluated the director compensation policy and approved annual cash compensation in lieu of equity based awards. The annual cash compensation approved consisted of $50,000 cash for the non-employee directors (other than Mr. Green) for the period of service between June 23, 2022 and the 2023 annual meeting of stockholders of the Company. Directors are also reimbursed for reasonable travel and other related expenses.

There were no grants of equity based awards to any of the current or former directors in 2022. As of December 31, 2022, none of the non-employee directors held any unvested RSUs.

The following table sets forth amounts paid to our non-employee directors for service in 2022.

| Name | Fees Earned or Paid in Cash ($) | Stock Awards ($) | Total ($) |
|---|---|---|---|
| Jonathan Green (1) | $ — | $ — | $ — |
| Charles Holzer (2) | 12,500 | — | 12,500 |
| Buford Ortale | 25,000 | — | 25,000 |
| Steven L. Scheinthal | 25,000 | — | 25,000 |
| J. Daniel Schmidt | 25,000 | — | 25,000 |

___________________

(1) Mr. Green did not receive cash compensation for board services because he is a partner at Luxor Capital, our lender under the Credit Agreement and Convertible Notes Agreement, as further described under “Item 13. Certain Relationships and Related Transactions, and Director Independence.”

(2) Mr. Holzer resigned as a director effective September 30, 2022.

## Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters

### Security Ownership of Certain Beneficial Owners and Management

The following table sets forth information known to the Company regarding beneficial ownership of common stock as of March 15, 2023 by:

- each person known by the Company to be the beneficial owner of more than 5% of outstanding common stock;
- each of the Company's current directors and each NEO (which includes one former executive officer); and
- all current executive officers and directors of the Company as a group.

Beneficial ownership is determined according to the rules of the SEC, which generally provide that a person has beneficial ownership of a security if he or she possesses sole or shared voting or investment power over that security. In computing the number of shares beneficially owned by a person and the percentage ownership of that person, shares of common stock subject to options, warrants, restricted stock units and/or other rights held by that person that are currently exercisable and/or exercisable or will be settled upon vesting within 60 days after March 15, 2023 are deemed outstanding.

The beneficial ownership of the common stock of the Company is based on 13,443,697 shares of common stock issued and outstanding as of March 15, 2023.

Unless otherwise indicated, the Company believes that each person named in the table below has sole voting and investment power with respect to all shares of common stock beneficially owned by him.

| | Number of Shares Beneficially Owned | Percentage of Outstanding Shares |
|---|---|---|
| **Directors and Officers (1)** | | |
| Carl A. Grimstad (2) | 586,323 | 4.2% |
| Thomas C. Pritchard (3) | 18,359 | —%* |
| Mark D'Ambrosio (4) | 11,818 | —%* |
| Jonathan Green (5) | 507,746 | 3.7% |
| Buford Ortale | 16,009 | —%* |
| Steven L. Scheinthal | 17,047 | —%* |
| J. Daniel Schmidt | — | —%* |
| All current Executive Officers and Directors as a group (9 individuals) (6) | 1,163,346 | 8.2% |
| **5% Shareholders** | | |
| Luxor Capital Group, LP (5) | 1,025,494 | 7.5% |

* Less than 1%

(1) Except as described in the footnotes below and subject to applicable community property laws and similar laws, the Company believes that each person listed above has sole voting and investment power with respect to such shares. Unless otherwise indicated, the business address of each of the entities, directors and executives in this table is 214 Jefferson Street, Suite 200, Lafayette, Louisiana 70501.

(2) The interests shown for Mr. Grimstad include 478,619 shares of common stock underlying a currently exercisable option as of March 15, 2023, pursuant to his Option Agreement dated January 3, 2020, and 66,667 shares of common stock that are issuable within 60 days after March 15, 2023 upon the vesting of RSUs.

(3) The interests shown for Mr. Pritchard include 3,250 shares of common stock that are issuable within 60 days after March 15, 2023 upon the vesting of RSUs.

(4) Mr. D'Ambrosio resigned from the Company as an executive officer effective February 10, 2023.

(5) The interests held by Luxor Capital Group, LP ("Luxor Capital") include (i) 737,674 shares of common stock and (ii) 287,820 shares of common stock issuable upon conversion of the Notes held by the Luxor Entities. Luxor Capital may be deemed to beneficially own the shares held by each of the Luxor Entities. In addition, Jonathan Green, as a managing member and controlling person of the general partner of one of the Luxor Entities, may be deemed to beneficially own (i) 356,285 shares of common stock held by such fund and (ii) 151,461 shares of common stock issuable upon conversion of the Notes held by such fund (based on the conversion rate of $147.10 per share as of December 14, 2022). The Luxor Entities will not have the right to convert the Notes to the extent that after giving effect to such conversion, Luxor Capital would beneficially own in excess of 9.99% of the shares of common stock outstanding immediately after giving effect to such conversion. Christian Leone, as a controlling person of Luxor Capital, may be deemed a beneficial owner of all the shares to be owned by Luxor Capital, and Jonathan Green, as a controlling person of the general partner of one of the Luxor Entities, may be deemed the beneficial owner of the shares to be owned by such fund. Mr. Leone and Mr. Green disclaim beneficial ownership except to the extent of their respective pecuniary interests therein. The business address of Luxor Capital, Mr. Leone and Mr. Green is 1114 Avenue of the Americas, 28th Floor, New York, NY 10036.

(6) The interests shown for all current executive officers and directors as a group include 478,619 shares of common stock underlying a currently exercisable option as of March 15, 2023 and 73,667 shares of common stock that are issuable within 60 days after March 15, 2023 upon the vesting of RSUs.

**Securities Authorized For Issuance Under Equity Incentive Plans**

The following table summarizes information, as of December 31, 2022, for the equity compensation plans of the Company pursuant to which grants of options, restricted stock, restricted stock units or other rights to acquire shares may be granted from time-to-time.

| | Number of securities to be issued upon exercise of outstanding options, warrants and rights (a) (#) | | Weighted average exercise price of outstanding options, warrants and rights (b) ($) | | Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a)) (c) (#) |
|---|---|---|---|---|---|
| Equity compensation plans approved by security holders: | | | | | |
| Waitr, Inc. 2014 Stock Plan | 2,046 | | $19.29 | | — |
| 2018 Incentive Plan | 1,247,886 | (1) | $7.53 | (2) | 353,539 |
| Equity compensation plans not approved by security holders | — | | — | | — |
| Total | 1,249,932 | (1) | $7.58 | (2) | 353,539 |

(1) Includes 768,907 shares issuable upon the vesting of RSUs.

(2) The weighted-average exercise price excludes RSUs, which have no exercise price.

The 2018 Incentive Plan provides for automatic increases in shares reserved for issuance on January 1 of each year, for a period of not more than ten years, commencing on January 1, 2019, in an amount equal to 5% of the total number of outstanding shares of the Company's common stock (including shares of common stock issuable upon exercise of outstanding options, warrants and convertible debt) on December 31 of the preceding calendar year.

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

**Indemnification of Officers and Directors**

Our Charter contains provisions that limit the liability of our directors for monetary damages to the fullest extent permitted by Delaware law. Consequently, our directors will not be personally liable to us or our stockholders for monetary damages resulting from any breach of their fiduciary duties as directors, except liability for the following:

• any breach of their duty of loyalty to the Company or our stockholders;

• any act or omission not in good faith or that involves intentional misconduct or a knowing violation of law;

• unlawful payments of dividends or unlawful stock repurchases or redemptions as provided in Section 174 of the Delaware General Corporation Law (the "DGCL"); or

• any transaction from which they derived an improper personal benefit.

Any amendment to, or repeal of, these provisions will not eliminate or reduce the effect of these provisions in respect of any act, omission or claim that occurred or arose prior to that amendment or repeal. If the DGCL is amended to provide for further limitations on the personal liability of directors of corporations, then the personal liability of our directors will be further limited to the greatest extent permitted by the DGCL.

Our Bylaws provide that we will indemnify, to the fullest extent permitted by law, any person who is or was a party or is threatened to be made a party to any action, suit or proceeding by reason of the fact that he or she is or was one of our directors or officers or is or was serving at our request as a director or officer of another corporation, partnership, joint venture, trust, or other enterprise. Our Bylaws also provide that we must advance expenses incurred by or on behalf of a director or officer in advance of the final disposition of any action or proceeding, subject to very limited exceptions.

Further, we have entered into indemnification agreements with each of our executive officers and certain of our directors that may be broader than the specific indemnification provisions contained in the DGCL. These indemnification agreements require us, among other things, to indemnify our directors and executive officers against liabilities that may arise by reason of their status or service and to advance all expenses incurred by them in investigating or defending any such action, suit, or proceeding.

We believe that these Charter and Bylaws provisions and indemnification agreements are necessary to attract and retain qualified persons as officers and members of the Board. We also maintain directors' and officers' liability insurance.

**Director Independence**

As discussed in "Item 10. Directors, Executive Officers and Corporate Governance," our Board has affirmatively determined that each of Messrs. Ortale, Scheinthal and Schmidt is deemed "independent" (as that term is defined under the applicable rules and regulations of the SEC).

**Policies and Procedures for Related Party Transactions**

***Related Party Transaction Policy***

The Board has adopted a written Related Party Transaction Policy (the "Policy") governing the review, approval and ratification of transactions that involve related persons and potential conflicts of interest. Related persons include the Company's officers, directors and director nominees, holders of more than five percent (5%) of a class of the Company's voting securities, and immediate family members of the foregoing persons. A "related party transaction" means a transaction or series of transactions in which the Company was, is or will be a participant and the amount involved will or may be expected to exceed $120,000, and in which a related party has a direct or indirect material interest. Examples include sales, purchases or other transfers of real or personal property, use of property and equipment by lease or otherwise, services received or furnished, the borrowing and lending of funds, as well as guarantees of loans or other undertakings, and the employment by the Company of an immediate family member of a related party, or a material change in the terms or conditions of the employment of such an individual.

The Audit Committee has the authority to (i) determine categories of related party transactions that are immaterial and are not required to be individually reported to, reviewed by, and/or approved by the Audit Committee and (ii) approve in advance categories of related party transactions that need not be individually reported to, reviewed by, and/or approved by the Audit Committee, but instead may be reported to and reviewed by the Audit Committee collectively on a periodic basis.

According to the Policy, the following transactions do not constitute related party transactions due to their nature, size and/or degree of significance to the Company and therefore do not require approval:

• Any transaction where the interest of a related party arises solely as a result of being a director or a less than 10% beneficial owner of another entity that is a party to the transaction.

• Any transaction where the interest of any (a) person who is or was (since the beginning of the last fiscal year for which the Company has filed an Annual Report on Form 10-K and proxy statement, even if they do not presently serve in that role) an executive officer, director or nominee for election as a director, (b) greater than five percent (5%) beneficial owner of the Common Stock, or (c) Immediate Family Member (as defined below) of any of the foregoing (such party, a "Related Party") arises solely as a result of being an employee (other than an executive officer) of another entity that is a party to the transaction, where (a) the Related Party and all other Related Parties own in the aggregate less than a five percent (5%) equity or similar ownership interest in such entity, (b) the Related Party and his or her spouse, parents, stepparents, children, stepchildren, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, and brothers- and sisters-in-law and anyone residing in such person's home (other than a tenant or employee) (such party, an "Immediate Family Member") are not involved in the negotiations of the terms of the transaction and do not receive any special benefits as a result of the transaction and (c) the amount involved in the transaction equals less than the greater of $1,000,000 or 2% of the consolidated annual gross revenues of the other entity that is a party to the transaction (and of which the Related Party is an employee).

• Any employment by the Company of an executive officer of the Company, so long as (a) the related compensation is required to be reported in the Company's proxy statement under applicable compensation disclosure requirements (generally applicable to "named executive officers") or (b) the executive officer is not an Immediate Family Member of another executive officer or director of the Company, or nominee for director, and the related compensation would be reported in the Company's proxy statement under applicable disclosure requirements if the executive officer was a "named executive officer," and the Compensation Committee approved (or recommended that the Board approve) such compensation.

• Any compensation paid to a director if the compensation is required to be reported in the Company's proxy statement under applicable compensation disclosure requirements.

• A transaction where the rates or charges involved are determined by competitive bids, or a transaction involving the rendering of services as a common or contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority.

• A transaction involving services as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services.

• A transaction in which the interest of the Related Party arises solely from ownership of a class of equity securities of the Company where all holders of that class of equity securities receive the same benefit on a pro rata basis.

***Audit Committee Review and Approval***

The Audit Committee has the primary responsibility for reviewing and approving "related party transactions." The Audit Committee may delegate its authority to review and approve specified related party transactions or categories of related party transactions (other than a transaction involving a member of the Audit Committee) to one or more members of the Audit Committee where the Audit Committee determines that such action is warranted. The Audit Committee may also delegate its authority to review and approve specified related party transactions or categories of related party transactions to our Chief Executive Officer and Chief Financial Officer, acting collectively (other than transactions involving any such delegated officer or a director). Any determinations made by such Audit Committee member or members or by officers pursuant to such delegated authority shall be promptly reported to the full Audit Committee, which may ratify or reverse such determination, as it deems appropriate.

In connection with the approval or ratification of a related party transaction, the Audit Committee shall consider all relevant facts and circumstances relating to whether the transaction is in our best interests, including consideration of the following factors:

• the Related Party's relationship to the Company and interest in the transaction;

• the material facts of the transaction, including the aggregate value of such transaction or, in the case of indebtedness, the amount of principal involved;

• the benefits to the Company of the transaction;

• if applicable, the availability of other sources of comparable products, services or capital;

• an assessment of whether the transaction is on terms that are comparable to the terms available to or from an unrelated third party or to employees generally;

• whether the transaction is in the ordinary course of business;

• whether a transaction has the potential to impair director independence; and

• whether the transaction constitutes a conflict of interest.

The Audit Committee has the obligation to notify our Board in writing on a quarterly basis of any and all related party transactions approved by the Audit Committee.

***Other Transactions***

*Credit Agreement and Convertible Notes Agreement*

The Company maintains an agreement with Luxor Capital (as amended or otherwise modified from time to time, the "Credit Agreement"). Additionally, the Company issued unsecured convertible promissory notes (the "Notes") to the Luxor Entities pursuant to an agreement, herein referred to as the "Convertible Notes Agreement". The Company entered into the Credit Agreement and Convertible Notes Agreement in November 2018. In January 2019, the Company entered into an amendment to the Credit Agreement with Luxor Capital and an amendment to the Convertible Notes Agreement with the Luxor Entities. In addition, on each of May 21, 2019, July 15, 2020, March 9, 2021, May 9, 2022, November 8, 2022 and January 6, 2023, the Company entered into amendments to the Credit Agreement with Luxor Capital and amendments to the Convertible Notes Agreement with the Luxor Entities. Additionally, on May 12, 2022, the Company entered into an amendment to the Convertible Notes Agreement with the Luxor Entities.

On May 1, 2020, the Company entered into a Limited Waiver and Conversion Agreement with respect to the Credit Agreement and Convertible Notes Agreement. On May 13, 2022, the Company entered into the May 2022 Conversion Agreement, and on July 22, 2022, the Company entered into the July 2022 Conversion Agreement, with respect to the Convertible Notes Agreement. Jonathan Green, a member of the Board, is a partner at Luxor Capital.

During the fiscal year ended December 31, 2022, the largest aggregate amount of principal outstanding was $49.5 million on the Convertible Notes Agreement and $35.0 million on the Credit Agreement. As of December 31, 2022, there was $42.5 million of principal outstanding on the Convertible Notes Agreement and $12.6 million of principal outstanding on the Credit Agreement. As of December 31, 2022, the principal amount of the Convertible Notes Agreement was convertible into 324,555 shares of Company common stock.

During the fiscal year ended December 31, 2022, we prepaid $22.9 million of principal on the Credit Agreement and the Luxor Entities converted $7.5 million of principal of the Notes into Company common stock. Portions of the interest payments due in 2022 were paid in cash and portions were paid-in-kind and added to the principal amounts of the related debt. During fiscal year 2022, we made cash payments of $2.2 million and $1.0 million for interest on the Convertible Notes Agreement and Credit Agreement, respectively. Interest paid-in-kind during fiscal year 2022 totaled approximately $0.5 million for each of the Convertible Notes Agreement and Credit Agreement. From January 1, 2022 to November 7, 2022, our interest rate was 6% on the Convertible Notes Agreement. On November 8, 2022, pursuant to an amendment to the Convertible Notes Agreement, the interest rate was reduced to 4.5% (see Part II, Item 8, *Note 11 - Debt*). From January 1, 2022 through December 31, 2022, our interest rate was 7.125% on the Credit Agreement.

During the fiscal year ended December 31, 2021, the largest aggregate amount of principal outstanding was $49.5 million on each of the Credit Agreement and Convertible Notes Agreement. As of December 31, 2021, there was $35.0 million of principal outstanding on the Credit Agreement and $49.5 million of principal outstanding on the Convertible Notes Agreement. As of December 31, 2021, (i) the principal amount of the Convertible Note Agreement was convertible into 284,506 shares of Company common stock and (ii) the lenders owned warrants to purchase an aggregate of 28,735 shares of Company common stock at an exercise price of $174.00 per share, expiring November 15, 2022. During fiscal year 2021, we prepaid $14.5 million of principal on the Credit Agreement and we paid $2.3 million and $2.4 million of interest on the Credit Agreement and Convertible Notes Agreement, respectively. From January 1, 2021 to December 31, 2021, our interest rate was 7.125% and 6% on the Credit Agreement and Convertible Notes Agreement, respectively.

*Other Transactions with Related Parties*

As of December 31, 2022, some of the restaurants on our Platform are affiliated with one current and one prior member of our Board. We estimate that we generated total revenue, inclusive of diner fees, of approximately $0.3 million and $0.7 million in fiscal 2022 and 2021, respectively, from such restaurants that are affiliated with a current and prior member of our Board. Such restaurants enter into customary master service agreements with the Company, which are generally consistent with our other national partner agreements.

## Item 14. Principal Accounting Fees and Services

The Company's independent registered public accounting firm is Moss Adams LLP, Denver, Colorado, PCAOB ID: 659.

### Independent Registered Public Accounting Firm Fees

The following table shows the fees for professional services rendered to the Company by Moss Adams LLP for services in respect of the years ended December 31, 2022 and 2021.

| | 2022 | 2021 |
|---|---|---|
| Audit Fees (1) | $1,538,035 | $832,012 |
| Audit-Related Fees (2) | — | — |
| Tax Fees (3) | — | — |
| All Other Fees (4) | — | — |
| Total Fees | $1,538,035 | $832,012 |

(1) Audit fees include fees associated with the annual audit of our consolidated financial statements, the reviews of our interim condensed consolidated financial statements, accounting and financial reporting consultations, and the issuance of consent and comfort letters in connection with registration statement filings with the SEC, and all services that are normally provided by the accounting firm in connection with statutory and regulatory filings or engagements.

(2) Audit-related fees pertain to professional services for assurance and related services that are reasonably related to the performance of the audit of our financial statements and are not reported under "Audit fees." These services include services and consultations related to the Company's registration statements.

(3) Tax fees include fees for tax compliance, tax advice and tax planning.

(4) All other fees consist of permitted services other than those that meet the criteria described above.

All of the professional services described above were pre-approved by the Audit Committee or were pre-approved in accordance with the Audit Committee Pre-Approval Policy. The Audit Committee was provided with regular updates as to the nature of such services and fees paid for such services.

None of the hours expended on the independent registered public accounting firm's engagement to audit the Company's financial statements for the most recent fiscal year were attributed to work performed by persons other than the independent registered public accounting firm's full-time permanent employees.

### Policy on Pre-Approval of Services Performed by Independent Registered Public Accounting Firm

The Audit Committee is responsible for appointing, setting compensation and overseeing the work of the independent auditors. In recognition of this responsibility, the Audit Committee shall review and, in its sole discretion, pre-approve all audit and permitted non-audit services to be provided by the independent auditors as provided under the Audit Committee's charter.

The Audit Committee has adopted a policy and procedures for the pre-approval of audit and non-audit services rendered by our independent registered public accounting firm. The policy generally requires pre-approval of specified services in the defined categories of audit services, audit-related services and tax services up to specified amounts. Pre-approval may also be given as part of the Audit Committee's approval of the scope of the engagement of the independent registered public accounting firm or on an individual, explicit, case-by-case basis before the independent registered public accounting firm is engaged to provide each service. The pre-approval of services may be delegated to one or more of the Audit Committee's members, but the decision must be reported to the full Audit Committee at its next scheduled meeting.

# PART IV

## Item 15. Exhibits, Financial Statement Schedules

**1. Financial Statements:**

The following Consolidated Financial Statements, notes to the Consolidated Financial Statements and the Report of Independent Registered Public Accounting Firm thereon are included beginning on page F-1 of this Form 10-K:

Report of Independent Registered Public Accounting Firm

Consolidated Balance Sheets as of December 31, 2022 and 2021

Consolidated Statements of Operations for the years ended December 31, 2022 and 2021

Consolidated Statements of Cash Flows for the years ended December 31, 2022 and 2021

Consolidated Statements of Stockholders' Equity for the years ended December 31, 2022 and 2021

Notes to Consolidated Financial Statements

**2. Financial Statement Schedules:**

All schedules are omitted because the required information is inapplicable or the information is presented in the Consolidated Financial Statements or the notes thereto.

**3. Exhibits:**

| Exhibit No. | Description |
|---|---|
| 3.1 | First Amendment to Third Amended and Restated Certificate of Incorporation (incorporated by reference to Exhibit 3.1 of the Form 8-K (Fi No. 001-37788) filed by the Company on November 21, 2022). |
| 3.2 | Third Amended and Restated Certificate of Incorporation (incorporated by reference to Exhibit 3.1 of the Form 8-A/A (File No. 001-37788) filed by the Company on November 19, 2018). |
| 3.3 | Amended and Restated Bylaws (incorporated by reference to Exhibit 3.2 of the Form 8-A/A (File No. 001-37788) filed by the Company on November 19, 2018). |
| 4.1 | Description of Registrant's Securities Registered Pursuant to Section 12 of the Securities Exchange Act of 1934 (incorporated by reference t Exhibit 4.1 of the Annual Report on Form 10-K (File No. 001-37788) filed by the Company on March 16, 2020). |
| 4.2 | Specimen Common Stock Certificate (incorporated by reference to Exhibit 4.1 of the Form 8-A/A (File No. 001-37788) filed by the Compa on November 19, 2018). |
| 4.3 | Specimen Warrant Certificate (incorporated by reference to Exhibit 4.2 of the Form 8-A/A (File No. 001-37788) filed by the Company on November 19, 2018). |
| 4.4 | Warrant Agreement, dated May 25, 2016, between the Company and Continental Stock Transfer &Trust Company, as warrant agent (incorporated by reference to Exhibit 4.4 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on June 1, 2016). |
| 4.5 | Amendment No. 1 to Warrant Agreement, dated as of February 25, 2019, by and between the Company and Continental Stock Transfer & Trust Company (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company o February 25, 2019). |

| Exhibit No. | Description |
|---|---|
| 4.6 | Form of Warrant (incorporated by reference to Exhibit 4.3 of the Form 8-A/A (File No. 001-37788) filed by the Company on November 19, 2018). |
| 10.1 | Credit and Guaranty Agreement, dated as of November 15, 2018, by and among Waitr Inc., as Borrower, Waitr Intermediate Holdings, LLC, certain subsidiaries of Waitr Inc., as Guarantors, various lenders and Luxor Capital Group, LP, as Administrative Agent, Collateral Agent an Lead Arranger (incorporated by reference to Exhibit 10.3 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on November 21, 2018). |
| 10.2 | Amendment No. 1 to Credit and Guaranty Agreement, dated as of January 17, 2019, by and among Waitr Inc., as Borrower, Waitr Intermediate Holdings, LLC, the various lenders and Luxor Capital Group, LP, as Administrative Agent and Collateral Agent (incorporated reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on January 18, 2019). |
| 10.3 | Amendment No. 2 to Credit and Guaranty Agreement, dated as of May 21, 2019, by and among Waitr Inc., Waitr Intermediate Holdings, LL Luxor Capital, LLC, as a Lender, and Luxor Capital Group, LP, as administrative agent and collateral agent for the Lenders (incorporated by reference to Exhibit 1.2 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on May 24, 2019). |
| 10.4 | Limited Waiver and Conversion Agreement, dated as of May 1, 2020, by and among Waitr Holdings Inc., Waitr Inc., Waitr Intermediate Holdings, LLC, the Lenders party thereto and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on May 7, 2020). |
| 10.5 | Amendment No. 3 to Credit and Guaranty Agreement, dated as of July 15, 2020, by and among Waitr Holdings Inc., Waitr Intermediate Holdings, LLC, Luxor Capital, LLC, Luxor Capital Group, LP, and the lenders party thereto (incorporated by reference to Exhibit 10.7 of th Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on August 6, 2020). |
| 10.6 | Amendment No. 4 to Credit and Guaranty Agreement, dated as of March 9, 2021, by and among Waitr Inc., as Borrower, Waitr Intermediate Holdings, LLC, the various lenders and Luxor Capital Group, LP, as Administrative Agent and Collateral Agent (incorporated by reference t Exhibit 10.1 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on May 6, 2021). |
| 10.7 | Amendment No. 5 to Credit and Guaranty Agreement, dated as of May 9, 2022, by and among Waitr Inc., Waitr Intermediate Holdings, LLC other guarantors party hereto, Luxor Capital, LLC and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on May 10, 2022). |
| 10.8 | Conversion Agreement dated as of May 13, 2022 by and among Waitr Holdings Inc., the lenders party thereto, and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on May 17, 2022 |
| 10.9 | Conversion Agreement dated as of July 22, 2022 by and among Waitr Holdings Inc., the lenders party thereto, and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on July 25, 2022) |
| 10.10 | Amendment No. 6 to Credit and Guaranty Agreement, dated as of November 8, 2022, by and among ASAP Inc. (f/k/a Waitr Inc.), Waitr Intermediate Holdings, LLC, other guarantors party hereto, Luxor Capital, LLC and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.3 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on November 9, 2022). |

| Exhibit No. | Description |
|---|---|
| 10.11 | Amendment No. 7 to Credit and Guaranty Agreement, dated as of January 6, 2023, by and among Waitr Inc., Waitr Intermediate Holdings, LLC, other guarantors party hereto, Luxor Capital, LLC and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on January 9, 2023). |
| 10.12 | Amendment No. 8 to Credit and Guaranty Agreement, dated as of March 31, 2023, by and among ASAP Inc. (f/k/a Waitr Inc.), Waitr Intermediate Holdings, LLC, other guarantors party hereto, Luxor Capital, LLC and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on April 3, 2023). |
| 10.13 | Pledge and Security Agreement, dated as of November 15, 2018, by and among Waitr Inc., Waitr Intermediate Holdings, LLC and certain subsidiaries of Waitr Inc., as Grantors, and Luxor Capital Group, LP, as Collateral Agent (incorporated by reference to Exhibit 10.4 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on November 21, 2018). |
| 10.14 | Credit Agreement, dated November 15, 2018, by and among the Company, as Borrower, various lenders and Luxor Capital Group, LP, as Administrative Agent and Lead Arranger (incorporated by reference to Exhibit 10.5 of the Current Report on Form 8-K (File No. 001-3778 filed by the Company on November 21, 2018). |
| 10.15 | Amendment No. 1 to Credit Agreement, dated as of January 17, 2019, by and among the Company, as Borrower, the lenders party thereto ar Luxor Capital Group, LP, as Administrative Agent (incorporated by reference to Exhibit 10.2 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on January 18, 2019). |
| 10.16 | Amendment No. 2 to Credit Agreement, dated as of May 21, 2019, by and among Waitr Holdings Inc., Luxor Capital, LLC, as a Lender, and Luxor Capital Group, LP, as administrative agent for the Lenders (incorporated by reference to Exhibit 1.1 of the Current Report on Form 8- (File No. 001-37788) filed by the Company on May 24, 2019). |
| 10.17 | Amendment No. 3 to Credit Agreement, dated as of July 15, 2020, by and among Waitr Holdings Inc., Waitr Intermediate Holdings, LLC, Luxor Capital, LLC, Luxor Capital Group, LP, and the lenders party thereto (incorporated by reference to Exhibit 10.6 of the Quarterly Repo on Form 10-Q (File No. 001-37788) filed by the Company on August 6, 2020). |
| 10.18 | Amendment No. 4 to Credit Agreement, dated as of March 9, 2021, by and among the Company, as Borrower, the lenders party thereto and Luxor Capital Group, LP, as Administrative Agent (incorporated by reference to Exhibit 10.2 of the Quarterly Report on Form 10-Q (File N 001-37788) filed by the Company on May 6, 2021). |
| 10.19 | Amendment No. 5 to Credit Agreement, dated as of May 9, 2022, by and among Waitr Holdings Inc., Luxor Capital, LLC and Luxor Capita Group, LP (incorporated by reference to Exhibit 10.2 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on Ma 10, 2022). |
| 10.20 | Amendment No. 6 to Credit Agreement dated May 12, 2022 by and among Waitr Holdings Inc., various lenders thereto, and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.2 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on Ma 17, 2022). |
| 10.21 | Amendment No. 7 to Credit Agreement, dated as of November 8, 2022, by and among Waitr Holdings Inc., various lenders thereto, and Lux Capital Group, LP (incorporated by reference to Exhibit 10.4 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on November 9, 2022). |

| Exhibit No. | Description |
|---|---|
| 10.22 | Amendment No. 8 to Credit Agreement, dated as of January 6, 2023, by and among Waitr Holdings Inc., Luxor Capital, LLC and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.2 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on January 9, 2023). |
| 10.23 | Amendment No. 9 to Credit Agreement, dated as of March 31, 2023, by and among Waitr Holdings Inc., Luxor Capital, LLC and Luxor Capital Group, LP (incorporated by reference to Exhibit 10.2 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on April 3, 2023). |
| 10.24 | Form of Convertible Promissory Note (incorporated by reference to Exhibit 10.6 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on November 21, 2018). |
| 10.25 | Form of Amended and Restated Registration Rights Agreement by and among the Company and the investors listed on the signature pages thereto (incorporated by reference to Exhibit 10.1 of the Form 8-A/A (File No. 001-37788) filed by the Company on November 19, 2018). |
| 10.26 | Registration Rights Agreement, dated November 15, 2018, by and among the Company and the parties listed on the signature pages thereto (incorporated by reference to Exhibit 10.2 of the Form 8-A/A (File No. 001-37788) filed by the Company on November 19, 2018). |
| 10.27 | Form of Registration Rights Agreement by and among Waitr Holdings Inc. and the parties listed on the signature pages thereto (incorporated by reference to Exhibit 10.3 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on January 18, 2019). |
| 10.28 | Fourth Amended and Restated Open Market Sale Agreement dated August 17, 2022, by and between Waitr Holdings Inc. and Jefferies LLC (incorporated by reference to Exhibit 1.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on August 17, 2022 |
| 10.29 | Letter Agreement, dated November 15, 2018, by and among the Company, Luxor Capital Group, LP, Luxor Capital Partners, LP, Luxor Capital Partners Offshore Master Fund, LP, Luxor Wavefront, LP and Lugard Road Capital Master Fund, LP. (incorporated by reference to Exhibit 10.9 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on November 21, 2018). |
| 10.30* | Amended and Restated Employment Agreement, dated April 23, 2021, by and between Waitr Holdings Inc. and Carl A. Grimstad (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on April 29, 2021 |
| 10.31* | Executive Employment Agreement, dated July 1, 2020, by and between Waitr Holdings Inc. and Thomas Pritchard (incorporated by reference to Exhibit 10.6 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on May 6, 2021). |
| 10.32* | Executive Employment Agreement, dated July 1, 2020, by and between Waitr Holdings Inc. and David J. Cronin (incorporated by reference Exhibit 10.7 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on May 6, 2021). |
| 10.33* | Executive Employment Agreement, dated May 28, 2020, by and between Waitr Holdings Inc. and Mark D'Ambrosio (incorporated by reference to Exhibit 10.8 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on May 6, 2021). |
| 10.34* | Amendment to the Mark D'Ambrosio employment agreement dated effective October 24, 2022 (incorporated by reference to Exhibit 10.5 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on November 9, 2022). |

| Exhibit No. | Description |
|---|---|
| 10.35* | Employment Agreement dated September 2, 2021, by and between Waitr Holdings Inc. and Armen Yeghyazarians (incorporated by referenc to Exhibit 10.6 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on November 2, 2021). |
| 10.36* | Amendment No. 1 to the employment agreement of Armen Yeghyazarians dated May 24, 2022 (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on May 25, 2022). |
| 10.37* | Employment Agreement dated January 7, 2022, by and between Waitr Holdings Inc. and Timothy Newton (incorporated by reference to Exhibit 10.27 of the Annual Report on Form 10-K (File No. 001-37788) filed by the Company on March 11, 2022). |
| 10.38* | Option Agreement, dated January 3, 2020, by and between Waitr Holdings Inc. and Carl A. Grimstad (incorporated by reference to Exhibit 10.2 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on January 3, 2020). |
| 10.39* | Performance Bonus Agreement, dated April 23, 2020, by and between Waitr Holdings Inc. and Carl A. Grimstad (incorporated by reference to Exhibit 10.1 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on April 28, 2020). |
| 10.40* | Restricted Stock Unit Award Agreement, dated April 23, 2020, by and between Waitr Holdings Inc. and Carl A. Grimstad (incorporated by referenced to Exhibit 10.2 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on April 28, 2020). |
| 10.41* | Restricted Stock Unit Award Agreement, dated April 23, 2021, by and between Waitr Holdings Inc. and Carl A. Grimstad (incorporated by reference to Exhibit 10.32 of the Annual Report on Form 10-K (File No. 001-37788) filed by the Company on March 11, 2022). |
| 10.42 | Form of Lockup Agreement (incorporated by reference to Exhibit 10.19 of the Current Report on Form 8-K (File No. 001-37788) filed by th Company on November 21, 2018). |
| 10.43 | Form of Lockup Agreement (incorporated by reference to Exhibit 10.4 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on January 18, 2019). |
| 10.44 | Form of Indemnification Agreement (incorporated by reference to Exhibit 10.20 of the Current Report on Form 8-K (File No. 001-37788) filed by the Company on November 21, 2018). |
| 10.45* | Waitr Holdings Inc. Amended and Restated 2018 Omnibus Incentive Plan (incorporated by reference to Exhibit 10.1 of the Current Report c Form 8-K (File No. 001-37788) filed by the Company on June 17, 2020). |
| 10.46* | Form of Restricted Stock Unit Award Agreement under the Amended and Restated 2018 Omnibus Incentive Plan (incorporated by reference to Exhibit 10.26 of the Annual Report on Form 10-K (File No. 001-37788) filed by the Company on March 8, 2021). |
| 10.47 | License, Release and Settlement Agreement, entered into as of June 22, 2021, by Waiter.com, Inc. and Waitr Holdings Inc. and Waitr Inc. (incorporated by reference to Exhibit 10.1 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on August 9, 2021). |
| 10.48 | Asset Purchase Agreement, dated as of August 9, 2021, by and among Waitr Holdings Inc., Cape Payments LLC, Cape Cod Merchant Services LLC, Brett Husak, and Brad Anderson (incorporated by reference to Exhibit 10.1 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on November 2, 2021). |

| Exhibit No. | Description |
|---|---|
| 10.49 | Asset Purchase Agreement, dated as of August 9, 2021, by and among Waitr Holdings Inc., Cape Payments LLC, Flow Payments LLC, Eastham Holdings LLC, and ProMerchant LLC (incorporated by reference to Exhibit 10.2 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on November 2, 2021). |
| 10.50 | Asset Purchase Agreement, dated as of August 9, 2021, by and among Waitr Holdings Inc., Cape Payments LLC, ProMerchant LLC, Jabala LLC and PMSB Holdings LLC (incorporated by reference to Exhibit 10.3 of the Quarterly Report on Form 10-Q (File No. 001-37788) filed by the Company on November 2, 2021). |
| 21.1 | Subsidiaries of the Registrant.[(1)] |
| 23.1 | Consent of Moss Adams LLP.[(1)] |
| 31.1 | Certification of the Principal Executive Officer pursuant to Rules 13a-14(b) and 15d-14(a) under the Securities Exchange Act of 1934, as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.[(1)] |
| 31.2 | Certification of the Principal Financial Officer pursuant to Rules 13a-14(b) and 15d-14(a) under the Securities Exchange Act of 1934, as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.[(1)] |
| 32.1 | Certification of the Principal Executive Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.[(1)] |
| 32.2 | Certification of the Principal Financial Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.[(1)] |
| 101.INS | Inline XBRL Instance Document – the instance document does not appear in the Interactive Data File because its XBRL tags are embedded within the Inline XBRL document.[(1)] |
| 101.SCH | Inline XBRL Taxonomy Extension Schema Document.[(1)] |
| 101.CAL | Inline XBRL Taxonomy Extension Calculation Linkbase Document.[(1)] |
| 101.DEF | Inline XBRL Taxonomy Extension Definition Linkbase Document.[(1)] |
| 101.LAB | Inline XBRL Taxonomy Extension Label Linkbase Document.[(1)] |
| 101.PRE | Inline XBRL Taxonomy Extension Presentation Linkbase Document.[(1)] |
| 104 | Cover Page Interactive Data File (embedded within the Inline XBRL document).[(1)] |

* Indicates a management contract or compensatory plan
[(1)] Filed herewith

**Item 16. Form 10-K Summary**

None.

## SIGNATURES

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

By: /s/ Armen Yeghyazarians
Armen Yeghyazarians
Chief Financial Officer and Chief Accounting Officer
(Principal Financial Officer)
April 17, 2023

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities indicated on April 17, 2023.

| Signature | Title |
|---|---|
| /s/ Carl A. Grimstad<br>Carl A. Grimstad | Chief Executive Officer and Chairman of the Board<br>(Principal Executive Officer) |
| /s/Armen Yeghyazarians<br>Armen Yeghyazarians | Chief Financial Officer and Chief Accounting Officer<br>(Principal Accounting Officer) |
| /s/ Jonathan Green<br>Jonathan Green | Director |
| /s/ Buford H. Ortale<br>Buford H. Ortale | Director |
| /s/ Steven L. Scheinthal<br>Steven L. Scheinthal | Director |
| /s/ J. Daniel Schmidt<br>J. Daniel Schmidt | Director |

**INDEX TO FINANCIAL STATEMENTS**

## Report of Independent Registered Public Accounting Firm

To the Shareholders and the Board of Directors of
Waitr Holdings Inc.

### *Opinion on the Financial Statements*

We have audited the accompanying consolidated balance sheets of Waitr Holdings Inc. (the "Company") as of December 31, 2022 and 2021, the related consolidated statements of operations, stockholders' equity (deficit) and cash flows for the years then ended, and the related notes (collectively referred to as the "consolidated financial statements"). In our opinion, the consolidated financial statements present fairly, in all material respects, the consolidated financial position of the Company as of December 31, 2022 and 2021, and the consolidated results of its operations and its cash flows for the years then ended, in conformity with accounting principles generally accepted in the United States of America.

### *Going Concern Uncertainty*

The accompanying consolidated financial statements have been prepared assuming that the Company will continue as a going concern. As described in Note 3 to the consolidated financial statements, the Company has suffered recurring losses from operations and declines in cash positions that raise substantial doubt about its ability to continue as a going concern. Management's plans in regard to these matters are also described in Note 3. The consolidated financial statements do not include any adjustments that might result from the outcome of this uncertainty.

### *Basis for Opinion*

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

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

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

### *Critical Audit Matters*

The critical audit matters communicated below are matters arising from the current period audit of the consolidated financial statements that were communicated or required to be communicated to the audit committee and that (1) relate to accounts or disclosures that are material to the consolidated financial statements and (2) involved our especially challenging, subjective, or complex judgments. The communication of critical audit matters does not alter in any way our opinion on the consolidated financial statements, taken as a whole, and we are not, by communicating the critical audit matters below, providing a separate opinion on the critical audit matters or on the accounts or disclosures to which they relate.

### *Valuation of Goodwill and Intangible Assets*

As disclosed in Note 9 to the consolidated financial statements, the Company recognized impairment charges relating to goodwill of $121 million and intangible assets of $32 million during the year ended December 31, 2022.

Prior to the three months ended September 30, 2022, the Company concluded that it had one reporting unit for purposes of goodwill impairment testing. During the three months ended September 30, 2022, the Company quantitatively and qualitatively reassessed its segment reporting and determined the Third-Party Payment Processing Referral Services Segment is material to the group and has two reporting units for purposes of goodwill impairment testing. During the three months ended September 30, 2022, the Company reallocated its goodwill from a single reporting unit to the Delivery Services Segment and the Third-Party Payment Processing Referral Services Segment based on a relative fair value analysis using several probability weighted scenarios.

Fair value of goodwill is estimated giving consideration to the Income Approach, including the discounted cash flow method, and the Market Approach, including the similar transactions method and guideline public company method. Fair value of the trade names in the Delivery Services Segment was estimated using the Income Approach, specifically, the relief from royalty rate method. The fair value of the customer relationships and developed technology in the Delivery Services Segment was estimated using the Income Approach, specifically the discounted cash flow method.

We identified the valuation of goodwill, trade names, customer relationships and developed technology in the Delivery Services Segment to be critical audit matters. The Company's determination of the fair value of goodwill and the intangible assets required significant judgment by management, which in turn led to a high degree of auditor judgment, subjectivity and effort in performing procedures and evaluating certain of management's significant assumptions, including forecasted results (e.g., projected revenues and operating costs) and market-based enterprise value to revenue multiples. In addition, the audit effort involved the use of professionals with specialized skill and knowledge.

The primary procedures we performed to address this critical audit matter included:

- Evaluating the Company's accounting policies for goodwill, trade names, customer relationships and developed technology and testing management's interpretation of the accounting guidance related to the consideration of events and circumstances that would require an impairment test.
- Testing management's analysis and determination of reporting units and the reallocation of goodwill to those reporting units in the third quarter of 2022.
- Involving professionals with specialized skills and knowledge to assist with our evaluation of the methods used and certain key assumptions used to develop the estimates of fair value of goodwill, trade names, customer relationships and developed technology.
- Testing management's process used to develop the estimates of fair value by performing the following procedures -
  - Obtaining an understanding of the qualifications of the Company's third-party valuation specialist and evaluating the specialist's objectivity.
  - Evaluating the valuation methodologies used.
  - Testing the accuracy and completeness of the underlying data used in the valuations.
  - Evaluating the reasonableness of significant assumptions used by the Company to develop the estimates of fair value.

***Revenue Recognition for the Delivery Services Segment***

The Company's information technology (IT) environment is complex and includes proprietary online ordering technology systems (the "Platform") which process revenue-related data which output the Company relies on to process and record its revenue transactions. Given the Company's systems to process and record revenue are highly automated, there are potential risks arising from the capture, processing and transfer of data accurately and completely between the various IT systems. As discussed in Management's Report on Internal Control Over Financial Reporting, the Company identified a material weakness in internal control related to the ineffective design and operation of information technology general controls in the areas of program change management and user access over certain IT systems that support the Company's financial reporting processes. Specifically, the Company did not adequately design and maintain user access and program change management controls to ensure that IT program and data changes affecting the Platform are authorized and implemented appropriately. The IT systems involved generate data that impacts the Company's revenue process. As a result, the Company's revenue process controls were also deemed ineffective because they could have been adversely impacted.

This material weakness had a pervasive impact on the Company's controls over the revenue process, including the related business process controls that rely on information and reports produced by the Platform. We identified the impact of the material weakness as a critical audit matter due to the increased extent of audit effort required to audit revenue in the Delivery Services Segment, including the need to modify the nature and extent of audit procedures performed as well as audit evidence obtained.

The primary procedures we performed to address this critical audit matter included:

- Testing a selection of individual transactions and performing the following procedures:
    - Confirming the amount of revenue and key terms of a transaction with a restaurant customer and performing alternative procedures for non-responses to the confirmations.
    - Recalculating revenue based on gross food sales per the Platform and the transaction fee rate in the Platform.
    - Comparing the amount of revenue included in the Platform to the Company's books and records.
    - Comparing the amount of revenue recognized in the Platform to cash receipts.
- Testing the delivery transaction fee rate per the Platform by agreeing it to an executed master service agreement with a customer or to the customer's historical delivery transaction fee rate.
- Testing revenue journal entries for unusual account combinations that could result from management override of controls.
- Developing an independent expectation of revenue and performing the following:
    - Reconciling net revenue per the Platform to third-party merchant processor reports and to the Company's books and records.
    - Reconciling the net revenue recorded in the Platform to the Company's books and records and to cash receipts reported in the Company's bank statements.
    - Testing the bank deposits included in the reconciliation to evaluate the classification between revenue and non-revenue.

/s/ Moss Adams LLP

Denver, Colorado
April 17, 2023

We have served as the Company's auditor since 2018.

**WAITR HOLDINGS INC.**
**CONSOLIDATED BALANCE SHEETS**
**(in thousands, except share and per share data)**

| | December 31, 2022 | December 31, 2021 |
|---|---|---|
| **ASSETS** | | |
| **CURRENT ASSETS** | | |
| Cash | $ 12,066 | $ 60,111 |
| Accounts receivable, net | 3,982 | 3,027 |
| Capitalized contract costs, current | 1,559 | 1,170 |
| Prepaid expenses and other current assets | 5,997 | 8,706 |
| **TOTAL CURRENT ASSETS** | **23,604** | **73,014** |
| Property and equipment, net | 808 | 3,763 |
| Capitalized contract costs, noncurrent | 3,403 | 3,183 |
| Goodwill | 9,536 | 130,624 |
| Intangible assets, net | 7,065 | 43,126 |
| Operating lease right-of-use assets | 2,917 | 4,327 |
| Other noncurrent assets | 812 | 1,070 |
| **TOTAL ASSETS** | **$ 48,145** | **$ 259,107** |
| **LIABILITIES AND STOCKHOLDERS' EQUITY** | | |
| **LIABILITIES:** | | |
| **CURRENT LIABILITIES** | | |
| Accounts payable | $ 5,689 | $ 7,018 |
| Restaurant food liability | 1,282 | 3,327 |
| Accrued payroll | 1,672 | 2,988 |
| Short-term loans for insurance financing | 1,892 | 3,142 |
| Income tax payable | 74 | 74 |
| Operating lease liabilities | 1,023 | 1,581 |
| Other current liabilities | 17,596 | 19,309 |
| **TOTAL CURRENT LIABILITIES** | **29,228** | **37,439** |
| Long term debt - related party | 53,901 | 81,977 |
| Accrued medical contingency | — | 53 |
| Operating lease liabilities, net of current portion | 2,079 | 3,034 |
| Other noncurrent liabilities | 28 | 2,115 |
| **TOTAL LIABILITIES** | **85,236** | **124,618** |
| Commitments and contingent liabilities (Note 13) | | |
| **STOCKHOLDERS' EQUITY:** | | |
| Common stock, $0.0001 par value; 249,000,000 shares authorized and 12,955,299 and 7,304,714 shares issued and outstanding at December 31, 2022 and 2021, respectively | 21 | 15 |
| Additional paid in capital | 538,812 | 503,609 |
| Accumulated deficit | (575,924) | (369,135) |
| **TOTAL STOCKHOLDERS' EQUITY (DEFICIT)** | **(37,091)** | **134,489** |
| **TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY** | **$ 48,145** | **$ 259,107** |

The accompanying notes are an integral part of these consolidated financial statements.

**WAITR HOLDINGS INC.**
**CONSOLIDATED STATEMENTS OF OPERATIONS**
**(in thousands, except share and per share data)**

| | Year Ended December 31, | |
|---|---|---|
| | 2022 | 2021 |
| **REVENUE** | **$ 111,801** | **$ 182,194** |
| **COSTS AND EXPENSES:** | | |
| Operations and support | 60,055 | 108,599 |
| Sales and marketing | 29,388 | 19,198 |
| Research and development | 4,454 | 4,156 |
| General and administrative | 38,010 | 45,042 |
| Depreciation and amortization | 13,296 | 12,429 |
| Goodwill impairment | 121,088 | — |
| Intangible and other asset impairments | 32,957 | 186 |
| Loss on disposal of assets | 288 | 158 |
| **TOTAL COSTS AND EXPENSES** | **299,536** | **189,768** |
| **LOSS FROM OPERATIONS** | **(187,735)** | **(7,574)** |
| **OTHER EXPENSES (INCOME) AND LOSSES (GAINS), NET** | | |
| Interest expense | 5,664 | 7,074 |
| Other expense (income) | 13,310 | (9,443) |
| **NET LOSS BEFORE INCOME TAXES** | **(206,709)** | **(5,205)** |
| Income tax expense | 80 | 24 |
| **NET LOSS** | **$ (206,789)** | **$ (5,229)** |
| **LOSS PER SHARE:** | | |
| Basic and diluted | $ (23.00) | $ (0.87) |
| **Weighted average shares used to compute net loss per share:** | | |
| Weighted average common shares outstanding – basic and diluted | 8,991,262 | 6,029,671 |

The accompanying notes are an integral part of these consolidated financial statements.

**WAITR HOLDINGS INC.**
**CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY (DEFICIT)**
**(in thousands, except share data)**

| | Common stock | | | | |
|---|---|---|---|---|---|
| | Shares | Amount | Additional paid in capital | Accumulated deficit | Total stockholders' equity (deficit) |
| **Balances at December 31, 2020** | **5,562,952** | **$ 11** | **$ 451,991** | **$ (363,906)** | **$ 88,096** |
| Net loss | — | — | — | (5,229) | (5,229) |
| Exercise of stock options and vesting of restricted stock units | 133,893 | 1 | 13 | — | 14 |
| Taxes paid related to net settlement on stock-based compensation | — | — | (985) | — | (985) |
| Stock-based compensation | — | — | 7,974 | — | 7,974 |
| Equity issued for asset acquisition | 307,739 | — | 13,724 | — | 13,724 |
| Issuance of common stock | 1,300,130 | 3 | 30,892 | — | 30,895 |
| **Balances at December 31, 2021** | **7,304,714** | **15** | **503,609** | **(369,135)** | **134,489** |
| Net loss | — | — | — | (206,789) | (206,789) |
| Exercise of stock options and vesting of restricted stock units | 94,911 | — | — | — | — |
| Taxes paid related to net settlement on stock-based compensation | — | — | (106) | — | (106) |
| Stock-based compensation | — | — | 5,703 | — | 5,703 |
| Stock issued for conversion of Notes | 1,570,575 | 3 | 16,944 | — | 16,947 |
| Issuance of common stock | 3,985,099 | 3 | 12,662 | — | 12,665 |
| **Balances at December 31, 2022** | **12,955,299** | **$ 21** | **$ 538,812** | **$ (575,924)** | **$ (37,091)** |

The accompanying notes are an integral part of these consolidated financial statements.

**WAITR HOLDINGS INC.**
**CONSOLIDATED STATEMENTS OF CASH FLOWS**
**(in thousands)**

| | Year Ended December 31, | |
|---|---|---|
| | **2022** | **2021** |
| **Cash flows from operating activities:** | | |
| Net loss | $ (206,789) | $ (5,229) |
| Adjustments to reconcile net loss to net cash used in operating activities: | | |
| Non-cash interest expense | 2,323 | 2,258 |
| Induced conversion expense related to Notes | 9,499 | — |
| Stock-based compensation | 5,703 | 7,974 |
| Loss on disposal of assets | 288 | 158 |
| Depreciation and amortization | 13,296 | 12,429 |
| Goodwill impairment | 121,088 | — |
| Intangible and other asset impairments | 32,957 | 186 |
| Amortization of capitalized contract costs | 1,358 | 964 |
| Change in estimate of accrued medical contingency | — | (16,715) |
| Change in fair value of contingent consideration liability | (1,939) | 253 |
| Other | (103) | (111) |
| Changes in assets and liabilities: | | |
| Accounts receivable | (955) | 1,503 |
| Capitalized contract costs | (1,967) | (2,151) |
| Prepaid expenses and other current assets | 2,709 | (1,865) |
| Other noncurrent assets | 275 | (243) |
| Accounts payable | (1,329) | 1,307 |
| Restaurant food liability | (2,045) | (974) |
| Income tax payable | — | (48) |
| Accrued payroll | (1,316) | (2,062) |
| Accrued medical contingency | (53) | (218) |
| Other current liabilities | (3,939) | 1,039 |
| Other noncurrent liabilities | 2,223 | (796) |
| **Net cash used in operating activities** | **(28,716)** | **(2,341)** |
| **Cash flows from investing activities:** | | |
| Purchases of property and equipment | (284) | (767) |
| Internally developed software | (7,439) | (8,752) |
| Purchase of domain names | (26) | (3,006) |
| Acquisitions, net of cash acquired | — | (25,435) |
| Proceeds from sale of property and equipment | 61 | 21 |
| **Net cash used in investing activities** | **(7,688)** | **(37,939)** |
| **Cash flows from financing activities:** | | |
| Proceeds from issuance of stock | 12,665 | 30,895 |
| Payments on long-term loan | (22,945) | (14,472) |
| Borrowings under short-term loans for insurance financing | 4,968 | 8,671 |
| Payments on short-term loans for insurance financing | (6,218) | (8,256) |
| Payments on acquisition loans | — | (182) |
| Payments on finance lease obligation | (5) | — |
| Proceeds from exercise of stock options | — | 14 |
| Taxes paid related to net settlement on stock-based compensation | (106) | (985) |
| **Net cash (used in) provided by financing activities** | **(11,641)** | **15,685** |
| **Net change in cash** | **(48,045)** | **(24,595)** |
| Cash, beginning of period | 60,111 | 84,706 |
| **Cash, end of period** | **$ 12,066** | **$ 60,111** |
| **Supplemental disclosures of cash flow information:** | | |
| Cash paid during the period for interest | $ 3,341 | $ 4,816 |
| **Supplemental disclosures of non-cash investing and financing activities:** | | |
| Conversion of convertible notes to stock | $ 16,947 | $ — |
| Stock issued as consideration in acquisitions | — | 13,724 |
| Noncash impact of operating lease assets upon adoption | — | 5,833 |
| Noncash impact of operating lease liabilities upon adoption | — | 6,232 |

The accompanying notes are an integral part of these consolidated financial statements.

**WAITR HOLDINGS INC.**
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS**
**(In thousands, except share and per share data)**

## 1. Organization

Waitr Holdings Inc., a Delaware corporation, together with its wholly owned subsidiaries (the "Company," "ASAP," "we," "us" and "our"), operates an online ordering technology platform (the "Platform"), providing delivery, carryout and dine-in options, connecting restaurants, merchants, drivers and diners in certain cities in the United States. The Platform uses the "deliver anything ASAP" model making it easy for consumers to order food, alcohol, convenience, grocery, flowers, auto parts and more. The Platform also includes proprietary in-stadium mobile ordering technology, providing an enhanced fan experience at sports and entertainment venues. Additionally, the Company facilitates access to third parties that provide payment processing solutions for restaurants and other merchants, pursuant to the acquisition of the Cape Payment Companies (as defined below) on August 25, 2021 (see *Note 5 – Business Combinations*).

On November 18, 2022, the Company filed a Certificate of Amendment to amend the Company's Third Amended and Restated Certificate of Incorporation, which effected a one for twenty (1:20) reverse stock split (the "Reverse Stock Split") of its outstanding common stock. See *Note 15 – Stockholders' Equity* for additional information. All common share and per share amounts presented in the consolidated financial statements and accompanying notes have been retroactively adjusted to reflect the Reverse Stock Split.

## 2. Basis of Presentation and Summary of Significant Accounting Policies

### Basis of Presentation

The consolidated financial statements and accompanying notes have been prepared in accordance with generally accepted accounting principles in the United States of America ("GAAP") and in accordance with the rules and regulations of the United States Securities and Exchange Commission ("SEC"). References to the Accounting Standards Codification ("ASC") and Accounting Standards Updates ("ASUs") included hereafter refer to the ASC and ASUs established by the Financial Accounting Standards Board (the "FASB") as the source of authoritative GAAP.

### Reclassifications

Certain amounts from prior periods have been reclassified to conform to the current period presentation.

### Principles of Consolidation

The accompanying consolidated financial statements include the accounts of the Company and all wholly owned subsidiaries. Intercompany transactions and balances have been eliminated upon consolidation.

### Use of Estimates

The preparation of the consolidated financial statements in accordance with GAAP requires the Company to make estimates and assumptions that affect the amounts reported in the consolidated financial statements and accompanying notes. Significant estimates and judgments relied upon in preparing these consolidated financial statements affect the following items:

- incurred loss estimates under our insurance policies with large deductibles or retention levels;
- loss exposure related to claims;
- determination of agent vs. principal classification for revenue recognition purposes;
- income taxes;
- useful lives of tangible and intangible assets;
- equity compensation;
- contingencies;
- fair value and recoverability of property and equipment;
- fair value of goodwill and other intangible assets, including the recoverability of intangible assets with finite lives and other long-lived assets; and

- fair value of assets acquired, liabilities assumed and contingent consideration as part of a business combination.

The Company regularly assesses these estimates and records changes to estimates in the period in which they become known. The Company bases its estimates on historical experience and various other assumptions believed to be reasonable under the circumstances. Changes in the economic environment, financial markets, and any other parameters used in determining these estimates could cause actual results to differ from those estimates.

**Segments**

Operating segments are identified as components of an enterprise about which separate discrete financial information is available for evaluation by the chief operating decision maker (the “CODM”) in making decisions regarding resource allocation and assessing performance. The Company has determined that its chief executive officer is the CODM of the Company.

Our operations revolve around two primary areas of service: (i) delivery services, which include operations related to the Company’s technology platform for online ordering and delivery (“Delivery Services”), and (ii) third-party payment processing referral services, which include operations related to facilitating access to third parties that provide payment processing solutions for restaurants and other merchants (“Third-Party Payment Processing Referral Services”). Prior to the three months ended September 30, 2022, the Company concluded that we had one operating segment as the operations of Third-Party Payment Processing Referral Services were not material to the Company’s consolidated operations. The CODM monitored performance of the Company on a consolidated basis during such time, with financial data related to Third-Party Payment Processing Referral Services being reviewed primarily for purposes of monitoring the achievement of an earnout provision associated with the acquisition of the Cape Payment Companies (see *Note 5 – Business Combinations*).

During the three months ended September 30, 2022, as the Third-Party Payment Processing Referral Services area became more significant to the operations of the Company, primarily on a percentage of revenue basis, our CODM began to manage operations and assess the Company’s performance based on the operations of the Delivery Services and Third-Party Payment Processing Referral Services areas separately. We quantitatively and qualitatively reassessed our segment reporting and determined the Third-Party Payment Processing Referral Services Segment is material to the group and now have two operating segments. See *Note 17 – Segment Information* for additional information on the Company’s segments and *Note 4 – Revenue* for additional information on revenue derived by segments.

**Business Combinations**

The Company accounts for business combinations under the acquisition method of accounting, in accordance with ASC Topic 805, *Business Combinations*, recording any assets acquired and liabilities assumed based on their respective fair values. Any excess of the fair value of merger consideration over the fair value of the assets acquired less liabilities assumed is recorded as goodwill. The Company uses management estimates based on historically similar transactions to assist in establishing the acquisition date fair values of assets acquired, liabilities assumed, and contingent consideration granted, if any. These estimates and valuations require the Company to make significant assumptions, including projections of future events and operating performance.

**Contingent Consideration**

The Company acquired the Cape Payment Companies on August 25, 2021 (see *Note 5 – Business Combinations*). Consideration for the acquisition included an earnout provision which provides for a one-time payment to the sellers, if the Cape Payment Companies exceed certain future revenue targets. The contingent consideration obligation for the earnout provision is valued at fair value as of the acquisition date, with subsequent changes in fair value evaluated at the end of each reporting period through the term of the earnout and recognized in income (loss) from operations in the consolidated statement of operations. Current and noncurrent portions of the contingent consideration obligation are included in other current liabilities and other noncurrent liabilities in the consolidated balance sheet.

**Cash**

Cash consists of demand deposits with financial institutions, as well as cash owed to restaurants on the Platform. The Company has a compensating balance arrangement with its financial institution related to a letter of credit. As of December 31, 2022, cash supporting the outstanding letter of credit was $601.

Certain restaurants on the Platform receive their portion of payments collected through the Company's Platform less frequently than daily. Upon receipt of the restaurants' cash, the Company records an offsetting liability. As of December 31, 2022 and 2021, our restaurant liability was $1,282 and $3,327, respectively.

The Company regularly maintains cash in excess of federally insured limits at financial institutions. The Company makes such deposits with entities it believes are of high credit quality and has not incurred any losses related to these balances. Management believes its credit risk, with respect to these financial institutions, to be minimal.

**Accounts Receivable and Allowance for Doubtful Accounts and Chargebacks**

Accounts receivable is primarily comprised of credit card receivables due from the credit card processor. Credit card payments on orders made through the Platform are generally remitted to the Company in one to six days from the date revenue is generated. Additionally, accounts receivable is also comprised of residual commissions receivable in connection with the acquisition of the Cape Payment Companies on August 25, 2021 (see *Note 5 – Business Combinations*).

Accounts receivable are stated net of an allowance for doubtful accounts, determined by management through an evaluation of specific accounts, considering historical experience, aging of accounts receivable, and information regarding the creditworthiness of the customers. When it becomes probable that the receivable will not be collected, the balance is written off. The Company performs periodic credit evaluations of the financial condition of customers, monitors collections and payments from customers, and generally does not require collateral.

Additionally, the Company is liable for uncollected credit card receivables (or "chargebacks"), including fraudulent orders, when a consumer's card is authorized but fails to process and for other unpaid credit card receivables. Chargebacks are recorded as a reduction of the revenue recorded for the transaction.

**Advertising Costs**

The costs of advertising are generally expensed as incurred, or in certain cases, advertising costs are capitalized and expensed when the advertisement first takes place. The accounting policy selected from these two alternatives is applied consistently to similar kinds of advertising activities. For the years ended December 31, 2022 and 2021, the Company recognized expense attributable to advertising totaling $6,896 and $4,681, respectively. Advertising costs are included in sales and marketing expense on the Company's consolidated statements of operations.

**Property and Equipment, net**

Property and equipment, net is stated at cost less accumulated depreciation. Depreciation is computed using the straight-line method over the estimated useful lives of the assets.

Useful lives of each asset class are as follows:

| | |
|---|---|
| Equipment | 3 years |
| Furniture | 5 years |
| Leasehold improvements | 7 years |

Maintenance and repair costs are expensed as incurred. Major improvements, which extend the useful life of the related asset, are capitalized. When these assets are sold or otherwise disposed of, the asset and related depreciation are relieved and any gain or loss is included in the consolidated statements of operations for the period of sale or disposal.

**Intangible Assets**

*Internally Developed Software*

The Company incurs expenses associated with software development of new features and functionality, which includes wages, employee benefits, and other compensation-related expenses associated with these improvements. Additionally, the Company incurs third-party development and programming costs.

*Costs of Software to Be Sold, Leased, or Marketed*

The Company accounts for costs incurred to develop its externally-marketed platform in accordance with ASC Topic 985-20*, Software — Costs of Software to Be Sold, Leased, or Marketed*. Internal and external costs incurred after technological feasibility has been established are capitalized. Technological feasibility is established upon completion of planning, designing, coding, and testing activities necessary to establish that the product can be produced to meet its design specifications, including functions, features, and technical performance requirements. The Company's software products generally reach technical feasibility shortly before the products are released to production. Capitalized software costs are amortized on a product-by-product basis. The Company amortizes capitalized software costs using the straight-line method over the estimated economic life of the product, which is generally 3 years.

*Internal Use Software*

The Company also capitalizes costs to develop or purchase internal-use software in accordance with ASC Topic 350-40, *Intangibles, Goodwill and Other — Internal-Use Software*. Costs are capitalized as incurred after the preliminary project stage is completed, the Company authorizes and commits funding to the project, and it is probable that the project will be completed and used for intended function. The Company amortizes capitalized software costs on a straight-line basis over the estimated useful term, which is 3 years.

*Customer Relationships*

The Company records customer relationship intangible assets at fair value as of the date of acquisition and amortizes the costs on a straight-line basis to reflect the pattern in which the economic benefits of the intangible asset are consumed. The Company's customer relationship intangible assets have estimated useful lives of 7.5 years.

*Trademarks, trade name and domain name intangible assets*

The Company records trademarks, trade name and domain name intangible assets at fair value as of the date of acquisition and amortizes the costs on a straight-line basis over their estimated useful lives. The Bite Squad, Delivery Dudes and Cape Payment Companies trade name assets are being amortized over their estimated useful lives of 3 years. The Company has determined that the trademark intangible asset and domain names related to the Company's rebranding initiative are indefinite-lived assets and therefore are not subject to amortization but are evaluated annually for impairment.

**Impairment of Long-Lived and Other Intangible Assets**

The Company reviews the recoverability of its long-lived assets, including acquired technology, capitalized software costs, and property and equipment, when events or changes in circumstances occur that indicate that the carrying value of the asset may not be recoverable. Recoverability of finite and other long-lived assets is measured by comparing the carrying amount of an asset group to the fair value. The fair value is typically estimated based on future undiscounted net cash flows expected to be generated by that asset group. The Company groups assets for purposes of such review at the lowest level for which identifiable cash flows of the asset group are largely independent of the cash flows of the other groups of assets and liabilities. If the underlying assets are not supported by cash flow from operations, fair value is determined using other methods such as orderly liquidation value. An orderly liquidation value is the amount that could be realized upon liquidation given a sufficient amount of time to find a purchaser for a sale of assets in their existing condition and location. The amount of impairment to be recognized for finite and indefinite-lived intangible assets and other long-lived assets is calculated as the difference between the carrying value and the fair value of the asset group.

The Company recognized intangible and other asset impairment charges totaling $32,957 and $186 during the years ended December 31, 2022 and 2021, respectively (see *Note 9 – Intangible Assets and Goodwill* and *Note 8 – Property and Equipment, Net*).

**Goodwill**

Goodwill represents the excess purchase price over tangible and intangible assets acquired, less liabilities assumed arising from business combinations. The Company conducts its goodwill impairment test annually as of October 1, or more frequently if indicators of impairment exist. When performing the annual impairment test, the Company may elect to utilize a qualitative assessment to evaluate whether it is more likely than not that the fair value of a reporting unit is less than its carrying amount. If the qualitative assessment indicates that goodwill impairment is more likely than not, the Company performs a quantitative impairment test. The Company would recognize an impairment charge for the amount by which the reporting unit's carrying amount exceeds its fair value, if any, not to exceed the carrying amount of goodwill.

The Company recognized goodwill impairment charges totaling $121,088 during the year ended December 31, 2022 (see *Note 9 – Intangible Assets and Goodwill*). The Company has determined there was no goodwill impairment during the year ended December 31, 2021.

**Leases**

The Company adopted ASC 842, *Leases* on January 1, 2021 using the modified retrospective transition approach, with no adjustment to prior comparative periods. ASC 842 continues to retain a distinction between finance and operating leases but requires lessees to recognize a right-of-use asset representing its right to use the underlying asset for the lease term and a corresponding lease liability on the balance sheet for all leases with terms greater than twelve months.

The Company determines if an arrangement is a lease at inception of a contract. A contract is or contains a lease if it conveys the right to control the use of an identified asset for a period of time in exchange for consideration. The Company elected the optional practical expedient package, which includes retaining the current classification of leases, and is utilizing the practical expedient which allows the use of hindsight in determining the lease term and in assessing impairment of its operating lease right-of-use assets. Additionally, the Company has elected to treat lease and non-lease components as a single lease component for all assets. The Company has elected to apply the short-term scope exception for leases with original terms of twelve months or less, and accordingly, recognizes the lease payments for such leases in the statement of operations on a straight-line basis over the lease term and variable lease payments in the period in which the obligation for those payments is incurred.

As the Company's leases do not provide an implicit rate, the Company generally uses its incremental borrowing rate based on the estimated rate of interest for collateralized borrowing over a similar term of the lease payments at commencement date, which is estimated to be 5.0%. See *Note 13 – Commitments and Contingent Liabilities* for additional details on the Company's leases.

**Stock-Based Compensation**

The Company measures compensation expense for all stock-based awards, including stock options, restricted stock units ("RSUs") and restricted stock awards ("RSAs"), in accordance with ASC Topic 718, *Compensation — Stock Compensation*. Stock-based compensation is measured at fair value on grant date and recognized as compensation expense ratably over the course of the requisite service period for awards expected to vest. The resulting expense is recorded either in operations and support, sales and marketing, research and development, or general and administrative expense, depending on the department of the recipient. The Company recognizes forfeitures of stock-based awards as they occur. In the case of an award pursuant to which a performance condition must be met for the award to vest, no stock-based compensation cost is recognized until such time as the performance condition is considered probable of being met, if at all. If the assessment of probability of the performance condition changes, the impact of the change in estimate would be recognized in the period of change. Because of the non-cash nature of stock-based compensation, it is added back to net income in arriving at net cash provided by operating activities in our statement of cash flows.

The fair value of restricted shares is typically determined based on the closing price of the Company's common stock on the date of grant. The Company uses an option-pricing model to determine the fair value of stock options. Determining the fair value of stock options at the grant date requires judgment. The determination of the grant date fair value of options using an option-pricing model is affected by the Company's estimated common stock value, as well as assumptions regarding a number of other complex and subjective variables. These assumptions include:

*Risk-free rate:* Risk-free interest rates are derived from U.S. Treasury securities as of the option grant date.

*Volatility:* Volatility of the Company's stock price is estimated based on a combination of the historical volatility of the Company's stock price and the historical and implied volatility of comparable publicly traded companies.

*Expected term:* The expected term calculation for option awards considers a combination of the Company's historical and estimated future exercise behavior.

If any of the assumptions used in the option-pricing model change significantly, stock-based compensation for future awards may differ materially compared to the awards granted.

**Debt Issuance Costs**

The Company incurs debt issuance costs in connection with its debt facilities and related amendments. Amounts paid directly to lenders are classified as issuance costs and are recorded as a reduction of the carrying value of the debt. Debt issuance costs are amortized using the effective interest rate method to interest expense on the Company's consolidated statements of operations. See *Note 11 – Debt* for additional details.

**Convertible Notes**

The Company accounts for convertible notes in accordance with ASC Topic 470-20, *Debt with Conversion and Other Options*. Convertible notes are classified as liabilities measured at amortized cost, net of debt discounts from the allocation of proceeds. Interest expense is recognized using the effective interest method over the expected term of the debt instrument pursuant to ASC Topic 835, *Interest*.

*Beneficial Conversion Feature*

If the amount allocated to the convertible notes results in an effective per share conversion price that is less than the fair value of the Company's common stock on the commitment date, the intrinsic value of this beneficial conversion feature is recorded as a discount to the convertible notes, with a corresponding increase to additional paid in capital. The beneficial conversion feature discount is equal to the difference between the effective conversion price and the fair value of the Company's common stock at the commitment date, unless limited by the remaining proceeds allocated to the convertible notes.

**Earnings per Common Share**

Basic earnings (loss) per share is computed by dividing net income (loss) attributable to common stockholders by the weighted-average number of common stock outstanding during the period, without consideration for common stock equivalents. Diluted earnings (loss) per share attributable to common stockholders is computed by dividing net income (loss) attributable to common stockholders by the weighted-average number of common stock outstanding during the period and potentially dilutive common stock equivalents, including stock options, RSAs, RSUs and warrants, except in cases where the effect of the common stock equivalent would be antidilutive.

Under GAAP, certain instruments granted in stock-based payment transactions are considered participating securities prior to vesting and are therefore required to be included in the earnings allocation in calculating earnings per share under the two-class method. Companies are required to treat unvested stock-based payment awards with a right to receive non-forfeitable dividends as a separate class of securities in calculating earnings per share, except in cases where the effect of the inclusion of the participating securities would be antidilutive.

**Fair Value Measurements**

The Company records the fair value of assets and liabilities in accordance with ASC Topic 820, *Fair Value Measurement*. ASC 820 defines fair value as the price received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date and in the principal or most advantageous market for that asset or liability. Based on the guidance in ASC 820, the Company uses a three-tier fair value hierarchy, prioritizing and defining the types of inputs used to measure fair value depending on the degree to which they are observable. Each fair value measurement is reported in one of the three levels, which is determined by the lowest level input that is significant to the fair value measurement in its entirety. The levels are as follows:

Level 1 — Quoted prices (unadjusted) in active markets for identical assets or liabilities.

Level 2 — Quoted prices for similar assets and liabilities in active markets or inputs that are observable for the asset or liability, either directly or indirectly through market corroboration, for substantially the full term of the financial instrument.

Level 3 — Unobservable inputs reflecting the Company's own assumptions about the inputs used in pricing the asset or liability at fair value.

Certain financial instruments are required to be recorded at fair value. Other financial instruments, including cash, are recorded at cost, which approximates fair value. Additionally, accounts receivable, accounts payable and accrued expenses approximate fair value because of the short-term nature of these financial instruments.

**Insurance Reserves**

The Company maintains insurance coverage for business risks in customary amounts believed to be sufficient for our operations, including, but not limited to, workers' compensation, auto and general liability. These plans contain various self-insured retention levels for which we provide accruals based on the aggregate of the liability for claims incurred and an estimate for claims incurred but not reported. We review our estimates of claims costs at each reporting period and adjust our estimates when appropriate. We use third-party actuarial specialists to assist in estimating our claims costs.

**Loss Contingencies**

The Company is involved in various legal proceedings that arise from the normal course of business activities. Certain of these matters include speculative claims for substantial or indeterminate amounts of damages. The Company records a liability when the Company believes that it is both probable that a loss has been incurred and the amount of the loss or a range of loss can be reasonably estimated. If the Company determines that a loss is reasonably possible, the Company discloses the possible loss in the notes to the consolidated financial statements, including the amount of the loss or range of loss if estimable. Significant judgment is required to determine both probability and the estimated amount of loss. The Company reviews developments in contingencies that could affect previously recorded provisions and disclosures related to such contingencies and adjusts these provisions and disclosures accordingly to reflect the impact of negotiations, settlements, rulings, advice of legal counsel, and updated information.

The Company typically recognizes estimated losses from legal contingencies as other expense in the consolidated statement of operations. Legal fees associated with such actions are expensed as incurred and recognized as general and administrative expense in the consolidated statement of operations.

**Concentration of Credit Risk**

Financial instruments that potentially subject the Company to concentration of credit risk consist primarily of accounts receivable. From time to time, the Company assesses the credit worthiness of its payment processing service provider and restaurants on the Platform. Credit risk on accounts receivable is minimized through use of a reputable payment processing service provider as well as a diverse group of restaurants dispersed across several geographic areas. The Company has not experienced material losses related to receivables from individual restaurants or groups of restaurants and is not expecting a change from this historical norm.

**Revenue**

The Company recognizes revenue in accordance with ASC Topic 606, *Revenue from Contracts with Customers*. See *Note 4 – Revenue* for additional details on the Company's revenue.

***Revenue from Contracts with Customers***

*Delivery Services Segment*

The Delivery Services Segment includes operations related to the Company's technology platform for online ordering and delivery. While food ordering and delivery is the primary component of the Delivery Services Segment, the Company recently added online ordering and delivery of various other products such as flowers, auto parts, alcohol and luxury goods. The Company generates revenue ("Delivery Transaction Fees") in the Delivery Services Segment primarily when diners or customers place an order on the Platform.

Delivery Transaction Fees represent the revenue recognized from the Company's obligation to process orders on the Platform. The performance obligation is satisfied when the Company successfully processes an order placed on the Platform and the restaurant receives the order at their location. Consistent with the recognition objective in ASC 606, *Revenue from Contracts with Customers*, the variable consideration due to the Company for processing orders is recognized on a daily basis. The Company is the agent in the transaction as the Platform provides a means for the restaurant to receive orders from customers. As an agent of the restaurant in the transaction, the Company recognizes Delivery Transaction Fees earned from the restaurant on the Platform on a net basis. Delivery Transaction Fees also include a fee charged to the end user customer when they request the order be delivered to their location. Revenue is recognized for diner fees once the delivery service is completed. The contract period for substantially all restaurant contracts is one month as both the Company and the restaurant have the ability to unilaterally terminate the contract by providing notice of termination.

In addition to Delivery Transaction Fees, revenue in the Delivery Services Segment includes other revenue sources such as paid placement revenue for prominent positioning of a restaurant on the Platform and revenue related to fees received for the early distribution of earnings to independent contractor drivers.

*Third-Party Payment Processing Referral Services Segment*

The Company generates revenue from Third-Party Payment Processing Referral Services by facilitating access to third-party payment processing solution providers. Revenue from such services primarily consists of residual payments received from third-party payment processing solution providers, based on the volume of transactions a payment processing solution provider performs for the merchant. The Company also occasionally receives a bonus up-front fee from third-party payment processing solution providers, paid at the time of a merchant's initial transaction with a payment processing solution provider, based on a price specified in the agreement between the merchant and the payment processing solution provider.

Third-party payment processing referral fees represent revenue recognized from the Company's offering of referral services, connecting a merchant with a third-party payment processing service. The Company's performance obligation in its contracts with payment processors is for an unknown or unspecified quantity of transactions and the consideration received is contingent upon the number of transactions submitted by the merchant and processed by the payment processor. Accordingly, the total transaction price is variable. The performance obligation is satisfied and revenue is recognized by the Company when the third-party payment processor finalizes the processing of a transaction through the payment system and transaction volume is available from the payment processor to the Company. Consistent with the recognition objective in ASC 606, the variable consideration due to the Company for serving as the facilitator of the arrangement between the third-party payment processor and merchant is recognized on a daily basis. The Company is the agent in these arrangements as it establishes the relationship between the third-party payment processor and merchant, and thus, recognizes revenue on a net basis. The third-party payment processor is considered the customer of the Company as no direct contract exists between the merchant and the Company.

***Accounts Receivable***

The Company records a receivable when it has an unconditional right to the consideration. See *Note 6 – Accounts Receivable* for additional details on the Company's accounts receivable.

***Deferred Contract Costs***

The Company recognizes an asset for the incremental costs of obtaining a contract with a restaurant and also recognizes an asset for the costs to fulfill a contract with a restaurant when they are specifically identifiable, generate or enhance resources used to satisfy future performance obligations, and are expected to be recovered. See *Note 4 – Revenue* for additional details on the Company's deferred contract costs.

**Income Taxes**

The Company files federal and state income tax returns in each of the jurisdictions in which it operates. The Company accounts for income taxes using the asset and liability method. Under this method, deferred tax assets and liabilities are calculated based upon the temporary differences between the financial statement and income tax bases of assets and liabilities using the enacted tax rates applicable in a given year. A valuation allowance is provided when it is more likely than not that all or some portion of the deferred tax assets will not be realized. The Company did not consider future book income as a source of taxable income when assessing if a portion of the deferred tax assets is more likely than not to be realized. However, scheduling the reversal of existing deferred tax liabilities indicated that a portion of the deferred tax assets are not likely to be realized. Therefore, the Company recorded a full valuation allowance against net deferred tax assets as of December 31, 2022 and 2021. In the event the Company determines that it would be able to realize deferred tax assets that have valuation allowances established, an adjustment to the deferred tax assets would be recognized as a component of income tax expense through continuing operations.

The calculation of income tax liabilities involves significant judgment in estimating the impact of uncertainties and complex tax laws. The Company's tax returns are subject to examination by the various federal and state income-taxing authorities in the normal course of business. Such examinations may result in future assessments of additional tax, interest, and penalties. The Company utilizes a two-step approach in recognizing and measuring uncertain tax positions ("tax contingencies"). The first step is to evaluate the tax position for recognition by determining if the weight of available evidence indicates it is more likely than not that the position will be sustained on audit. The second step is to measure the tax benefit as the largest amount, which is more than 50% likely to be realized upon ultimate settlement. The Company accounts for income taxes related to tax contingencies and recognizes interest and penalties related to tax contingencies in income tax expense in the consolidated statements of operations. The Company has not recorded any tax contingencies as of December 31, 2022 and 2021.

**Recent Accounting Pronouncements**

The Company considered the applicability and impact of all ASUs. ASUs not listed below were assessed and determined to be either not applicable or are expected to have minimal impact on these consolidated financial statements.

***Recently Adopted Accounting Standards***

In August 2020, the FASB issued ASU 2020-06, *Debt – Debt with Conversion and Other Options (Subtopic 470-20) and Derivatives and Hedging – Contracts in Entity's Own Equity (Subtopic 815-40)*, which simplifies the accounting for convertible instruments by reducing the number of accounting models for convertible debt, resulting in fewer embedded conversion features being separately recognized from the host contract as compared with current GAAP. The guidance also addresses how convertible instruments are accounted for in the diluted earnings per share calculation. ASU 2020-06 was effective for and adopted by the Company on January 1, 2022. The adoption of ASU 2020-06 did not have a material impact on the Company's disclosures or consolidated financial statements.

***Pending Accounting Standards***

In October 2021, the FASB issued ASU 2021-08, *Business Combinations (Topic 805): Accounting for Contract Assets and Contract Liabilities from Contracts with Customers*, which creates an exception to the general recognition and measurement principle in ASC 805 by requiring companies to apply ASC 606, *Revenue from Contracts with Customers*, to recognize and measure contract assets and contract liabilities from contracts with customers acquired in a business combination. The guidance additionally clarifies that companies should apply the definition of a performance obligation in ASC 606 when recognizing contract liabilities assumed in a business combination. ASU 2021-08 is effective for the Company on January 1, 2023. The Company does not expect ASU 2021-08 will have a material impact on the Company's disclosures or consolidated financial statements.

**3. Going Concern**

Pursuant to the requirements of ASC 205-40, *Going Concern*, management must evaluate whether there are conditions or events, considered in the aggregate, that raise substantial doubt about the Company's ability to continue as a going concern within one year after the date that the financial statements are issued. This evaluation initially does not take into consideration the potential mitigating effect of management's plans that have not been fully implemented as of the date the financial statements are issued. When substantial doubt exists under this methodology, management evaluates whether the mitigating effect of its plans sufficiently alleviates substantial doubt about the Company's ability to continue as a going concern. The mitigating effect of management's plans, however, is only considered if both (1) it is probable that the plans will be effectively implemented within one year after the date that the financial statements are issued, and (2) it is probable that the plans, when implemented, will sufficiently mitigate the relevant conditions or events that raise substantial doubt about the entity's ability to continue as a going concern within one year after the date that the financial statements are issued.

The Company has had recurring losses from operations and declines in cash positions. As reflected in the accompanying consolidated financial statements, the Company has an accumulated deficit of $575,924 as of December 31, 2022. The Company has had a trend of negative cash flow from operations during each quarter of 2022. For the year ended

December 31, 2022, the Company had negative cash flow from operations of $28,716. Additionally, the Company's cash position was impacted by the utilization of $20,000 in cash to pay down debt in May 2022. The Company's cash position has declined from $60,111 at December 31, 2021 to $12,066 as of December 31, 2022. In an effort to alleviate these conditions, management is evaluating its existing cost structure and implementing cost saving initiatives to reduce operating costs and plans to continue to implement further cost saving initiatives where appropriate. Management plans to raise additional equity capital in best efforts private placements, rather than through the ATM Program (see *Note 15 – Stockholders' Equity*), although there can be no assurance that we will be able to raise additional capital. The Company doesn't anticipate utilizing its ATM Program in fiscal 2023.

The Company's plans are designed to provide the Company with adequate liquidity to meet its obligations for at least the twelve-month period following the date these financial statements are issued; however, the plans are dependent on conditions and factors, many of which are outside of the Company's control. There can be no assurance that we will be able to generate positive cash flow from operations in any future period. Additionally, we may be unable to raise additional equity capital or enter into any financing arrangements when needed on favorable terms or at all. Accordingly, management could not conclude that it was probable that the plans will sufficiently mitigate the relevant conditions or events that raise substantial doubt about the Company's ability to continue as a going concern. As such, the Company has concluded that substantial doubt exists about the Company's ability to continue as a going concern for a period of at least twelve months from the date of issuance of these financial statements.

The accompanying consolidated financial statements have been prepared assuming the Company will continue as a going concern, which contemplates the realization of assets and satisfaction of liabilities in the ordinary course of business for the twelve-month period following the date the financial statements are issued. The financial statements do not include any adjustments relating to the recoverability and classification of recorded asset amounts or the amounts and classification of liabilities that might result should the Company be unable to continue as a going concern.

**4. Revenue**

The following table presents our revenue disaggregated by offering. Revenue consists of the following for the periods indicated (in thousands):

| | Year Ended December 31, | |
|---|---|---|
| | **2022** | **2021** |
| Delivery Services Segment: | | |
| Delivery Transaction Fees | $ 98,458 | $ 175,607 |
| Other revenue | 2,606 | 3,276 |
| Total Delivery Services Segment | 101,064 | 178,883 |
| Third-Party Payment Processing Referral Services Segment[1] | 10,737 | 3,311 |
| **Total Revenue** | **$ 111,801** | **$ 182,194** |

[1] The year ended December 31, 2021 includes revenue from the Cape Payment Companies beginning on the acquisition date of August 25, 2021, through December 31, 2021.

***Costs to Obtain a Contract with a Customer***

The Company recognizes an asset for the incremental costs of obtaining a contract with a restaurant and recognizes the expense over the course of the period when the Company expects to recover those costs. The Company has determined that certain internal sales incentives earned at the time when an initial contract is executed meet these requirements. Capitalized sales incentives are amortized to sales and marketing expense on a straight-line basis over the period of benefit, which the Company has determined to be five years. The Company applies a practical expedient to expense costs as incurred for costs to obtain a contract with a customer when the amortization period would have been one year or less.

Deferred costs related to obtaining contracts with restaurants were $3,128 and $2,968 as of December 31, 2022 and 2021, respectively, out of which $1,032 and $818, respectively, was classified as current. Amortization of expense for the costs to obtain a contract were $905 and $712 for the years ended December 31, 2022 and 2021, respectively.

***Costs to Fulfill a Contract with a Customer***

The Company also recognizes an asset for the costs to fulfill a contract with a restaurant when they are specifically identifiable, generate or enhance resources used to satisfy future performance obligations, and are expected to be recovered. The Company has determined that certain costs related to onboarding restaurants onto the Platform meet the capitalization criteria under ASC Topic 340-40, *Other Assets and Deferred Costs*. Costs related to these implementation activities are deferred and then amortized to operations and support expense on a straight-line basis over the period of benefit, which the Company has determined to be five years.

Deferred costs related to fulfilling contracts with restaurants were $1,834 and $1,385 as of December 31, 2022 and 2021, respectively, out of which $527 and $352, respectively, was classified as current. Amortization of expense for the costs to fulfill a contract were $453 and $252 for the years ended December 31, 2022 and 2021, respectively.

## 5. Business Combinations

***2021 Acquisitions***

*Cape Payment Acquisition*

On August 25, 2021, the Company completed the acquisition of certain assets and properties of ProMerchant LLC, Cape Cod Merchant Services LLC and Flow Payments LLC (collectively referred to herein as the “Cape Payment Companies”) (the “Cape Payment Acquisition”). The Cape Payment Companies facilitate merchant access to third-party payment processing solution providers and receive residual payments from the payment providers. The purchase price for the Cape Payment Companies consisted of $12,032 in cash and 128,205 shares of the Company’s common stock valued at $24.80 per share (the closing price of the Company’s common stock on August 24, 2021). The Cape Payment Acquisition included an earnout provision which provided for a one-time payment to the sellers if the Cape Payment Companies exceed certain future revenue targets. The earnout provision, if any, is payable no later than March 30, 2023, and was valued at $1,686 as of the acquisition date. As of December 31, 2021, the earnout provision was valued at $1,939. At December 31, 2022, the Company determined that it is unlikely that the earnout provision will be met, therefore no value was assigned. See *Note 16 – Fair Value Measurements* for additional details.

The Cape Payment Acquisition was considered a business combination in accordance with ASC 805 and was accounted for using the acquisition method. The results of operations of the Cape Payment Companies are included in our consolidated financial statements beginning on the acquisition date, August 25, 2021, and were immaterial at such time. Pro forma results were also deemed immaterial to the Company.

During the three months ended September 30, 2022, our operations related to the business acquired from the Cape Payment Companies became more significant to the operations of the Company. See *Note 2 – Basis of Presentation and Summary of Significant Accounting Policies* and *Note 17 - Segment Information* for additional details.

*Delivery Dudes Acquisition*

On March 11, 2021, the Company completed the acquisition of certain assets and properties from Dude Holdings LLC (“Delivery Dudes”), a third-party delivery business primarily serving the South Florida market, for $11,500 in cash and 178,129 shares of the Company’s common stock valued at $59.20 per share (the closing price of the Company’s common stock on March 11, 2021) (the “Delivery Dudes Acquisition”).

The Delivery Dudes Acquisition was considered a business combination in accordance with ASC 805 and was accounted for using the acquisition method. The results of operations of Delivery Dudes are included in our consolidated financial statements beginning on the acquisition date, March 11, 2021.

***Additional Information***

Included in general and administrative expenses in the consolidated statement of operations in certain periods are direct and incremental costs, consisting of legal and professional fees, related to business combinations and asset acquisitions. During the year ended December 31, 2021, the Company incurred direct and incremental costs of $1,614 related to the Delivery Dudes Acquisition and the Cape Payment Acquisition. There were no direct and incremental transaction costs incurred during the year ended December 31, 2022.

***Pro-Forma Financial Information (Unaudited)***

The supplemental consolidated results of the Company on an unaudited pro forma basis as if the Delivery Dudes Acquisition had been consummated on January 1, 2021 are included in the table below (in thousands):

| | Twelve Months Ended December 31, 2021 |
|---|---|
| Net revenue | $ 184,670 |
| Net loss | 4,865 |

These pro forma results were based on estimates and assumptions, which the Company believes are reasonable. They are not the results that would have been realized had the Company been a consolidated company during the period presented and are not indicative of consolidated results of operations in future periods. Acquisition costs and other non-recurring charges incurred are included in the period presented.

**6. Accounts Receivable, Net**

Accounts receivable consist of the following (in thousands):

| | December 31, 2022 | December 31, 2021 | December 31, 2020 |
|---|---|---|---|
| Credit card receivables | $ 2,334 | $ 1,354 | $ 3,013 |
| Residual commissions receivable | 1,422 | 1,342 | — |
| Receivables from restaurants and customers | 596 | 660 | 334 |
| Accounts receivable | $ 4,352 | $ 3,356 | $ 3,347 |
| Less: allowance for doubtful accounts and chargebacks | (370) | (329) | (393) |
| **Accounts receivable, net** | **$ 3,982** | **$ 3,027** | **$ 2,954** |

The activity in the allowance for doubtful accounts and chargebacks is as follows (in thousands):

| | December 31, 2022 | December 31, 2021 |
|---|---|---|
| **Balance, beginning of the year** | $ 329 | $ 393 |
| Additions to expense | 395 | 715 |
| Write-offs, net of recoveries and other adjustments | (354) | (779) |
| **Balance, end of the year** | **$ 370** | **$ 329** |

**7. Prepaid Expenses and Other Current Assets**

Prepaid expenses and other current assets consist of the following (in thousands):

| | December 31, 2022 | December 31, 2021 |
|---|---|---|
| Prepaid insurance expense | $ 3,475 | $ 6,703 |
| Prepaid software subscriptions | 1,401 | 1,318 |
| Other current assets | 1,121 | 685 |
| **Prepaid expenses and other current assets** | **$ 5,997** | **$ 8,706** |

## 8. Property and Equipment, Net

Property and equipment, net, consists of the following (in thousands):

| | December 31, 2022 | December 31, 2021 |
|---|---|---|
| Computer equipment | $ 771 | $ 10,671 |
| Furniture and fixtures | 37 | 1,280 |
| Leasehold improvements | — | 353 |
| Total property and equipment | 808 | 12,304 |
| Less: Accumulated depreciation | — | (8,541) |
| **Property and equipment, net** | **$ 808** | **$ 3,763** |

The Company recorded depreciation expense for property and equipment for the years ended December 31, 2022 and 2021 of $2,080 and $3,200, respectively.

At December 31, 2022, the Company conducted an impairment test for long-lived assets in the Delivery Services Segment under the guidance in ASC 360. See *Note 9 – Intangible Assets and Goodwill* for additional details. Total property and equipment with a net carrying value of $1,782 was tested for impairment. The impairment test resulted in a non-cash impairment charge of $974 related to property and equipment. The impairment charge is included in the consolidated statement of operations for the year ended December 31, 2022 under the caption “intangible and other asset impairments”.

## 9. Intangibles Assets and Goodwill

*Intangible Assets*

Intangible assets with finite useful lives are amortized using the straight-line method over their estimated useful lives and include internally developed software, as well as software to be otherwise marketed, and trademarks/trade name/patents and customer relationships. The Company has determined that the trademark intangible asset and domain names related to the rebranding initiative are indefinite-lived assets and therefore not subject to amortization but are evaluated annually for impairment. The Bite Squad, Delivery Dudes and Cape Payment Companies trade name intangible assets, however, are being amortized over their estimated useful lives.

See “Impairments” below for details of impairment testing for intangible assets during the year ended December 31, 2022. Intangible assets are stated at cost or acquisition-date fair value less accumulated amortization and impairment and consist of the following at December 31, 2022 and 2021 (in thousands):

| | As of December 31, 2022 | | | |
|---|---|---|---|---|
| | Gross Carrying Amount | Accumulated Amortization | Accumulated Impairment | Intangible Assets, Net |
| Intangible assets subject to amortization: | | | | |
| Software | $ 40,341 | $ (13,542) | $ (26,799) | $ — |
| Trademarks/Trade name/Patents | 6,549 | (6,044) | (284) | 221 |
| Customer Relationships | 96,510 | (18,647) | (72,519) | 5,344 |
| Total intangible assets subject to amortization | 143,400 | (38,233) | (99,602) | 5,565 |
| Trademarks, not subject to amortization | 3,038 | — | (1,538) | 1,500 |
| **Total** | **$ 146,438** | **$ (38,233)** | **$ (101,140)** | **$ 7,065** |

| | As of December 31, 2021 | | | |
|---|---|---|---|---|
| | Gross Carrying Amount | Accumulated Amortization | Accumulated Impairment | Intangible Assets, Net |
| Intangible assets subject to amortization: | | | | |
| Software | $ 35,686 | $ (9,632) | $ (11,779) | $ 14,275 |
| Trademarks/Trade name/Patents | 6,549 | (5,585) | — | 964 |
| Customer Relationships | 96,510 | (14,256) | (57,378) | 24,876 |
| Total intangible assets subject to amortization | 138,745 | (29,473) | (69,157) | 40,115 |
| Trademarks, not subject to amortization | 3,011 | — | — | 3,011 |
| **Total** | **$ 141,756** | **$ (29,473)** | **$ (69,157)** | **$ 43,126** |

During the year ended December 31, 2022, the Company capitalized approximately $7,439 of software costs related to the development of the Platform.

The Company recorded amortization expense for the years ended December 31, 2022 and 2021 of $11,216 and $9,229, respectively. Estimated future amortization expense of intangible assets subject to amortization as of December 31, 2022 is as follows (in thousands):

| | Amortization |
|---|---|
| 2023 | $ 992 |
| 2024 | 953 |
| 2025 | 875 |
| 2026 | 867 |
| 2027 | 867 |
| Thereafter | 1,011 |
| **Total future amortization for intangible assets subject to amortization** | **$ 5,565** |

*Goodwill*

Prior to the three months ended September 30, 2022, we concluded that we had one reporting unit for purposes of goodwill impairment testing. During the three months ended September 30, 2022, we quantitatively and qualitatively reassessed our segment reporting and determined the Third-Party Payment Processing Referral Services Segment is material to the group and now have two reporting units for purposes of goodwill impairment testing. See *Note 2 – Basis of Presentation and Summary of Significant Accounting Policies* for additional information.

The following table presents changes in the carrying value of goodwill for the Company's single reporting unit prior to the allocation of goodwill to segments (in thousands). See "Impairments" below for a discussion of goodwill impairment testing for the reporting unit.

| | | |
|---|---|---|
| **Balance as of December 31, 2021** | $ | 130,624 |
| March 15, 2022 impairment | | (67,190) |
| Balance prior to segment allocation | | 63,434 |
| September 30, 2022 impairment | | (51,991) |
| Remaining goodwill to be allocated to segments | $ | 11,443 |

During the three months ended September 30, 2022, the Company reallocated its goodwill from a single reporting unit to the Delivery Services Segment and the Third-Party Payment Processing Referral Services Segment based on a relative fair value analysis using several probability weighted scenarios. The following table presents changes in the carrying value of goodwill for the Company's segments (in thousands). See "Impairments" below for a discussion of goodwill impairment for the segments.

| | Delivery Services Segment | | Third-Party Payment Processing Referral Services Segment | | Total | |
|---|---|---|---|---|---|---|
| **Goodwill allocation to segments** | $ | 1,907 | $ | 9,536 | $ | 11,443 |
| September 30, 2022 impairment | | (1,907) | | — | | (1,907) |
| **Balance as of December 31, 2022** | $ | — | $ | 9,536 | $ | 9,536 |

*Impairments*

The Company has historically conducted its goodwill and intangible asset impairment test annually in October, or more frequently if indicators of impairment exist. The Company conducts the impairment test in accordance with FASB ASC Topic 360, *Impairment and Disposal of Long-Lived Assets* ("ASC 360") for certain long-lived assets, including capitalized contract costs, property and equipment, developed technology, customer relationships, and trade names, and in accordance with FASB ASC Topic 350, *Intangibles – Goodwill and Other* ("ASC 350") for the reporting unit's goodwill.

ASC 360 requires long-lived assets to be tested for impairment using a three-step impairment test. Step 1 of the test is giving consideration to whether indicators of impairment of long-lived assets are present. If indicators are present, the Company proceeds to Step 2 to determine whether an impairment loss should be recognized. As a part of Step 2, the Company performs a recoverability test by comparing the sum of the estimated undiscounted future cash flows attributable to the long-lived assets in question to their carrying amounts. ASC 350 requires goodwill and other indefinite lived assets to be tested for impairment at the reporting unit level. See the discussion below of impairment testing conducted as of March 15, 2022, September 30, 2022 and December 31, 2022. No events or circumstances occurred from the time of the March 15, 2022 impairment test through June 30, 2022 that would suggest an impairment may have occurred, and accordingly, the Company determined that goodwill and long-lived asset impairment testing was not needed at June 30, 2022.

Determining the fair value of a reporting unit and intangible assets requires the use of estimates and significant judgments that are based on a number of factors including actual operating results. It is reasonably possible that the judgments and estimates could change in future periods. There can be no assurance that additional goodwill or intangible assets will not be impaired in future periods.

As further detailed below, for the year ended December 31, 2022, the Company recognized non-cash goodwill impairment charges totaling $121,088 and non-cash impairment charges for long-lived assets totaling $32,957 (included in the consolidated statement of operations under the captions "goodwill impairment" and "intangible and other asset impairments", respectively). For the year ended December 31, 2021, the Company recognized no goodwill impairment charges and recognized $186 of non-cash impairment charges related to previously capitalized software development costs.

***March 15, 2022 Impairment Analysis***

As a result of a significant decline in the Company's share price and market capitalization in mid-March 2022, as well as other macroeconomic and industry related conditions during the first quarter of 2022, the Company conducted an impairment test as of the valuation date of March 15, 2022. For purposes of testing for goodwill impairment, the Company had one reporting unit at such time. The Company engaged a third-party to assist management in estimating the fair values of long-lived assets and the reporting unit for purposes of impairment testing under ASC 360 and ASC 350.

Given the results of the qualitative assessment and indications of possible impairment, the Company proceeded to Step 2 to determine whether an impairment loss should be recognized. The Company's primary long-lived assets, customer relationships and developed technology, were tested for impairment under the guidance in ASC 360. The undiscounted cash flows for the long-lived assets were above the carrying amounts and the Company determined that the long-lived asset group was recoverable, and no impairment existed as of March 15, 2022. The customer relationships intangible asset and developed technology assets were valued using an undiscounted cash flow model. The analysis for each of the long-lived assets represents a Level 3 measurement as it was based on unobservable inputs reflecting the Company's assumptions used in developing a fair value estimate. These inputs required significant judgments and estimates at the time of the valuation.

For ASC 350 testing purposes, the Company compared the fair value of the reporting unit with its carrying amount. The fair value of the reporting unit was estimated giving consideration to the Income Approach, including the discounted cash flow method, and the Market Approach, including the similar transactions method and guideline public company method. Significant inputs and assumptions in the ASC 350 analysis included forecasts (e.g., revenue, operating costs and capital expenditures), discount rate, long-term growth rate and tax rates for the reporting unit under the Income Approach and market-based enterprise value to revenue multiples under the Market Approach. As a result of the ASC 350 analysis, the Company recognized a non-cash pre-tax impairment loss of $67,190 during the three months ended March 31, 2022 to write down the carrying value of goodwill to its implied fair value.

***September 30, 2022 Impairment Analysis***

As a result of continued declines in the Company's share price and market capitalization during the third quarter of 2022, the Company conducted an additional impairment test as of the valuation date of September 30, 2022. The Company engaged a third-party to assist management in estimating the fair values of long-lived assets and the reporting units for purposes of impairment testing under ASC 360 and ASC 350.

Impairment Analysis on Single Reporting Unit Prior to Allocation of Goodwill to Segments

Given the results of the qualitative assessment and indications of possible impairment, the Company proceeded to Step 2 to determine whether an impairment loss should be recognized for the single reporting unit prior to the allocation of goodwill to segments. The Company's primary long-lived assets, customer relationships and developed technology, were tested for impairment under the guidance in ASC 360. The undiscounted cash flows for the long-lived assets were above the carrying amounts and the Company determined that the long-lived asset group was recoverable, and no impairment existed as of September 30, 2022. The customer relationships intangible asset and developed technology assets were valued using methods in a manner similar to the March 15, 2022 impairment analysis, and represent Level 3 measurements as both were based on unobservable inputs reflecting the Company's assumptions used in developing a fair value estimate. These inputs required significant judgments and estimates at the time of the valuation.

For ASC 350 testing purposes, the Company estimated the fair value of the single reporting unit giving consideration to the Income Approach and the Market Approach in a manner similar to the March 15, 2022 impairment analysis discussed above. As a result of the ASC 350 analysis, the Company recognized a non-cash pre-tax impairment loss of $51,991 during the three months ended September 30, 2022 to write down the carrying value of goodwill in the reporting unit to its implied fair value.

Impairment Analysis on Segments

In conjunction with the reallocation of goodwill, the Company tested the goodwill at its Delivery Services Segment and Third-Party Payment Processing Referral Services Segment as of September 30, 2022.

The Company's long-lived assets in each of the segments, including customer relationships and developed technology, were tested for impairment under the guidance in ASC 360. The undiscounted cash flows for the long-lived assets were above the carrying amounts for each segment and the Company determined that the long-lived asset groups were recoverable, and no impairment existed as of September 30, 2022. The customer relationships intangible assets and developed technology assets were valued using methods in a manner similar to the March 15, 2022 impairment analysis discussed above, and represent Level 3 measurements as both were based on unobservable inputs reflecting the Company's assumptions used in developing a fair value estimate. These inputs required significant judgments and estimates at the time of the valuation.

For ASC 350 testing purposes, the Company estimated the fair value of the Delivery Services Segment and the Third-Party Payment Processing Referral Services Segment giving consideration to the Income Approach and the Market Approach in a manner similar to the March 15, 2022 impairment analysis discussed above. The impairment assessment indicated that the fair value of the Third-Party Payment Processing Referral Services Segment exceeded its carrying value, and therefore did not result in a goodwill impairment. The goodwill in the Delivery Services Segment was determined to have no value and was fully impaired. The Company recognized a non-cash pre-tax impairment loss of $1,907 during the three months ended September 30, 2022 to write down the carrying value of goodwill in the Delivery Services Segment to zero.

***December 31, 2022 Impairment Analysis***

As a result of the significant and sustained decline in the Company's market capitalization, the Company conducted an additional impairment test as of the valuation date of December 31, 2022 for the Delivery Services Segment. The Company engaged a third-party to assist management in estimating the fair values of indefinite-lived and long-lived assets in the Delivery Services Segment for purposes of impairment testing under ASC 360 and ASC 350. For the Third-Party Payment Processing Referral Services Segment, the Company determined that given the positive performance of this segment, including growth in revenue since the acquisition of the Cape Payment Companies in the third quarter of 2021, ASC 350 and ASC 360 impairment testing was not warranted at December 31, 2022.

The trade name intangible assets in the Delivery Services Segment were tested for impairment under the guidance in ASC 350. The trade names were valued using the Income Approach, specifically, the relief from royalty rate method, which measures the cash flow streams attributable to the trade names in the form of royalty payments that would be paid to the owner of the trade names in return for the rights to use the trade names.

The customer relationships intangible assets, developed technology intangible assets and property and equipment in the Delivery Services Segment were tested for impairment under the guidance in ASC 360. As management did not envision a clear path to profitability in the foreseeable future, the customer relationships and developed technology intangible assets were valued using an Income Approach with consideration given to liquidation values. Such assets were determined to have minimal value and were fully impaired. As the Company's property and equipment assets were not supported by cash flows from operating activities, the fair value measurements were determined using cost and market approaches, along with consideration of orderly liquidation values (OLV). On an asset-by-asset basis, estimated values for property and equipment were based on the lower of the estimated OLV and the assets' initial net carrying value as of the valuation date of December 31, 2022. A fair value determination of the Company's right-of-use assets was not warranted as the related office facility leases contain the ability for the Company to sub-lease the space.

The analyses for the trade names, customer relationships, developed technology and property and equipment represent Level 3 measurements as they were based on unobservable inputs reflecting the Company's assumptions used in developing a fair value estimate. These inputs required significant judgments and estimates at the time of the valuation. As a result of this analysis, the Company recognized non-cash pre-tax impairment losses for the year ended December 31, 2022 totaling $32,957 for the long-lived assets, including $15,020 for developed technology, $15,141 for customer relationships, $1,822 for trade names and $974 for property and equipment. The impairment charges are included in the consolidated statement of operations under the caption "intangible and other asset impairments".

## 10. Other Current Liabilities

Other current liabilities consist of the following (in thousands):

| | December 31, 2022 | December 31, 2021 |
|---|---|---|
| Accrued insurance expenses | $ 7,139 | $ 3,932 |
| Accrued estimated workers' compensation expenses | 275 | 644 |
| Accrued medical contingency | 366 | 370 |
| Accrued legal contingency | 1,250 | 1,250 |
| Accrued sales tax payable | 307 | 175 |
| Accrued cash incentives | 52 | 3,130 |
| Other accrued expenses | 3,105 | 3,685 |
| Unclaimed property | 2,795 | 2,372 |
| Other current liabilities | 2,307 | 3,751 |
| **Total other current liabilities** | **$ 17,596** | **$ 19,309** |

## 11. Debt

The Company's outstanding debt obligations are as follows (in thousands):

| | Coupon Rate Range in 2021 and 2022 | Effective Interest Rate at December 31, 2022 | Maturity | December 31, 2022 | December 31, 2021 |
|---|---|---|---|---|---|
| Term Loan | 5.125% - 7.125% | 13.37% | May 2024 | $ 12,579 | $ 35,007 |
| Notes | 4.0% - 6.0% | 4.87% | May 2024 | 42,523 | 49,504 |
| | | | | $ 55,102 | $ 84,511 |
| Less: unamortized debt issuance costs on Term Loan | | | | (992) | (2,099) |
| Less: unamortized debt issuance costs on Notes | | | | (209) | (435) |
| **Long term debt - related party** | | | | **$ 53,901** | **$ 81,977** |
| | | | | | |
| Short-term loans for insurance financing | 4.35% - 6.96% | n/a | February 2023 - September 2023 | 1,892 | 3,142 |
| **Total outstanding debt** | | | | **$ 55,793** | **$ 85,119** |

Annual maturities of outstanding debt, net of discounts are as follows (in thousands):

| | Debt Maturity |
|---|---|
| 2023 | $ 1,892 |
| 2024 | 53,901 |
| **Total debt** | **$ 55,793** |

Interest expense related to the Company's outstanding debt totaled $5,664 and $7,074 for the years ended December 31, 2022 and 2021, respectively. Interest expense includes interest on outstanding borrowings and amortization of debt issuance costs and debt discount. See *Note 19 – Related Party Transactions* for additional information regarding the Company's related party long-term debt.

*Term Loan*

The Company maintains an agreement with Luxor Capital Group, LP ("Luxor Capital") (as amended or otherwise modified from time to time, the "Credit Agreement"). The Credit Agreement provides for a senior secured first priority term loan (the "Term Loan") which is guaranteed by certain subsidiaries of the Company. In connection with the Term Loan, the Company issued to Luxor Capital warrants which were exercisable for shares of the Company's common stock (see *Note 15 – Stockholders' Equity*).

Interest on the Term Loan is payable quarterly, in cash or, at the election of the Company, as a payment-in-kind, with interest paid-in-kind being added to the aggregate principal balance. The Company elected to pay the interest payments due on September 30, 2022 and December 31, 2022 in-kind, resulting in $517 being added to the principal balance of the Term Loan. See *Amendments to Loan Agreements* below for additional details on the Term Loan and Credit Agreement, including details of principal payments made during 2022.

The Credit Agreement includes a number of customary covenants that, among other things, limit or restrict the ability of the Company and its subsidiaries to incur additional debt, incur liens on assets, engage in mergers or consolidations, dispose of assets, pay dividends or repurchase capital stock and repay certain junior indebtedness. The Credit Agreement also includes customary affirmative covenants, representations and warranties and events of default. One of the affirmative covenants included in the Credit Agreement relates to the deliverance of audited annual financial statements to the administrative agent and lenders, accompanied by a report from an independent public accounting firm, which report shall be unqualified as to going concern and scope of audit. See *Note 20 – Subsequent Events* for details of a January 2023 amendment to the Credit Agreement to waive the requirement to deliver an audit report unqualified as to going concern with respect to the fiscal year 2022 financial statements.

*Notes*

Additionally, the Company issued unsecured convertible promissory notes (the "Notes") to Luxor Capital Partners, LP, Luxor Capital Partners Offshore Master Fund, LP, Luxor Wavefront, LP and Lugard Road Capital Master Fund, LP (the "Luxor Entities") pursuant to an agreement, herein referred to as the "Convertible Notes Agreement". The net carrying value of the Notes as of December 31, 2022 and 2021 totaled $42,314 and $49,069, respectively. See *Amendments to Loan Agreements* and *Conversion Agreements* below for additional details on the Notes, including details of conversions of the Notes during 2022.

Interest on the Notes is payable quarterly, in cash or, at the Company's election, up to one-half of the dollar amount of an interest payment due could be paid-in kind for the first three quarters of 2022 and in fiscal 2021. Pursuant to an amendment to the Convertible Notes Agreement in November 2022, the portion of an interest payment that the Company could elect to pay in-kind was reduced from 50% to approximately 33%. The Company elected to pay one-half of the $669 interest payment due on September 30, 2022 in-kind, resulting in approximately $335 being added to the principal balance of the Notes. The Company elected to pay 33% of the $554 interest payment due on December 31, 2022 in-kind, resulting in approximately $184 being added to the principal balance of the Notes. Interest expense related to the Notes was comprised of the following for the years ended December 31, 2022 and 2021 (in thousands):

| | Year Ended December 31, | |
|---|---|---|
| | **2022** | **2021** |
| Contractual interest expense | $ 2,711 | $ 2,389 |
| Amortization of debt discount | 175 | 856 |
| | **$ 2,886** | **$ 3,245** |

The Notes include customary anti-dilution protection, including broad-based weighted average adjustments for issuances of additional shares. Upon maturity, the outstanding Notes (and any accrued but unpaid interest) will be repaid in cash or converted into shares of common stock, at the holder's election. The Notes are convertible at the holder's election into shares of the Company's common stock at a rate of $131.02 per share, subject to certain "blocker" limitations limiting the amount of shares into which the Notes can be converted.

The Company's payment obligations on the Notes are not guaranteed. The Convertible Notes Agreement contains negative covenants, affirmative covenants, representations and warranties and events of default that are substantially similar to those that are set forth in the Credit Agreement (except those that relate to collateral and related security interests, which are not contained in the Convertible Notes Agreement or otherwise applicable to the Notes). See *Note 20 – Subsequent Events* for details of a January 2023 amendment to the Convertible Notes Agreement to waive the requirement to deliver an audit report unqualified as to going concern with respect to the fiscal year 2022 financial statements.

*Amendments to Loan Agreements*

***May 2022 Amendments***

On May 9, 2022, the Company entered into an amendment to the Credit Agreement and an amendment to the Convertible Notes Agreement (together, the "May 9, 2022 Amended Loan Agreements"). The May 9, 2022 Amended Loan Agreements provide, among other things, (i) that going forward on a quarterly basis, 50% of the proceeds of any at-the-market public common stock issuances by the Company will be applied to the prepayment of the Term Loan and (ii) a six-month extension of the maturity date of the Credit Agreement and Convertible Notes Agreement until May 15, 2024. Additionally, pursuant to the May 9, 2022 amendment to the Credit Agreement, the Company made a $20,000 prepayment on the Term Loan on May 9, 2022. On October 5, 2022, the Company made a $1,676 prepayment on the Term Loan, representing 50% of the net proceeds received by the Company for sales under the August 2022 ATM through such date.

The Company evaluated the amendments in the May 9, 2022 Amended Loan Agreements under ASC 470-50, "*Debt Modification and Extinguishment*", and concluded that the amendments did not meet the characteristics of debt extinguishments under ASC 470-50. Accordingly, the amendments were treated as a debt modification, and thus, no gain or loss was recorded. A new effective interest rate for each of the Term Loan and Notes that equated the revised cash flows to the carrying amount of the original debt was computed and applied prospectively through the date of the November 8, 2022 amendments to the Credit Agreement and Notes (described below).

On May 12, 2022, the Company entered into an additional amendment to the Convertible Notes Agreement (the "May 12, 2022 Amended Convertible Notes Agreement") which provides that subsequent to the payment in full of the Term Loan outstanding under the existing Credit Agreement, on a quarterly basis, 50% of the proceeds of any future at-the-market public common stock issuances received by the Company will be applied to prepayment of the Notes under the Convertible Notes Agreement. The provisions of the May 12, 2022 Amended Convertible Notes Agreement did not contain changes to the Convertible Notes Agreement that warranted an evaluation of debt modification or extinguishment.

***November 2022 Amendments***

On November 8, 2022, the Company entered into an amendment to the Credit Agreement and an amendment to the Convertible Notes Agreement (together, the "November 8, 2022 Amended Loan Agreements"). Pursuant to the November 8, 2022 amendment to the Credit Agreement, commencing with the fiscal quarter ended December 31, 2022, the portion of the proceeds of any ATM public common stock issuances to be applied to the prepayment of the Term Loan under the Credit Agreement increased from 50% to 60%. The Company made prepayments totaling $1,269 on the Term Loan from November 11, 2022 through December 31, 2022, representing 60% of the net proceeds received by the Company for sales under the August 2022 ATM during that period.

The November 8, 2022 amendment to the Convertible Notes Agreement includes (i) a reduction of the interest rate under the Convertible Notes Agreement from 6% to 4.5% per annum and (ii) an adjustment of the portion of an interest payment that can be paid in-kind, if elected by the Company, from 50% to approximately 33%. Additionally, subsequent to the payment in full of the Term Loan outstanding under the Credit Agreement, the portion of the proceeds of any future ATM public common stock issuances to be applied to the prepayment of the Notes under the Convertible Notes Agreement increases from 50% to 60%.

The Company evaluated the amendments in the November 8, 2022 Amended Loan Agreements under ASC 470-60, "*Troubled Debt Restructurings by Debtors*". Management concluded that there were indicators of financial difficulty for the Company at this date and concessions had been granted by the lenders. Therefore, the amendments are accounted for as a troubled debt restructuring. Management assessed whether the total undiscounted future cash payments specified by the amendments in the November 8, 2022 Amended Loan Agreements are greater or less than the carrying amount of the debt at the time of the restructuring and determined that the undiscounted future cash payments under the new terms are greater than the carrying amount of the debt at the time of the restructuring. Accordingly, no gain or loss was required to be recognized on the troubled debt restructuring. The change is accounted for prospectively using the new effective interest rate of the Term Loan and Notes.

*Conversion Agreements*

On May 13, 2022, the Company entered into a conversion agreement (the "May 2022 Conversion Agreement"), pursuant to which the lenders under the Convertible Notes Agreement were permitted to convert $750 of the outstanding principal amount of the Notes into shares of Company common stock at a conversion rate of 294 shares of Company common stock per one thousand dollars of principal amount of the Notes (calculated based on a per share price of $3.40 of Company common stock on Nasdaq), notwithstanding the conversion rate then in effect pursuant to the terms of the Notes.

On July 22, 2022, the Company entered into a conversion agreement (the "July 2022 Conversion Agreement"), pursuant to which the lenders under the Convertible Notes Agreement were permitted to convert $6,750 of the outstanding principal amount of the Notes into shares of Company common stock at a conversion rate of 200 shares of Company common stock per one thousand dollars of principal amount of the Notes (calculated based on a per share price of $5.00 of Company common stock on Nasdaq), notwithstanding the conversion rate then in effect pursuant to the terms of the Notes.

Accordingly, pursuant to the May 2022 Conversion Agreement, the Luxor Entities converted $750 principal amount of the Notes into 220,575 shares of Company common stock during the three months ended June 30, 2022, and pursuant to the July 2022 Conversion Agreement, the Luxor Entities converted $6,750 principal amount of the Notes into 1,350,000 shares of Company common stock during the three months ended September 30, 2022 (see *Note 15 – Stockholders' Equity*).

In accordance with ASC 470-20, "*Debt with Conversion and Other Options*", the fair value of the securities transferred in the induced conversion over the fair value of securities issuable pursuant to the original conversion terms is recognized as induced conversion expense. Accordingly, (i) upon the induced conversion related to the May 2022 Conversion Agreement, the Company recognized $930 of expense with a corresponding increase to equity of $1,673 and a net reduction of the Notes of $743, consisting of the $750 of principal, net of related discount, and (ii) upon the induced conversion related to the July 2022 Conversion Agreement, the Company recognized $8,569 of expense with a corresponding increase to equity of $15,275 and a net reduction of the Notes of $6,706, consisting of the $6,750 of principal, net of related discount.

Induced conversion expense is included in other expense in the consolidated statement of operations and totaled $9,499 for the year ended December 31, 2022.

*Short-Term Loans*

The Company has outstanding short-term loans as of December 31, 2022 for the purpose of financing portions of its annual insurance premium obligations. The loans are payable in monthly installments until maturity.

**12. Income Taxes**

The Company provides for income taxes using an asset and liability approach under which deferred income taxes are provided for based upon enacted tax laws and rates applicable to periods in which the taxes become payable.

The provision for federal and state income taxes consists of the following (in thousands):

| | Year Ended December 31, | |
|---|---|---|
| | **2022** | **2021** |
| **Current** | | |
| Federal | $ — | $ — |
| State | 80 | 24 |
| **Deferred** | | |
| Federal | — | — |
| State | — | — |
| **Income tax expense** | **$ 80** | **$ 24** |

The differences between income taxes expected by applying the U.S. federal statutory tax rate of 21% and the amount of income taxes provided for are as follows (in thousands):

| | Year Ended December 31, 2022 | Year Ended December 31, 2021 |
|---|---|---|
| Tax at statutory rate | $ (43,409) | $ (1,093) |
| State income taxes | (5,296) | (281) |
| Stock-based compensation | 836 | (62) |
| Non-deductible expenses | 901 | 286 |
| Interest expense | 606 | 674 |
| Work opportunity tax credit | 10 | 516 |
| Goodwill and acquired intangibles | 4,148 | — |
| Other | 1,983 | (15) |
| Deferred tax asset revisions | — | (689) |
| Change in valuation allowance | 40,301 | 688 |
| **Income tax expense** | **$ 80** | **$ 24** |

The tax effects of temporary differences giving rise to deferred income tax assets and liabilities are as follows (in thousands):

| | As of December 31, 2022 | As of December 31, 2021 |
|---|---|---|
| **Deferred tax assets:** | | |
| Stock-based compensation | $ 1,651 | $ 1,467 |
| Incentive compensation | 12 | 773 |
| Medical contingency | 85 | 105 |
| Bad debt reserve | 86 | 81 |
| Charitable contribution carryover | 43 | 35 |
| Unearned revenue | 198 | 118 |
| Workers’ compensation reserve | 69 | 159 |
| Lease obligation | 1,038 | 1,187 |
| Legal reserve | 290 | 309 |
| Non-deductible goodwill | 33,879 | 14,894 |
| Non-deductible other intangibles | 23,253 | 16,034 |
| Net operating losses | 54,583 | 40,824 |
| Work opportunity tax credit | 11,539 | 11,551 |
| Interest expense carryforward | 1,540 | 955 |
| Total deferred tax assets | 128,266 | 88,492 |
| Valuation allowance | (122,196) | (81,895) |
| Net deferred tax assets | **6,070** | **6,597** |
| **Deferred tax liabilities:** | | |
| Fixed assets | (3,770) | (4,383) |
| Capitalized contract costs | (1,150) | (1,075) |
| Right-of-use asset | (1,003) | (1,069) |
| Prepaids | (147) | (70) |
| Total deferred tax liabilities | **$ (6,070)** | **$ (6,597)** |
| **Net deferred tax asset (liability)** | **$ —** | **$ —** |

A full valuation allowance of $122,196 and $81,895 has been recorded against net deferred tax assets as of December 31, 2022 and 2021, respectively, as the Company has historically generated net operating losses, and the Company did not consider future book income as a source of taxable income when assessing if a portion of the deferred tax assets is more likely than not to be realized.

The Company has the following net operating loss carryforwards and tax credit carryforwards (in thousands):

| | As of December 31, | | Beginning Year of Expiration |
|---|---|---|---|
| | 2022 | 2021 | |
| Federal net operating losses | $ 211,421 | $ 167,362 | 2034 |
| State net operating losses | 189,973 | 149,206 | 2034 |
| Tax credit carryforwards | 11,539 | 11,551 | 2037 |
| **Total carryforwards** | **$ 412,933** | **$ 328,119** | |

Since the Company has net operating losses carrying forward, all of the Company's federal and state income tax returns, which were filed beginning with the 2014 tax year, are subject to examination by the respective taxing authorities. Additionally, Internal Revenue Code (IRC) Section 382 provides an annual limitation with respect to the ability of a corporation to utilize its tax attributes, as well as certain built-in-losses, against future U.S. taxable income in the event of a change in ownership. The Landcadia Business Combination resulted in a change in ownership for purposes of IRC Section 382, however, the Company has determined that the amount of net operating loss carryforwards subject to limitation under IRC Section 382 is immaterial.

During 2020, the Company was permitted to defer payment of the employer portion of certain payroll taxes under the Coronavirus Aid, Relief and Economic Security (CARES) Act. The Company did not defer any payroll taxes after December 31, 2020. As of December 31, 2022, the Company has paid all payroll tax deferrals.

## 13. Commitments and Contingent Liabilities

*Sponsorship Agreement*

On July 23, 2022 (the "Effective Date"), the Company entered into a multi-year sponsorship agreement (the "MetLife Sponsorship Agreement") with New Meadowlands Stadium Company, LLC ("NMSC"), pursuant to which the Company will be the exclusive mobile ordering platform used at MetLife Stadium. Pursuant to the MetLife Sponsorship Agreement, NMSC agrees to provide the Company with certain promotions, programs and benefits throughout each Contract Year of the agreement. The term "Contract Year" under the MetLife Sponsorship Agreement refers to each year of the agreement with the first Contract Year beginning on the Effective Date and ending on March 31, 2023, and each subsequent Contract Year beginning on April 1 and ending on the last day of the following March. The term of the MetLife Sponsorship Agreement is five Contract Years and will expire on March 31, 2027. The MetLife Sponsorship Agreement provides for customary representations, warranties, and indemnification from the parties.

In connection with the MetLife Sponsorship Agreement, the Company has committed to pay an aggregate of $9,128 in sponsorship fees which will be amortized over the performance period on a straight-line basis. The sponsorship fees are generally payable in quarterly installments and include the following amounts by Contract Year: $1,650 in year one, $1,732 in year two, $1,820 in year three, $1,920 in year four and $2,006 in year five.

Included in the consolidated statement of operations for the year ended December 31, 2022, is $1,650 of sales and marketing expense related to the MetLife Sponsorship Agreement.

*Leases*

As of December 31, 2022, the Company had operating lease agreements for office facilities in various locations in the United States, which expire on various dates through August 2026. The terms of the lease agreements provide for rental payments that generally increase on an annual basis. The Company has one immaterial finance lease for office equipment. The Company recognizes expense for leases on a straight-line basis over the lease term, which the Company generally expects to be the non-cancellable period of the lease. As of December 31, 2022, the Company recognized on its consolidated balance sheet operating right-of-use assets of $2,917 and current and noncurrent operating lease liabilities of

$1,023 and $2,079, respectively. Total operating lease costs recognized in the consolidated statement of operations for the years ended December 31, 2022 and 2021 totaled $1,744 and $1,911, respectively. We have subleased a portion of our leased office facilities. Sublease income totaled $225 and $114 for the years ended December 31, 2022 and 2021, respectively.

The following table presents supplemental cash flow information and the weighted-average discount rate for the year ended December 31, 2022 and the weighted-average remaining lease term for the Company's operating leases as of December 31, 2022:

| | Twelve Months Ended December 31, 2022 |
|---|---|
| Cash paid for operating lease liabilities (in thousands) | $ 1,513 |
| Weighted-average remaining lease term (years) | 3.3 years |
| Weighted-average discount rate | 5 % |

As of December 31, 2022, the future minimum lease payments required under non-cancelable operating leases were as follows (in thousands):

| | Amount |
|---|---|
| 2023 | $ 1,154 |
| 2024 | 874 |
| 2025 | 825 |
| 2026 | 536 |
| **Total future lease payments** | **$ 3,389** |
| Less: imputed interest | (287) |
| **Present value of operating lease liabilities** | **$ 3,102** |

*Workers' Compensation and Auto Policy Claims*

We establish a liability under our workers' compensation and auto insurance policies for claims incurred within our self-insured retention levels and an estimate for claims incurred but not yet reported. As of December 31, 2022 and 2021, $7,349 and $4,305, respectively, in outstanding workers' compensation and auto policy reserves are included in the consolidated balance sheet.

*Legal Matters*

In July 2016, Waiter.com, Inc. filed a lawsuit against Waitr Inc. in the United States District Court for the Western District of Louisiana, alleging trademark infringement based on the Company's use of the "Waitr" trademark and logo, Civil Action No.: 2:16-CV-01041. The plaintiff sought injunctive relief and damages relating to the Company's use of the "Waitr" name and logo. During the third quarter of 2020, the trial date was rescheduled to June 2021. On June 22, 2021, the Company entered into a License, Release and Settlement Agreement (the "Settlement") to settle all claims related to this lawsuit. Pursuant to the Settlement, the Company paid the plaintiff $4,700 in cash on July 1, 2021. In connection with the Settlement, we agreed to adopt a new trademark or tradename to replace the Waitr trademark and to discontinue use of the Waitr trademark in connection with the marketing, sale or provision of any web-based or mobile app-based delivery, pick-up, carry-out or dine-in services using the Waitr trademark by June 22, 2022, which was extended by eight additional months in exchange for a one-time payment of $800. During the three months ended March 31, 2022, the Company accrued an $800 reserve in connection with its option to extend the license period by an additional eight months. The $800 legal reserve and $4,700 legal settlement are included in other expense in the consolidated statement of operations for the years ended December 31, 2022 and 2021, respectively.

In April 2019, the Company was named as a defendant in a class action complaint filed by certain current and former restaurant partners, captioned *Bobby's Country Cookin', LLC, et al v. Waitr Holdings Inc.,* which is currently pending in the United States District Court for the Western District of Louisiana. The plaintiffs assert claims for breach of contract and violation of the duty of good faith and fair dealing, and they seek recovery on behalf of themselves and two separate classes. Based on the current class definitions, as many as 10,000 restaurant partners could be members of the two separate classes at issue. In February 2022, the parties reached a proposed settlement in principle to resolve the litigation in its entirety and requested a stay of the pending litigation. Ultimately, no settlement agreement was executed by the parties nor was District Court approval obtained. Consequently, the stay of the litigation was briefly lifted until the District Court certified its ruling on a motion for summary judgment for immediate appeal. The litigation is currently stayed while the matter proceeds on appeal. Based on the settlement negotiations, the Company accrued a $1,250 reserve in connection with this lawsuit during the three months ended December 31, 2021. The accrued legal contingency is included in other current liabilities in the consolidated balance sheet at December 31, 2022 and in other expenses in the consolidated statement of operations for the year ended December 31, 2021.

In September 2019,Christopher Meaux, David Pringle, Jeff Yurecko, Tilman J. Fertitta, Richard Handler, Waitr Holdings Inc. f/k/a Landcadia Holdings Inc., Jefferies Financial Group, Inc. and Jefferies, LLC were named as defendants in a putative class action lawsuit entitled *Walter Welch, Individually and on Behalf of all Others Similarly Situated vs. Christopher Meaux, David Pringle, Jeff Yurecko, Tilman J. Fertitta, Richard Handler, Waitr Holdings Inc. f/k/a Landcadia Holdings Inc., Jefferies Financial Group, Inc. and Jefferies, LLC*. The case was filed in the Western District of Louisiana, Lake Charles Division. In the lawsuit, the plaintiff asserts putative class action claims alleging, inter alia, that various defendants made false and misleading statements in securities filings, engaged in fraud, and violated accounting and securities rules, seeking damages based upon these allegations. A similar putative class action lawsuit, entitled *Kelly Bates, Individually and on Behalf of all Others Similarly Situated vs. Christopher Meaux, David Pringle, Jeff Yurecko, Tilman J. Fertitta, Richard Handler, Waitr Holdings Inc. f/k/a Landcadia Holdings Inc., Jefferies Financial Group, Inc. and Jefferies, LLC*, was filed in that same court in November 2019. These two cases were consolidated, and an amended complaint was filed in October 2020. The Company filed a motion to dismiss in February 2021. The Court assigned that motion to the Magistrate Judge, who issued her Report and Recommendation to the District Court Judge that the motion be granted in all respects. On August 10, 2022, the Court ruled in favor of the Company and its former officers and directors on all claims and dismissed the case with prejudice. The deadline for appeal has passed with no action from plaintiffs; the judgment dismissing the case with prejudice is now final.

In November 2022, the Company was named as a defendant in *Jenson et al. v. Bitesquad.com, LLC*, No. 22-cv-03044 (NEB), filed in Minnesota state court. The plaintiffs, three customers purporting to represent a class, allege that the Company's advertising is false and misleading in that the Company's "free delivery" promotions violate the Minnesota Uniform Deceptive Practices Act and the Minnesota False Statement in Advertising Act as a result of the Company charging "other fees" on such orders that plaintiffs assert constitute a "delivery charge." The plaintiffs seek unspecified damages as well as injunctive and declaratory relief. The Company removed the case to the United States District Court for the District of Minnesota under the Class Action Fairness Act. Based on the existence of an arbitration provision in the BiteSquad website "terms and conditions" section, the Company then moved to compel arbitration under the Federal Arbitration Act. The parties briefed and presented arguments on this motion to the court on March 8, 2023 and are waiting on the court's ruling. The Company believes that this lawsuit lacks merit and that it has strong defenses to all claims alleged. The Company continues to vigorously defend the lawsuit.

In October, 2017, the Company was named as a defendant in the matter of *Michael Boone and Jennifer Walters, individually and on behalf of their minor child Grace Boone, vs. Waitr Inc.*, pending in the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana. The action arises from a pedestrian/vehicle collision that occurred in November 2016, and the alleged substantial damages as a result thereof. This matter was not resolved through mediation. A trial date has not been set and discovery is ongoing. The Company intends to vigorously defend this lawsuit.

In May 2020, the Company was named as a defendant in *Mary Ritchey, Individually and as Conservator for A.M., a minor, vs. Kristi Rando, Waitr Holdings, Inc., et al., Civil No. 1CCV-20-0722 LWC*, and *Robert P. McPherson vs. Kristi Rando, Waitr Holdings, Inc., et al., Civil No. 1CCV-20-0764 LWC*, consolidated and which is currently pending in the Circuit Court of the First Circuit, State of Hawaii. This action is a result of an automobile accident that occurred in October 2018 involving an employee of a Company subsidiary and the alleged substantial injuries and damages as a result thereof. Discovery is ongoing, as well as the motion practice. The court recently granted plaintiffs' motion to continue trial, and the trial has been rescheduled for June 2024. The Company intends to vigorously defend this lawsuit.

In May 2020, the Company was named as a defendant in *Jessie Stewart, Bradley Stewart & Sheila Ludwig vs. Waitr Inc. of LA., Waitr Holdings, Inc., Delivery Logistics, LLC, et al.*, in the 22nd Judicial District Court, St. Tammany Parish, Louisiana. This action is a result of an automobile accident that occurred in April 2020 involving an independent contractor and the mother of the three plaintiffs, alleging substantial damages based on the injuries sustained in the accident and the ultimate death of the mother subsequent to the automobile accident. Discovery is ongoing and no trial date has been set. The Company intends to vigorously defend this lawsuit.

In addition to the lawsuits described above, the Company is involved in other litigation arising from the normal course of business activities, including, without limitation, vehicle accidents involving employees and independent contractor drivers resulting in claims alleging personal injuries and medical expenses, labor and employment claims, allegations of intellectual property infringement, and workers' compensation benefit claims as a result of alleged conduct involving its employees, independent contractor drivers, and third-party negligence. Although the Company believes that it maintains insurance with standard deductibles that generally covers liability for potential damages in many of these matters where coverage is available on acceptable terms (it is not maintained for claims involving intellectual property), insurance coverage is not guaranteed, there are limits to insurance coverage and in certain instances claims are met with denial of coverage positions by the carriers; accordingly, we could suffer material losses as a result of these claims, the denial of coverage for such claims, or damages awarded for any such claim that exceeds coverage. Litigation is unpredictable and we may determine in the future that certain existing claims have greater exposure or liability than previously understood. See Risk Factors – *"We are subject to claims, lawsuits, investigations, and various proceedings, and face potential liability and expenses for legal claims from the normal course of business activities."*

**14. Stock-Based Awards and Cash-Based Awards**

In June 2020, the Company's stockholders approved the Waitr Holdings Inc. Amended and Restated 2018 Omnibus Incentive Plan (the "2018 Incentive Plan"), which permits the granting of awards in the form of incentive stock options, non-qualified stock options, stock appreciation rights, restricted stock, restricted stock units, performance-based awards, and other stock-based or cash-based awards. As of December 31, 2022, there were 353,539 shares of common stock available for future grants pursuant to the 2018 Incentive Plan. On January 1, 2023, the number of shares available for future grants increased by 688,044 pursuant to the evergreen provision of the 2018 Incentive Plan. The evergreen provision is determined based on 5% of the total number of outstanding shares of the Company's common stock (taking into account for this purpose such common stock issuable upon the exercise of options or warrants and the conversion of convertible debt) on December 31$^{st}$ of the immediately preceding year. The Company also has outstanding equity awards under the 2014 Stock Plan (as amended in 2017, the "Amended 2014 Plan"). Total compensation expense related to awards under the Company's incentive plans was $5,703 and $7,974 for the years ended December 31, 2022 and 2021, respectively.

**Stock-Based Awards**

***Stock Options***

There were no stock option grants during the year ended December 31, 2022. During the year ended December 31, 2021, 25,000 stock options were granted under the 2018 Incentive Plan and were subsequently forfeited during such period.

The Company determines the fair value of stock option grants on the grant date using an option-pricing model with various assumptions regarding the risk-free rate, volatility and expected term. Expected volatility for stock options is estimated based on a combination of the historical volatility of the Company's stock price and the historical and implied volatility of comparable publicly traded companies. Assumptions used in determining the fair value of stock option grants during the year ended December 31, 2021 are as follows:

| | 2021 |
|---|---|
| Weighted-average fair value at grant | $43.80 |
| Risk free interest rate | 0.46% |
| Expected volatility | 131.4% |
| Expected option life (years) | 3.59 |

As of March 31, 2022, all outstanding stock options were fully vested and there was no remaining unrecognized compensation cost related to stock options. The Company recognized compensation expense for stock options of $33 and $1,248 for the years ended December 31, 2022 and 2021, respectively.

The stock option activity under the Company's incentive plans during the years ended December 31, 2022 and 2021 is as follows:

| | Number of Shares | Weighted Average Exercise Price | Weighted Average Grant Date Fair Value |
|---|---|---|---|
| **Balance, December 31, 2020** | **487,619** | **$ 8.60** | **$ 6.60** |
| Granted | 25,000 | 55.60 | 43.80 |
| Exercised | (702) | 18.60 | 91.20 |
| Forfeited | (26,530) | 59.00 | 46.40 |
| Expired | (2,620) | 105.60 | 103.60 |
| **Balance, December 31, 2021** | **482,767** | **$ 7.74** | **$ 5.58** |
| Expired | (1,742) | 52.91 | 95.23 |
| **Balance, December 31, 2022** | **481,025** | **$ 7.58** | **$ 5.25** |

Outstanding stock options, which were fully vested and expected to vest and exercisable are as follows as of December 31, 2022 and 2021:

| | As of December 31, 2022 | | As of December 31, 2021 | |
|---|---|---|---|---|
| | Options Fully Vested and Expected to Vest | Options Exercisable | Options Fully Vested and Expected to Vest | Options Exercisable |
| Number of Options | 481,025 | 481,025 | 482,767 | 243,501 |
| Weighted-average remaining contractual term (years) | 2.02 | 2.02 | 3.03 | 3.06 |
| Weighted-average exercise price | $ 7.58 | $ 7.58 | $ 7.80 | $ 8.00 |
| Aggregate Intrinsic Value (in thousands) | $ — | $ — | $ 3,543 | $ 1,773 |

The aggregate intrinsic value in the table above represents the total pre-tax intrinsic value (the difference between the fair value of the common stock and the exercise price, multiplied by the number of in-the-money options) that would have been received by the option holders had all option holders exercised their in-the-money options on each date. This amount will change in future periods based on the fair value of the Company's stock and the number of options outstanding. There were no exercises of stock options during the year ended December 31, 2022. The aggregate intrinsic value of awards exercised during the year ended December 31, 2021 was $22.

***Restricted Stock***

The Company's restricted stock grants include performance-based and time-based vesting awards. The fair value of restricted shares is typically determined based on the closing price of the Company's common stock on the date of grant.

*Performance-Based Awards*

As of December 31, 2022, there were 156,716 performance-based RSUs outstanding under the Company's 2018 Incentive Plan. Such RSUs were granted to the Company's chief executive officer, Carl Grimstad, in April 2020 (the "Grimstad RSU Grant"). The Grimstad RSU Grant has an aggregate grant date fair value of $3,542 and vests in full in the event of a change of control, as defined in Mr. Grimstad's employment agreement with the Company, subject to his continuous employment with the Company through the date of a change of control; provided, however, that the Grimstad RSU Grant shall fully vest in the event that Mr. Grimstad terminates his employment for good reason or he is terminated by the Company for reason other than misconduct. No stock-based compensation expense will be recognized for the Grimstad RSU Grant until such time that is probable that the performance goal will be achieved, or at the time that Mr. Grimstad terminates his employment for good reason or he is terminated by the Company for reason other than misconduct, should either occur.

*Awards with Time-Based Vesting*

During the year ended December 31, 2022, a total of 439,500 RSUs with time-based vesting were granted pursuant to the Company’s 2018 Incentive Plan (with an aggregate fair value of $3,545). The RSUs generally vest over three years in accordance with the terms specified in the applicable award agreements, all of which accelerate and vest upon a change of control.

The Company recognized compensation expense for restricted stock of $5,670 and $6,726 during the years ended December 31, 2022 and 2021, respectively. Unrecognized compensation cost related to unvested time-based RSUs as of December 31, 2022, was $10,166, with a weighted average remaining vesting period of approximately 2.05 years. The total fair value of restricted shares that vested during the years ended December 31, 2022 and 2021 was $548 and $6,812, respectively.

The activity for restricted stock with time-based vesting under the Company’s incentive plans is as follows for the years ended December 31, 2022 and 2021:

| | Number of Shares | Weighted Average Grant Date Fair Value | Weighted Average Remaining Contractual Term (years) |
|---|---|---|---|
| **Nonvested at December 31, 2020** | **227,934** | **$ 44.60** | **1.71** |
| Granted | 399,795 | 42.00 | |
| Shares vested | (152,573) | 42.00 | |
| Forfeitures | (44,428) | 45.40 | |
| **Nonvested at December 31, 2021** | **430,728** | **$ 42.97** | **2.50** |
| Granted | 439,500 | 8.07 | |
| Shares vested | (115,684) | 38.97 | |
| Forfeitures | (142,353) | 18.25 | |
| **Nonvested at December 31, 2022** | **612,191** | **$ 24.42** | **2.05** |

**Cash-Based Awards**

***Performance Bonus Agreement***

On April 23, 2020, the Company entered into a performance bonus agreement with Mr. Grimstad, which was extended through January 3, 2025 in connection with the extension of his employment agreement. Pursuant to the performance bonus agreement, upon the occurrence of a change of control in which the holders of the Company’s common stock receive per share consideration that is equal to or greater than $40.00, subject to adjustment in accordance with the 2018 Incentive Plan, the Company shall pay Mr. Grimstad an amount equal to $5,000 (the “Bonus”). In order to receive the Bonus, Mr. Grimstad must remain continuously employed with the Company through the date of the change of control; provided, however, that in the event Mr. Grimstad terminates his employment for good reason or the Company terminates his employment other than for misconduct, Mr. Grimstad will be entitled to receive the Bonus provided the change of control occurs on or before January 3, 2025. Compensation expense related to the bonus agreement will not be recognized until such time that is probable that the performance goal will be achieved.

## 15. Stockholders’ Equity

***Reverse Stock Split***

On November 18, 2022, the Company filed a Certificate of Amendment to amend the Company’s Third Amended and Restated Certificate of Incorporation, which effected a one for twenty (1:20) reverse stock split of its outstanding common stock. As a result of the Reverse Stock Split, every twenty (20) shares of the Company’s common stock issued and outstanding immediately prior to the Reverse Stock Split was reduced to a smaller number of shares, such that every 20 shares of common stock held by a stockholder immediately prior to the Reverse Stock Split was combined and reclassified into one share of common stock. No fractional shares were issued in connection with the Reverse Stock Split. Stockholders who would otherwise be entitled to a fractional share of common stock were instead entitled to receive a proportional cash payment. The Reverse Stock Split did not change the par value or authorized number of shares of common stock. All common share and per share amounts presented in the consolidated financial statements and accompanying notes have been retroactively adjusted to reflect the Reverse Stock Split.

***Common Stock***

At December 31, 2022 and 2021, there were 249,000,000 shares of common stock authorized and 12,955,299 and 7,304,714 shares of common stock issued and outstanding, respectively, with a par value of $0.0001. The Company did not hold any shares as treasury shares as of December 31, 2022 or December 31, 2021. The Company's common stockholders are entitled to one vote per share.

***At-the-Market Offerings***

In November 2021, the Company entered into a third amended and restated open market sale agreement with respect to an at-the-market offering program (the "ATM Program") under which the Company could offer and sell, from time to time at its sole discretion, shares of its common stock having an aggregate offering price of up to $50,000, through Jefferies LLC ("Jefferies") as its sales agent. There were no sales of common stock pursuant to the third amended and restated open market sales agreement after April 12, 2022. In August 2022, the Company entered into a fourth amended and restated open market sale agreement with respect to the ATM Program under which the Company may offer and sell, from time to time at its sole discretion, shares of its common stock having an aggregate offering price of up to $50,000. The issuance and sale of shares by the Company under the open market sales agreements were made pursuant to the Company's effective registration statements on Form S-3. Details of sales pursuant to the ATM Program are included in the table below. See *Note 20 – Subsequent Events* for additional details on the August 2022 ATM Program

| | Sales during the year ended December 31, 2022 | | |
|---|---|---|---|
| | November 2021 ATM Program | August 2022 ATM Program | Total |
| Total shares sold | 603,749 | 3,381,350 | 3,985,099 |
| Average sales price per share | $ 11.94 | $ 1.67 | $ 3.23 |
| Gross proceeds (in thousands) | $ 7,211 | $ 5,660 | $ 12,871 |
| Net proceeds (in thousands) | $ 7,120 | $ 5,545 | $ 12,665 |

***Preferred Stock***

At December 31, 2022 and 2021, the Company was authorized to issue 1,000,000 shares of preferred stock ($0.0001 par value per share). There were no issued or outstanding preferred shares as of December 31, 2022 or December 31, 2021.

***Notes***

The Company has outstanding Notes which are convertible into shares of the Company's common stock at a rate of $131.02 per share as of December 31, 2022. See *Note 11 – Debt* for additional information regarding the Notes.

Pursuant to the May 2022 Conversion Agreement, the Luxor Entities converted $750 principal amount of the Notes into 220,575 shares of Company common stock during the three months ended June 30, 2022, calculated based on a per share price of $3.40, notwithstanding the conversion rate then in effect pursuant to the terms of the Notes. In connection with the conversion, the Company recognized $930 of induced conversion expense (see *Note 11 – Debt*).

Pursuant to the July 2022 Conversion Agreement, the Luxor Entities converted $6,750 principal amount of the Notes into 1,350,000 shares of Company common stock during the three months ended September 30, 2022, calculated based on a per share price of $5.00, notwithstanding the conversion rate then in effect pursuant to the terms of the Notes. In connection with the conversion, the Company recognized $8,569 of induced conversion expense (see *Note 11 – Debt*).

***Warrants***

In November 2018, the Company issued warrants to Luxor Capital (the “Debt Warrants”). The Debt Warrants expired on November 15, 2022 with none being exercised. Prior to expiration, the warrants were exercisable into 31,446 shares of the Company’s common stock at a conversion price of $159.00 per share.

**16. Fair Value Measurements**

*Medical Contingency*

Included in other income in the consolidated statement of operations for the year ended December 31, 2021 is $16,715 related to the change in estimate of a medical contingency (the “Medical Contingency”). The death of the individual in August 2021 associated with the Medical Contingency was new information the Company deemed a change in accounting estimate for the total liability.

The estimated loss exposure for the Medical Contingency as of December 31, 2021 was measured at fair value on a recurring basis and reflected the liability for unpaid medical expenses and dependent death benefits, totaling $423. The analysis used in the measurement of the reserve for the Medical Contingency reflected the Company’s assumptions used regarding unpaid medical expenses and estimated death benefits used in developing the fair value estimate and was a Level 3 measurement. The inputs required significant judgments and estimates at the time of the valuation.

At March 31, 2022, management no longer deemed the Medical Contingency a liability requiring fair value measurement estimation as the remaining liability at such time consisted entirely of discrete costs related to certain unpaid medical expenses. Accordingly, the Medical Contingency was transferred out the Level 3 fair value hierarchy.

*Contingent Consideration*

The fair value of contingent consideration is measured at acquisition date, and at the end of each reporting period through the term of the arrangement, using the Black Scholes option-pricing model with assumptions for volatility and risk-free rate. Contingent consideration relates to the earnout provision in the Company’s acquisition of the Cape Payment Companies in August 2021 and the future contingent payment based on the achievement of certain revenue targets (see *Note 5 – Business Combinations*). The contingent consideration liability was valued at $1,939 at December 31, 2021 and is included in other non-current liabilities on the consolidated balance sheet. As of December 31, 2022, the Company determined that it is unlikely that the earnout provision will be met, therefore no value was assigned.

Expected volatility is based on a blended weighted average of the volatility rates for a number of similar publicly-traded companies. The risk-free rates are based on U.S. Treasury securities with similar maturities as the expected term of the earnout provision at the date of valuation. The fair value measurement was based on significant inputs not observable in the market and thus, represents Level 3 measurements within the fair value hierarchy. These inputs required significant judgments and estimates at the time of the valuation. The Company engaged a third-party specialist to assist management in estimating the fair value of the contingent consideration obligation.

*Summary by Fair Value Hierarchy*

The following table presents the Company's liabilities measured at fair value on a recurring basis as of December 31, 2022 and 2021 (in thousands):

| | As of December 31, 2022 | | | |
|---|---|---|---|---|
| | Level 1 | Level 2 | Level 3 | Total |
| **Liabilities** | | | | |
| Contingent consideration | $ — | $ — | $ — | $ — |
| **Total liabilities measured and recorded at fair value** | $ — | $ — | $ — | $ — |

| | As of December 31, 2021 | | | |
|---|---|---|---|---|
| | Level 1 | Level 2 | Level 3 | Total |
| **Liabilities** | | | | |
| Accrued medical contingency | $ — | $ — | $ 423 | $ 423 |
| Contingent consideration | — | — | 1,939 | 1,939 |
| **Total liabilities measured and recorded at fair value** | $ — | $ — | $ 2,362 | $ 2,362 |

The Company had no assets required to be measured at fair value on a recurring basis at December 31, 2022 or 2021.

Adjustments to the fair value of the accrued Medical Contingency were recognized in other income on the consolidated statement of operations. The following table presents a reconciliation of the accrued Medical Contingency liability which was classified as a Level 3 financial instrument prior to March 31, 2022 (in thousands):

| | Medical Contingency | |
|---|---|---|
| | Year Ended December 31, | |
| | 2022 | 2021 |
| **Balance, beginning of the period** | **$ 423** | **$ 17,435** |
| Increases/additions | — | 84 |
| Reductions/settlements | (53) | (17,096) |
| Transfers out of Level 3 | (370) | — |
| **Balance, end of the period** | **$ —** | **$ 423** |

Adjustments to the fair value of the contingent consideration liability at the end of each reporting period are recognized in income (loss) from operations on the consolidated statement of operations. The following table presents a reconciliation of the contingent consideration liability classified as a Level 3 financial instrument for the years ended December 31, 2022 and 2021 (in thousands):

| | Contingent Consideration | |
|---|---|---|
| | Year Ended December 31, | |
| | 2022 | 2021 |
| **Balance, beginning of the period** | $ 1,939 | $ — |
| Additions | — | 1,686 |
| Increase (decrease) in fair value | (1,939) | 253 |
| Reductions/settlements | — | — |
| **Balance, end of the period** | **$ —** | **$ 1,939** |

In addition to assets and liabilities that are recorded at fair value on a recurring basis, the Company is required to record certain assets and liabilities at fair value on a non-recurring basis. The Company generally applies fair value concepts in recording assets and liabilities acquired in business combinations and acquisitions (see *Note 5 – Business Combinations*). Fair value concepts are also generally applied in estimating the fair value of long-lived assets and a reporting unit in connection with impairment analyses. See *Note 9 – Intangible Assets and Goodwill* and *Note 8 – Property and Equipment, Net*, for further discussion of the fair value of long-lived assets and the reporting unit associated with impairment testing conducted at March 15, 2022, September 30, 2022 and December 31, 2022. Additionally, in connection with the induced conversion of the Notes during the three months ended June 30, 2022 and the three months ended September 30, 2022, the Company applied fair value concepts. See *Note 11 – Debt* for further discussion.

**17. Segment Information**

The Company operates through two reportable operating segments based on two primary areas of service: (i) Delivery Services, which include operations related to the Company's technology platform for online ordering and delivery, and (ii) Third-Party Payment Processing Referral Services, which include operations related to facilitating access to third parties that provide payment processing solutions for restaurants and other merchants. For additional information about how our reportable segments derive revenue, refer to *Note 4 – Revenue*.

The CODM does not evaluate operating segments using asset information and, accordingly, we do not report asset information by segment. There are no internal revenue transactions between our reportable segments. The accounting policies of the segments are the same as those described in *Note 2 – Basis of Presentation and Summary of Significant Accounting Policies*.

The CODM evaluates segment performance primarily based on segment adjusted EBITDA. Segment adjusted EBITDA is defined as revenue less the following expenses: operations and support, sales and marketing, research and development, general and administrative and certain non-operating expenses associated with our segments. Excluded from segment adjusted EBITDA are non-cash items and other items that do not reflect our core operations. The following table presents information about our segments, with a reconciliation of total segments adjusted EBITDA to net loss from continuing operations of the consolidated Company (in thousands):

| | Year Ended December 31, | |
|---|---|---|
| | **2022** | **2021** |
| **Segments adjusted EBITDA:** | | |
| Delivery Services Segment | $ (15,995) | $ 14,800 |
| Third-Party Payment Processing Referral Services Segment | 447 | 756 |
| **Total segments adjusted EBITDA** | (15,548) | 15,556 |
| Reconciling items: | | |
| Interest expense | (5,664) | (7,074) |
| Income taxes | (80) | (24) |
| Depreciation and amortization expense | (13,296) | (12,429) |
| Goodwill impairment | (121,088) | — |
| Stock-based compensation expense | (5,703) | (7,974) |
| Loss on disposal of assets | (288) | (158) |
| Intangible and other asset impairments | (32,957) | (186) |
| Induced conversion expense related to Notes | (9,499) | — |
| Change in fair value of contingent consideration liability | 1,939 | (253) |
| Medical contingency change in estimate | — | 16,715 |
| Transaction related expenditures and other non-recurring adjustments | (3,805) | (3,452) |
| Accrued legal contingency and reserve | (800) | (5,950) |
| **Net loss from continuing operations** | $ (206,789) | $ (5,229) |

## 18. Loss Per Share Attributable to Common Stockholders

The calculation of basic and diluted loss per share attributable to common stockholders for the years ended December 31, 2022 and 2021 is as follows (in thousands, except share and per share data):

| | Year Ended December 31, | |
|---|---|---|
| | **2022** | **2021** |
| **Basic and diluted loss per share:** | | |
| Net loss attributable to common stockholders - basic and diluted | **$ (206,789)** | **$ (5,229)** |
| Weighted average number of shares outstanding - basic and diluted | 8,991,262 | 6,029,671 |
| Basic and diluted loss per common share | **$ (23.00)** | **$ (0.87)** |

The Company has outstanding Notes which are convertible into shares of the Company's common stock. See *Note 11 – Debt* for additional details on the Notes. Based on the conversion price in effect at the end of December 31, 2022 and 2021, the Notes were convertible into 324,555 and 284,506 shares, respectively, of the Company's common stock. During such years, the Company's weighted average common stock price was below the Notes conversion price. Additionally, the Company had net losses during the years ended December 31, 2022 and 2021. Accordingly, the shares were not considered in the dilutive earnings per share calculation.

Additionally, the following table includes securities outstanding at the end of the respective periods, which have been excluded from the fully diluted calculations because the effect on net loss per common share would have been anti-dilutive:

| | Year Ended December 31, | |
|---|---|---|
| | **2022** | **2021** |
| **Antidilutive shares underlying stock-based awards:** | | |
| Stock options | 481,025 | 482,767 |
| Restricted stock units | 768,907 | 588,694 |
| Warrants (see *Note 15 – Stockholders' Equity*) | — | 28,735 |

## 19. Related-Party Transactions

*Credit Agreement and Convertible Notes Agreement*

In November 2018, the Company entered into the Credit Agreement, and in January 2019, the Company entered into an amendment to the Credit Agreement, with Luxor Capital and an amendment to the Convertible Notes Agreement with the Luxor Entities. In addition, on each of May 21, 2019, July 15, 2020, March 9, 2021, May 9, 2022 and November 8, 2022, the Company entered into amendments to the Credit Agreement with Luxor Capital and amendments to the Convertible Notes Agreement with the Luxor Entities. Additionally, on May 12, 2022, the Company entered into an amendment to the Convertible Notes Agreement with the Luxor Entities.

On May 1, 2020, the Company entered into a Limited Waiver and Conversion Agreement with respect to the Credit Agreement and Convertible Notes Agreement. On May 13, 2022, the Company entered into the May 2022 Conversion Agreement, and on July 22, 2022, the Company entered into the July 2022 Conversion Agreement, with respect to the Convertible Notes Agreement.

Pursuant to the May 9, 2022 amendment to the Credit Agreement, the Company made a $20,000 prepayment on the Term Loan on such date. On October 5, 2022, the Company made a $1,676 prepayment on the Term Loan, representing 50% of the net proceeds received by the Company for sales under the August 2022 ATM through such date. The Company made prepayments totaling $1,269 on the Term Loan from November 11, 2022 through December 31, 2022, representing 60% of the net proceeds received by the Company for sales under the August 2022 ATM during such period.

Jonathan Green, a board member of the Company, is a partner at Luxor Capital. See *Note 11 – Debt* for additional details on related-party debt.

*Other Transactions with Related Parties*

As of December 31, 2022, some of the restaurants on our Platform are affiliated with one current and one prior member of our Board. We estimate that we generated total revenue, inclusive of diner fees, of approximately $269 and $700 during the years ended December 31, 2022 and 2021, respectively, from such restaurants that are affiliated with those current and prior members of our Board. Such restaurants enter into customary restaurant master service agreements with the Company, which are generally consistent with the other national partner agreements.

**20. Subsequent Events**

***ATM Program***

From January 1, 2023 through January 4, 2023, we sold 431,429 shares of common stock for gross proceeds of $157. As of March 15, 2023, we have approximately $44,183 available under the ATM Program, however, the Company does not anticipate utilizing its ATM Program in 2023.

***Amended Loan Agreements***

On January 6, 2023, ASAP Inc. (f/k/a Waitr Inc.), Waitr Intermediate Holdings, LLC, other guarantors party thereto, Luxor Capital, LLC and Luxor Capital entered into an amendment to the Credit Agreement (the “January 2023 Amended Credit Agreement”). Additionally, on January 6, 2023, Waitr Holdings Inc. and Luxor Capital entered into an amendment to the Convertible Notes Agreement (the “January 2023 Amended Convertible Notes Agreement”). The January 2023 Amended Credit Agreement and January 2023 Amended Convertible Notes Agreement provide that (i) Section 5.1(c) of each of the agreements is amended to waive the requirement for the audit report to be unqualified as to going concern with respect to the fiscal year 2022 financial statements and (ii) the requirement of Section 5.1(i) of each of the agreements that the financial plan demonstrate adequate liquidity through the final maturity date is amended to waive such requirement with respect to the financial plan to be delivered within 30 days of the end of fiscal year 2022.

On March 31, 2023, the Company entered into an amendment to the Credit Agreement (the “March 2023 Amended Credit Agreement”) and an amendment to the Convertible Notes Agreement (the “March 2023 Amended Convertible Notes Agreement”). The March 2023 Amended Credit Agreement and March 2023 Amended Convertible Notes Agreement provide that Section 5.1(c) is amended to extend the due date from March 31, 2023 to April 17, 2023 for submission of the fiscal year 2022 audited financial statements of the Company to the lenders. Additionally, the March 2023 Amended Convertible Notes Agreement allows the Company to PIK one hundred percent of the accrued interest for the fiscal quarter ending March 31, 2023 due on March 31, 2023.

***Executive Retention Bonuses***

On January 31, 2023, the Company agreed to a pay retention bonus to Mr. Grimstad in the amount of $1,000, of which $750 was payable immediately (and was paid on February 17, 2023) and the balance of $250 is to be paid upon the satisfaction of certain conditions. In the event Mr. Grimstad terminates his employment, other than for good reason (as defined in his employment agreement), or is terminated by the Company for misconduct (as defined in his employment agreement), in each case prior to January 31, 2024, Mr. Grimstad is required to repay the Company an amount of cash equal to the after-tax amount of the retention compensation actually paid.

Additionally, on January 31, 2023, the Company agreed to pay retention bonuses totaling $500 to certain executive officers of the Company (chief financial officer, general counsel and chief engagement officer), of which $375 was payable immediately (and was paid on February 17, 2023) and the balance of $125 is to be paid upon the satisfaction of certain conditions. In the event that any such executive officer terminates his at-will employment for any reason, other than the Company’s failure to timely pay salary, or the Company terminates such employment for such executive officer’s willful misconduct, gross negligence, failure to perform required duties or due to a felony conviction, in each case prior to January 31, 2024, such executive officer is required to repay the Company an amount of cash equal to the after-tax amount of the retention compensation actually paid.

**Exhibit 21.1**

**Subsidiaries of Waitr Holdings Inc.**

| Entity | Jurisdiction |
| --- | --- |
| Waitr Intermediate Holdings, LLC | Delaware |
| ASAP, Inc. (f/k/a Waitr Inc.) | Louisiana |
| BiteSquad.com, LLC | Minnesota |
| KASA Delivery, LLC | Minnesota |
| KASA Delivery Corporation | Minnesota |
| CDMX Holdings, LLC | Minnesota |
| Catering on Demand LLC | Minnesota |
| Delivery Logistics, LLC | Minnesota |
| Dude Delivery, LLC | Delaware |
| Dude Cannabis, LLC | Delaware |
| DDIT LLC | Florida |
| Have Fun, LLC | Florida |
| Cape Payments, LLC | Delaware |
| Leaf Advisors, LLC | Delaware |

**Exhibit 23.1**

**Consent of Independent Registered Public Accounting Firm**

We consent to the incorporation by reference in the Registration Statements on Form S-3 (No. 333-264257 and No. 333-228722 ) and Form S-8 (No. 333-229684, No. 333-232984, No. 333-241694 and No. 333-263550) of Waitr Holdings Inc. (the "Company"), of our report dated April 17, 2023, relating to the consolidated financial statements of the Company (which report expresses an unqualified opinion and includes an explanatory paragraph relating to a going concern uncertainty), appearing in this Annual Report on Form 10-K of the Company for the year ended December 31, 2022.

/s/ Moss Adams LLP

Denver, Colorado
April 17, 2023

**EXHIBIT 31.1**

**CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER**

**PURSUANT TO RULES 13a-14(b) and 15d-14(a)**
**UNDER THE SECURITIES EXCHANGE ACT OF 1934**

**AS ADOPTED PURSUANT TO SECTION 302**
**OF THE SARBANES-OXLEY ACT OF 2002**

I, Carl A. Grimstad, certify that:

1. I have reviewed this Annual Report on Form 10-K of Waitr Holdings Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal controls over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: April 17, 2023

By: /s/ Carl A. Grimstad

Carl A. Grimstad
Chief Executive Officer and Chairman of the Board
(Principal Executive Officer)

**EXHIBIT 31.2**

**CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER**

**PURSUANT TO RULES 13a-14(b) and 15d-14(a)**
**UNDER THE SECURITIES EXCHANGE ACT OF 1934**

**AS ADOPTED PURSUANT TO SECTION 302**
**OF THE SARBANES-OXLEY ACT OF 2002**

I, Armen Yeghyazarians, certify that:

1. I have reviewed this Annual Report on Form 10-K of Waitr Holdings Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal controls over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: April 17, 2023

By: /s/ Armen Yeghyazarians
Armen Yeghyazarians
Chief Financial Officer and Chief Accounting Officer
(Principal Financial Officer)

**EXHIBIT 32.1**

**CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER**

**PURSUANT TO 18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO SECTION 906
OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report of Waitr Holdings Inc. (the “Company”) on Form 10-K for the year ended December 31, 2022 as filed with the Securities and Exchange Commission on the date hereof (the “Report”), I, Carl A. Grimstad, certify, as of the date hereof and solely for purposes of and pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to my knowledge:

(1) The Report fully complies with the requirements of section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m); and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company as of the dates set forth and for the periods presented in the Report.

By: /s/ Carl A. Grimstad
Carl A. Grimstad
Chief Executive Officer and Chairman of the Board
(Principal Executive Officer)

Date: April 17, 2023

**EXHIBIT 32.2**

**CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER**

**PURSUANT TO 18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO SECTION 906
OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report of Waitr Holdings Inc. (the "Company") on Form 10-K for the year ended December 31, 2022 as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, Armen Yeghyazarians, certify, as of the date hereof and solely for purposes of and pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to my knowledge:

1. The Report fully complies with the requirements of section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m); and

2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company as of the dates set forth and for the periods presented in the Report.

By: /s/ Armen Yeghyazarians

Armen Yeghyazarians
Chief Financial Officer and Chief Accounting Officer
(Principal Financial Officer)

Date: April 17, 2023