

SECURITIES AND EXCHANGE COMMISSION

FORM 8-K

Current report filing

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FILER

MobileSmith, Inc.

CIK: **1113513** | IRS No.: **954439334** | State of Incorporation: **DE** | Fiscal Year End: **1231**
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Mailing Address
5400 TRINITY RD
SUITE 208
RALEIGH NC 27607

Business Address
5400 TRINITY RD
SUITE 208
RALEIGH NC 27607
919-765-5000

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

FORM 8-K

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

Date of report (Date of earliest event reported): **December 23, 2020**

MOBILESMITH, INC.

(Exact Name of Registrant as Specified in Its Charter)

Delaware

(State or Other Jurisdiction of Incorporation)

001-32634

(Commission File Number)

95-4439334

(IRS Employer Identification No.)

**5400 Trinity Rd., Suite 208
Raleigh, North Carolina**

(Address of Principal Executive Offices)

27607

(Zip Code)

855-516-2413

(Registrant's Telephone Number, Including Area Code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

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

Title of each class	Trading Symbol(s)	Name of each exchange on which registered

Indicate by check mark whether the registrant is an emerging growth company as defined in in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company

If an emerging growth company, indicate by checkmark 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.

Item 1.01 Entry into a Material Definitive Agreement.

On December 23, 2020 (the “Closing Date”), MobileSmith, Inc., a Delaware corporation (the “Company”), entered into Series A Exchange Agreements (the “Exchange Agreements”) with various holders of the Company’s convertible and non-convertible debt to convert such debt and related accrued interest into 1,158,141 shares of the Company’s newly created Series A Convertible Preferred Stock (the “Series A Preferred Stock”) as further described by the Certificate of Designation of Preferences, Rights and Limitations of Series A Convertible Preferred Stock (the “Certification of Designations”) which was filed with the Delaware Secretary of State on December 23, 2020. The Company is entitled to issue up to 1,750,000 shares of Series A Preferred Stock pursuant to the terms of the Certificate of Designations.

Specifically and as previously disclosed by the Company, pursuant a Convertible Secured Subordinated Note Purchase Agreement dated November 14, 2007 and a Convertible Subordinated Note Purchase Agreement dated December 11, 2014, the Company had immediately prior to the Closing Date outstanding Convertible Secured Subordinated Promissory Notes and Convertible Subordinated Promissory Notes (collectively, the “Convertible Promissory Notes”) in the aggregate principal amount including accrued but unpaid interest of \$52,687,735. The holders of the Convertible Promissory Notes were entitled to convert at any time the outstanding principal and accrued but unpaid interest into shares of the Company’s common stock, par value \$0.001 (the “Common Stock”), at a conversion price of \$1.43 (the “Conversion Rate”). Additionally, the Company had immediately prior to the Closing Date outstanding non-convertible Subordinated Promissory Notes (collectively, the “Non-Convertible Promissory Notes”) in the aggregate principal amount including accrued but unpaid interest of approximately \$5,000,000.

Of the total aggregate amount of principal and accrued but unpaid interest of \$52,687,735 underlying the Convertible Promissory Notes and Non-Convertible Promissory Notes, \$49,684,130 of such amount was converted into the 1,158,141 shares of the Series A Preferred Stock pursuant to the terms of the Exchange Agreement. The Convertible Promissory Notes and Non-Convertible Promissory Notes which converted are now terminated pursuant to the terms of the Exchange Agreement. Subsequent to the Closing Date, the Company also continues to owe \$5,000,000 in principal and accrued but unpaid interest under the that certain Loan and Security Agreement with Comerica Bank, which matures in June of 2022 and is secured by an extended irrevocable letter of credit issued by UBS AG with a renewed term expiring on May 31, 2021. In addition, the Company continues to owe \$3,003,605 in Convertible Promissory Notes, which it expects to exchange into Series A Preferred Stock in first quarter of 2021.

The 1,158,141 shares of the Series A Preferred Stock are convertible at any time into 34,744,230 shares of the Company’s Common Stock (or 30 shares of Common Stock for each share of Series A Preferred Stock and subject to adjustment as set forth in the Certificate of Designation), which equates to the same Conversion Rate that existed under the Convertible Promissory Notes. The shares of Series A Preferred Stock will automatically convert in the event of a Fundamental Transaction (as defined in the Certificate of Designations).

Each share of Series A Preferred Stock is entitled to an annual dividend equal to \$3.43, which equates to an annual dividend rate of 8% which is the same as annual interest rate that existed under the Convertible Promissory Notes. The dividend is payable in January and July of each year and may, at the Company’s discretion, be paid either in cash or in additional shares of Series A Preferred Stock based on the formula set forth in the Certificate of Designations.

The holders of the Series A Preferred Stock do not have voting rights. However and pursuant to the Certificate of Designations, two-thirds of the Holders of the Series A Preferred Stock have the right to appoint as Agent. Pursuant to Section 4(f) of the Certificate of Designations, the Company will not be entitled to take a number of significant corporate actions with the approval of the Agent. The requirement of the Agent to approve these corporate actions is identical to the rights the holders possessed under the Convertible Promissory Note. The Agent under the Certificate of Designation will initially be Avy Lugassy, one of Company's principal shareholders. Mr. Lugassy has acted as the Agent under the Convertible Promissory Notes in the past.

Below in tabular format is the name of each holder of Series A Preferred Stock and number of shares of Series A Preferred Stock owned by such shareholder immediately subsequent to the Closing Date:

Name of Series A Preferred Stock	Number of Series A Preferred Stock Shares Owned
Union Bancaire Privee, UBP SA	695,728
Grasford International Ltd.	291,555
Crystal Management Ltd.	17,643
The Blue Line Fund	11,762
Other Entities under control of Avy Lugassy (in aggregate)	141,453

The foregoing descriptions of the Exchange Agreement and the Certificate of Designations by the Company do not purport to be complete and are qualified in their entirety by reference to the full text of the Exchange Agreement and Certificate of Designations which are attached as Exhibits 3.1 and 10.1, respectively, to this Current Report on Form 8-K and incorporated herein by reference.

The shares of Series A Preferred Stock and the shares of Common Stock underlying the Series A Preferred Stock will be issued in reliance upon an exemption from registration provided by Section 4(2) of the Securities Act of 1933, as amended (the “Securities Act”). All such shares will be “restricted securities” in accordance with Rule 144(a)(3) of the Securities Act and each of the holders is “accredited investor” as defined under the Securities Act. This Current Report on Form 8-K is not and shall not be deemed to be an offer to sell or the solicitation of an offer to purchase equity of the Company.

Item 3.02 Unregistered Sales of Equity Securities

All information set forth in Item 1.01 of this Current Report on Form 8-K is hereby incorporated herein by referenced.

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

All information set forth in Item 1.01 of this Current Report on Form 8-K is hereby incorporated herein by referenced.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

- 3.1 Certificate of Designation of Preferences, Rights and Limitations of Series A Convertible Preferred Stock filed with Delaware Secretary of State on December 23, 2020.
 - 10.1 Form of Series A Exchange Agreement between MobileSmith, Inc. and various entities.
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SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: December 31, 2020

Company Name:
MobileSmith Inc.

By: */s/ Gleb*
Mikhailov

Gleb Mikhailov
Chief Financial
Officer

Exhibit 3.1

Certificate of Designation of Preferences, Rights and Limitations of Series A Convertible Preferred Stock filed with Delaware Secretary of State on December 23, 2020

MOBILESMITH, INC.

**CERTIFICATE OF DESIGNATION OF PREFERENCES,
RIGHTS AND LIMITATIONS
OF
SERIES A CONVERTIBLE PREFERRED STOCK**

PURSUANT TO SECTION 151(g) OF THE
DELAWARE GENERAL CORPORATION LAW

The undersigned, Jerry Lepore and Gleb Mikhailov, do hereby certify that:

1. They are the President and Secretary, respectively, of MobileSmith, Inc., a Delaware corporation (the “Corporation”).
2. The Corporation is authorized to issue 5,000,000 shares of preferred stock, none of which have been issued.
3. The following resolutions were duly adopted by the board of directors of the Corporation (the “Board of Directors”):

WHEREAS, the certificate of incorporation of the Corporation provides for a class of its authorized stock known as preferred stock, consisting of 5,000,000 shares, \$0.001 par value per share, issuable from time to time in one or more series;

WHEREAS, the Board of Directors is authorized to fix the dividend rights, dividend rate, voting rights, conversion rights, rights and terms of redemption and liquidation preferences of any wholly unissued series of preferred stock and the number of shares constituting any Series A Preferred Stock and the designation thereof, of any of them; and

WHEREAS, it is the desire of the Board of Directors, pursuant to its authority as aforesaid, to fix the rights, preferences, restrictions and other matters relating to a series of the preferred stock, which shall consist of up to 1,750,000 shares of the preferred stock which the Corporation has the authority to issue, as follows:

NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors does hereby provide for the issuance of a series of preferred stock for cash or exchange of other securities, rights or property and does hereby fix and determine the rights, preferences, restrictions and other matters relating to such series of preferred stock as follows:

TERMS OF PREFERRED STOCK

Section 1. Definitions. For the purposes hereof, the following terms shall have the following meanings:

“Affiliate” means any Person that, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with a Person, as such terms are used in and construed under Rule 405 of the Securities Act.

“Agent” means the individual designated by the Requisite Holders to perform the functions described herein and agrees to perform such functions in writing.

“Automatic Conversion Notice” shall have the meaning set forth in Section 5(c).

“Business Day” means any day except any Saturday, any Sunday, any day which is a federal legal holiday in the United States or any day on which banking institutions in the State of North Carolina are authorized or required by law or other governmental action to close.

“Commission” means the United States Securities and Exchange Commission.

“Common Stock” means the Corporation’s common stock, par value \$0.001 per share, and stock of any other class of securities into which such securities may hereafter be reclassified or changed.

“Common Stock Equivalents” means any securities of the Corporation or the Subsidiaries which would entitle the holder thereof to acquire at any time Common Stock, including, without limitation, any debt, preferred stock, rights, options, warrants or other instrument that is at any time convertible into or exercisable or exchangeable for, or otherwise entitles the holder thereof to receive, Common Stock.

“Conversion Date” shall have the meaning set forth in Section 5(a).

“Conversion Ratio” means thirty (30) shares of Common Stock for each share of Series A Preferred Stock, subject to adjustment as set forth herein.

“Conversion Shares” means, collectively, the shares of Common Stock issuable upon conversion of the shares of Series A Preferred Stock in accordance with the terms hereof.

“Debentures” means the debt instruments set forth on Exhibit A of the Series A Exchange Agreement.

“DGCL” means the Delaware General Corporation Law.

“Dividend Date” shall have the meaning set forth in Section 3(b).

“Exchange Act” means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

“Fundamental Transaction” means in the event the Corporation (i) directly or indirectly, in one or more related transactions effects any merger or consolidation of the Corporation with or into another Person, (ii) directly or indirectly, effects any sale, lease, license, assignment, transfer, conveyance or other disposition of all or substantially all of its assets in one or a series of related transactions, (iii) any, direct or indirect, purchase offer, tender offer or exchange offer (whether by the Corporation or another Person) is completed pursuant to which holders of Common Stock are permitted to sell, tender or exchange their shares for other securities, cash or property and has been accepted by the holders of 50% or more of the outstanding Common Stock, (iv) directly or indirectly, in one or more related transactions effects any reclassification, reorganization or recapitalization of the Common Stock or any compulsory share exchange pursuant to which the Common Stock is effectively converted into or exchanged for other securities, cash or property, or (v) directly or indirectly, in one or more related transactions consummates a stock or share exchange or other business combination (including, without limitation, a reorganization, recapitalization, spin-off or scheme of arrangement) with another Person whereby such other Person acquires more than 50% of the outstanding shares of Common Stock (not including any shares of Common Stock held by the other Person or other Persons making or party to, or associated or affiliated with the other Persons making or party to, such stock or share exchange or other business combination).

“Holder” shall have the meaning given such term in Section 2.

“Liquidation Event” means, whether in a single transaction or series of transactions, the voluntary or involuntary liquidation, dissolution or winding up of the Corporation or such Subsidiaries the assets of which constitute all or substantially all of the assets of the business of the Corporation and its Subsidiaries, taken as a whole.

“North Carolina Courts” shall have the meaning set forth in Section 9(d).

“Notice of Conversion” shall have the meaning set forth in Section 5(a).

“Original Issue Date” means the date of the first issuance of any shares of the Preferred Stock regardless of the number of transfers of any particular shares of Preferred Stock and regardless of the number of certificates which may be issued to evidence such Preferred Stock.

“Payment-in-Kind” shall have the meaning set forth in Section 3(c).

“Permitted Assigns” means the Persons identified in the Series A Exchange Agreement to whom Series A Preferred Stock will be issued contemporaneously with the issuance of Series A Preferred Stock pursuant to the Series A Exchange Agreement.

“Person” means an individual or corporation, partnership, trust, incorporated or unincorporated association, joint venture, limited liability company, joint stock company, government (or an agency or subdivision thereof) or other entity of any kind.

“Requisite Holders” means the written consent or approval of at least two-thirds (2/3rds) of the then outstanding Series A Preferred Stock.

“Rule 144” means Rule 144 promulgated by the Commission pursuant to the Securities Act, as such Rule may be amended from time to time, or any similar rule or regulation hereafter adopted by the Commission having substantially the same effect as such Rule.

“Securities” means the Series A Preferred Stock and the Conversion Shares.

“Securities Act” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

“Series A Exchange Agreement” means the Series A Exchange Agreement entered into simultaneously with the Original Issue Date among the Corporation and the holders of the Corporation’s outstanding Debentures for the issuance of **9,778** shares of Series A Preferred Stock, as amended, modified or supplemented from time to time in accordance with its terms.

“Series A Preferred Stock” shall have the meaning set forth in Section 2.

“Series A Preferred Stock Value” means the Stated Value multiplied by the then number of outstanding shares of Series A Preferred Stock.

“Share Delivery Date” shall have the meaning set forth in Section 5(c).

“Stated Value” shall have the meaning set forth in Section 2.

“Subsidiaries” means any subsidiaries of the Corporation as set forth on Schedule 4.1(a) of the Series A Exchange Agreement and shall, where applicable, also include any direct or indirect subsidiary of the Corporation formed or acquired after the date of the Series A Exchange Agreement.

“Trading Day” means a day on which the principal Trading Market is open for business.

“Trading Market” means any of the following markets or exchanges on which the Common Stock is listed or quoted for trading on the date in question: the NYSE American, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the North Carolina Stock Exchange, OTCQB, OTCQX or OTC Pink (or any successors to any of the foregoing).

“Transaction Documents” means this Certificate of Designation, the Series A Exchange Agreement and all exhibits and schedules thereto and hereto and any other documents or agreements executed in connection with the transactions contemplated pursuant to the Series A Exchange Agreement.

“Transfer Agent” means Issuer Direct Corporation, the current transfer agent of the Corporation, with a mailing address of 1 Glenwood Avenue, Suite 1001, Raleigh, North Carolina 27603, and any successor transfer agent of the Corporation.

Section 2. Designation, Amount and Par Value. The series of preferred stock shall be designated as its Series A Convertible Preferred Stock (the “Series A Preferred Stock”) and the number of shares so designated shall be up to 1,750,000 (which shall not be subject to increase without the written consent of the holders of a majority of the then outstanding Series A Preferred Stock (each, a “Holder” and collectively, the “Holders”). Each share of Series A Preferred Stock shall have a par value of \$0.001 per share and a stated value equal to \$42.90 (the “Stated Value”).

Section 3. Dividends.

a) Dividend Preference. The Holders of each share of the Series A Preferred Stock then outstanding shall be entitled to receive an annual dividend equal to \$3.43, subject to proration described below, out of any funds and assets of the Corporation legally available therefor, prior and in preference to any declaration or payment of any dividend payable on the Common Stock, payable bi-annually during the months of January and July each year (each, a “Dividend Date”). Such dividends shall accrue and be prorated with respect to each share of Series A Preferred Stock from the date on which such share is issued and outstanding and thereafter shall be deemed to accrue from day to day whether or not earned or declared and whether or not there exists profits, surplus, or other funds legally available for the payment of dividends, and shall be cumulative so that, if such dividends on the Series A Preferred Stock shall not have been paid, or declared and set apart for payment, the deficiency shall be fully paid or declared and set apart for payment before any dividend shall be paid or declared or set apart for the Common Stock.

b) Payment of Dividends. Each dividend shall be paid either in shares of Series A Preferred Stock (“Payment-in-Kind”) or in cash, at the option of the Corporation, on the respective Dividend Date. For Payment-in-Kind dividends, each Holder on the record date for such dividend will receive that number of shares of Series A Preferred equal to (i) \$3.43 divided by (ii) the Stated Value and (iii) multiplied by the number of shares of Series A Preferred Stock held by such Holder. No fractional shares shall be issued upon payment of such dividends pursuant to this Section 3(c) and the number of shares to be issued upon payment of such dividends will be rounded up to the nearest whole share based on the aggregate number of shares of Series A Preferred Stock held by such Holder.

Section 4. Voting and Other Rights.

a) Voting Rights. The Holders of Series A Preferred Stock shall have no voting rights with respect to any matters to be voted on by the stockholders of the Corporation. Holders of the Series A Preferred Stock shall be entitled to written notice of all stockholder meetings or written consents (and copies of proxy materials and other information sent to stockholders) with respect to which they would be entitled by vote, which notice would be provided pursuant to the Corporation’s bylaws and the DGCL.

b) Board Observation Rights. So long as any shares of Series A Preferred Stock are outstanding, the Corporation shall invite a representative of the Agent to attend all meetings of its Board and any committee thereof in a nonvoting observer capacity and, in this respect, shall give the representative of the Agent copies of all notices, minutes, consents, and other materials that it provides to its directors at the same time and in the same manner as provided to such directors; provided, however, that such representative shall agree in writing to hold in confidence and trust and to act in a fiduciary manner with respect to all information so provided; and provided further, that the Corporation reserves the right to withhold any information and to exclude such representative from any meeting or portion thereof if access to such information or attendance at such meeting could adversely affect the attorney-client privilege between the Corporation and its counsel or result in disclosure of trade secrets or a conflict of interest, or if such holder or its representative is a competitor of the Corporation. The Corporation shall reimburse the representative of the Agent with board observation rights pursuant hereto for all reasonable out-of-pocket travel expenses incurred (consistent with the Corporation’s travel policy) in connection with attending meetings of the Board.

c) Inspection Rights. The Corporation shall permit the Agent and its representatives to visit and inspect the Corporation’s properties; examine its books of account and records; and discuss the Corporation’s affairs, finances, and accounts with its officers, during normal business hours of the Corporation as may be reasonably requested by the Agent; provided, however, that the Corporation shall not be obligated pursuant to this Section 4(c) to provide access to any information that it reasonably considers to be a trade secret or confidential information (unless covered by an enforceable confidentiality agreement, in form acceptable to the Corporation) or the disclosure of which would adversely affect the attorney-client privilege between the Corporation and its counsel. The Corporation shall reimburse the Agent for all reasonable out-of-pocket travel expenses incurred (consistent with the Corporation’s travel policy) in connection with the exercise of its inspection rights under this Section 4(c).

d) Agent of the Holders. The Corporation may look solely to the Agent with respect to any matters relating to the giving or receipt of notices, consents or waivers from the Holders under this Certificate of Designation.

e) Rights and Duties of Agent.

(i) In acting under this Certificate of Designation and in connection with the Series A Preferred Stock, the Agent is acting solely as agent of the Holders and does not assume any obligation or relationship of agency or trust for or with the Corporation or any stockholder of the Corporation.

(ii) The Agent may consult with counsel satisfactory to it, and the advice of such counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by it hereunder in good faith and in accordance with the advice of such counsel.

(iii) The Agent shall be protected and shall incur no liability for or in respect of any action taken or thing suffered by it in reliance upon any notice, direction, consent, certificate, affidavit, statement or other paper or document reasonably believed by it to be genuine and to have been presented or signed by the Holders, or any of them. The Agent will not have any liability to any Holder or other person as a result of its inability to perform any of its obligations under this Certificate of Designation by reason of any preliminary or permanent injunction or other order, decree or ruling issued by a court of competent jurisdiction or by a governmental, regulatory or administrative agency or commission, or any statute, rule, regulation or executive order promulgated or enacted by any governmental authority, prohibiting or otherwise restraining performance of such obligation.

(iv) The Agent shall be obligated to perform only such duties as are herein and no implied duties or obligations shall be read into this Certificate of Designation against the Agent. The Agent shall not be under any obligation to take any action hereunder or thereunder which may tend to involve it in any expense or liability for which it does not receive indemnity. The Agent shall have no duty or responsibility in case of any default by the Corporation in the performance of its covenants or agreements contained herein except as directed by the Requisite Holders, including any duty or responsibility to initiate or attempt to initiate any proceedings at law or otherwise.

(v) The Agent shall not be accountable with respect to the validity or value of any Conversion Shares or of any securities or property which may at any time be issued or delivered upon conversion of the Conversion Shares and it makes no representation with respect thereto. The Agent shall not be responsible for any failure of the Corporation to comply with any of the covenants of the Corporation contained in this Certificate of Designation.

(vi) The Agent shall be entitled to use its discretion with respect to exercising or refraining from exercising any rights which may be vested in it by, and with respect to taking or refraining from taking any action or actions which it may be able to take under or in respect of, this Certificate of Designation, unless the Agent shall have been instructed by the Requisite Holders to refrain from exercising such rights or to take or refrain from taking such action. The Agent is hereby authorized and directed to accept instructions with respect to the performance of its duties hereunder from any officer, director, or manager of any Holder, and to apply to such officers, directors or managers for advice or instructions in connection with its duties, and shall not be liable to such Holder for any action taken or suffered to be taken by it in good faith in accordance with instructions of any such officer, director or manager or in good faith reliance upon any statement signed by any one of such officers, directors or managers of the Holders with respect to any fact or matter (unless other evidence in respect thereof is herein specifically prescribed) which may be deemed to be conclusively proved and established by such signed statement.

(vii) Nothing herein shall preclude the Agent from acting in any other capacity for any Holder or for any other legal entity.

(viii) The Agent shall not be responsible for and makes no representation as to the validity or adequacy of this Certificate of Designation or the Series A Preferred Stock and it shall not be responsible for any statement in this Certificate of Designation or the Series A Preferred Stock other than its signature thereon as a Holder and with respect to representations made in such capacity.

(ix) The Corporation agrees to reimburse the Agent upon request for all reasonable out of pocket expenses incurred by it, including the reasonable expenses of the Agent's agents and counsel. Each of the Holders shall indemnify (to the extent not reimbursed by the Corporation) pro rata according to their respective aggregate number of Series A Preferred Stock held and hold harmless the Agent against any loss, liability or reasonable expense (including reasonable agents' and attorneys' fees and expenses) incurred by it without willful misconduct, gross negligence or bad faith on its part arising out of or in connection with the acceptance or performance of its duties under this Certificate of Designation. The Agent shall notify the Holders promptly of any claim for which it may seek indemnity and the failure to provide such notice shall not prejudice the Agent's right to indemnity hereunder unless and to the extent that the Holders' ability to defend any

such claim shall have been compromised as a result of such failure to notify. The Corporation need not reimburse any expense and the Holders shall not be obligated to indemnify against any loss or liability incurred by the Agent through willful misconduct, gross negligence or bad faith. The obligations pursuant to this Section 4(d)(i) shall survive regardless of whether any shares of Series A Preferred Stock remain outstanding.

- (x) The Agent may at any time resign by giving written notice to the Holders of such intention on its part, specifying the date on which its desired resignation shall become effective; provided, however, that such date shall not be less than 30 days after the date on which such notice is given, unless the Holders otherwise agree. Such resignation under this Section 4(e)(x) shall take effect upon the appointment by the (remaining) Holders as hereinafter provided of a successor Agent and the acceptance of such appointment by such successor Agent. Any successor Agent appointed hereunder shall execute, acknowledge and deliver to its predecessor and to the Holders an instrument accepting such appointment hereunder, and thereupon such successor Agent, without any further act, deed or conveyance, shall become vested with all the rights and obligations of such predecessor with like effect as if originally named as Agent hereunder. As soon as practicable after appointment of the successor Agent, the Holders shall cause written notice of the change in the Agent to be given to the Corporation. Failure to give any notice provided for in this Section 4(d)(i) or any defect therein, shall not affect the legality or validity of the appointment of a successor Agent, as the case may be.
- f) Matters Requiring Agent Approval. So long as any of shares of the Series A Preferred Stock remain outstanding, the Company will not, without the approval of the Agent:
- (i) make any loan or advance to, or own any stock or other securities of, any subsidiary or other corporation, partnership, or other entity unless it is wholly owned by the Company;
 - (ii) make any loan or advance to any person, except advances and similar expenditures in the ordinary course of business or under the terms of an employee stock or option plan approved by the Company's Board of Directors;
 - (iii) guarantee any indebtedness except for trade accounts of the Company or any subsidiary arising in the ordinary course of business;
 - (iv) make any investment other than investments in prime commercial paper, money market funds, certificates of deposit in any United States bank having a net worth in excess of \$100,000,000 or obligations issued or guaranteed by the United States of America, in each case having a maturity not in excess of two years;
 - (v) incur any indebtedness in excess of \$25,000 individually or in the aggregate, other than trade credit incurred in the ordinary course of business;
 - (vi) increase or approve the compensation of the named executive officers, including benefits, bonuses and issuances of equity compensation; provided, however, that approval by the Agent of a pool of compensation benefits to be allocated by the Company will constitute approval of each specific allocation of such benefits by the Company;
 - (vii) change the principal business of the Company, enter new lines of business, or exit the current line of business;
 - (viii) sell, transfer, exclusively license, pledge or encumber any material Intellectual Property of the Company, except in the ordinary course of business;
 - (ix) create or authorize the creation of or issue any other security convertible into or exercisable for any equity security of the Company, other than issuances to officers, directors, employees, consultants or advisors pursuant to equity compensation plans approved by the Company's Board of Directors;
 - (x) purchase or redeem or pay any dividend on any capital stock, other than stock repurchased from former employees or consultants in connection with the cessation of their employment or consulting services, at the lower of fair market value or cost; or
 - (xi) increase the number of shares authorized for issuance to officers, directors, employees, consultants and advisors pursuant to equity incentive plans or other similar compensatory agreements or arrangement.

Section 5.

Conversion of Series A Preferred Stock.

a) Conversions at Option of the Holder. Subsequent to the Original Issuance Date, each share of Series A Preferred Stock shall be convertible, at any time and from time to time, at the option of the Holder thereof, into that number of shares of Common Stock equal to the then effective Conversion Ratio. Holders shall effect conversions by providing the Corporation with the form of conversion notice attached hereto as Annex A (a “Notice of Conversion”). Each Notice of Conversion shall specify the number of shares of Series A Preferred Stock to be converted, the number of shares of Series A Preferred Stock owned prior to the conversion at issue, the number of shares of Series A Preferred Stock owned subsequent to the conversion at issue and the date on which such conversion is to be effected, which date may not be prior to the date the applicable Holder delivers by facsimile such Notice of Conversion to the Corporation (such date, the “Conversion Date”). If no Conversion Date is specified in a Notice of Conversion, the Conversion Date shall be the date that such Notice of Conversion to the Corporation is deemed delivered hereunder. No ink-original Notice of Conversion shall be required, nor shall any medallion guarantee (or other type of guarantee or notarization) of any Notice of Conversion form be required. The calculations and entries set forth in the Notice of Conversion shall control in the absence of manifest or mathematical error. To effect conversions of shares of Series A Preferred Stock, a Holder shall not be required to surrender the certificate(s) representing the shares of Series A Preferred Stock to the Corporation unless all of the shares of Series A Preferred Stock represented thereby are so converted, in which case such Holder shall deliver the certificate representing such shares of Series A Preferred Stock promptly following the Conversion Date at issue. Shares of Series A Preferred Stock converted into Common Stock or redeemed in accordance with the terms hereof shall be canceled and shall not be reissued.

b) Mechanics of Conversion.

i. Delivery of Conversion Shares Upon Conversion. Not later than seven (7) Trading Days after each Conversion Date (the “Share Delivery Date”), the Corporation shall deliver, or cause to be delivered, to the converting Holder (A) Conversion Shares representing the number of Conversion Shares being acquired upon the conversion of the Series A Preferred Stock and (B) a bank check in the amount of accrued and unpaid dividends, if any, payable at the next Dividend Date to occur.

ii. Failure to Deliver Conversion Shares. If, in the case of any Notice of Conversion, such Conversion Shares are not delivered to or as directed by the applicable Holder by the Share Delivery Date, the Holder shall be entitled to elect by written notice to the Corporation at any time on or before its receipt of such Conversion Shares, to rescind such Conversion, in which event the Corporation shall promptly return to the Holder any original Series A Preferred Stock certificate delivered to the Corporation and the Holder shall promptly return to the Corporation the Conversion Shares issued to such Holder pursuant to the rescinded Conversion Notice.

iii. Reservation of Shares Issuable Upon Conversion. The Corporation covenants that it will at all times reserve and keep available out of its authorized and unissued shares of Common Stock for the sole purpose of issuance upon conversion of the Series A Preferred Stock, free from preemptive rights or any other actual contingent purchase rights of Persons other than the Holder (and the other holders of the Series A Preferred Stock), not less than such aggregate number of shares of the Common Stock as shall (subject to the terms and conditions set forth in the Series A Exchange Agreement) be issuable (taking into account the adjustments and restrictions of Section 6) upon the conversion of the then outstanding shares of Series A Preferred Stock. The initial number of shares of Common Stock reserved for conversions of the Series A Preferred Stock and each increase in the number of shares so reserved shall be allocated pro rata among the Holders based on the number of Preferred Shares held by each Holder on the Original Issuance Date or increase in the number of reserved shares (as the case may be) (the “Authorized Share Allocation”). In the event a Holder shall sell or otherwise transfer any of such Holder’s Series A Preferred Stock, each transferee shall be allocated a pro rata portion of such Holder’s Authorized Share Allocation. Any shares of Common Stock reserved and allocated to any Person which ceases to hold any Series A Preferred Stock shall be allocated to the remaining Holders of Series A Preferred Stock, pro rata based on the number of Series A Preferred Stock then held by such Holders. If, notwithstanding this Section 5(b)(iii) and not in limitation thereof, at any time while any of the Series A Preferred Stock remain outstanding the Corporation does not have a sufficient number of authorized and unissued shares of Common Stock to satisfy its obligation to have available for issuance upon conversion of the Series A Preferred Stock at least a number of shares of Common Stock equal to 100% of the Conversion Shares (an “Authorized Share Failure”), then the Corporation shall immediately take all reasonable action (within its control) to increase the Corporation’s authorized shares of Common Stock to an amount sufficient to allow the Corporation to reserve and have available the Conversion Shares for all of the Series A Preferred Stock then outstanding. Without limiting the generality of the foregoing sentence, as soon as practical after the date of the occurrence of an Authorized Share Failure, the Corporation shall hold a meeting of its stockholders for the approval of an increase in the number of authorized shares of Common Stock or obtain the approval of its stockholders for such increase through a written consent if appropriate under applicable law. In connection with such meeting, the Corporation shall provide each stockholder with a proxy statement and shall use its best efforts to solicit its stockholders’ approval of such increase in authorized shares of Common Stock. Nothing contained in this Section 5(c)(iii) shall limit any obligations of the Corporation under any provision of the Purchase Agreement. The Corporation covenants that all shares of Common Stock that shall be issuable upon conversion of Series A Preferred Stock shall, upon issue, be duly authorized, validly issued, fully paid and nonassessable.

iv. Fractional Shares. No fractional shares or scrip representing fractional shares shall be issued upon the conversion of the Series A Preferred Stock. As to any fraction of a share which the Holder would otherwise be entitled to purchase upon

such conversion, the Corporation shall at its election, either pay a cash adjustment in respect of such final fraction in an amount equal to such fraction multiplied by the Stated Value or round up to the next whole share.

c) Automatic Conversion. Subsequent to the Original Issuance Date and immediately prior to the occurrence of a Fundamental Transaction, the then outstanding shares of Series A Preferred Stock shall be automatically converted into shares of Common Stock equal to the then effective Conversion Ratio by delivering to a Holder of Series A Stock written notice by the Company no less than ten (10) Trading Days prior to the consummation of a Fundamental Transaction to effect such automatic conversion (the “Automatic Conversion Notice”).

d) Procedural Requirement for Automatic Conversion. Each Holder of Series A Preferred Stock or the Agent shall be sent the Automatic Conversion Notice indicating the time and the place for the automatic conversion of all such shares of Series A Preferred Stock pursuant to Section 5(d). Upon receipt of such notice, each Holder of shares of Series A Preferred Stock in certificated form shall surrender his, her or its certificate or certificates for all such shares (or, if such Holder alleges that such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the Corporation to indemnify the Corporation against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate) to the Corporation at the place designated in such notice. If so required by the Corporation, any certificates surrendered for conversion shall be endorsed or accompanied by written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered Holder or by his, her or its attorney duly authorized in writing. All rights with respect to the Series A Preferred Stock converted pursuant to Section 5(c), including the rights, if any, to receive notices and vote (other than as a Holder of Common Stock), will terminate upon the automatic conversion (notwithstanding the failure of the Holder or Holders thereof to surrender any certificates at or prior to such time of automatic conversion), except only the rights of the Holders thereof, upon surrender of any certificate or certificates of such Holders (or lost certificate affidavit and agreement) therefor, to receive the items provided for in the next sentence of this Section 5(d). As soon as practicable after the automatic conversion and, if applicable, the surrender of any certificate or certificates (or lost certificate affidavit and agreement) for Series A Preferred Stock, the Corporation shall issue and deliver to such Holder, or to his, her or its nominees, a certificate or certificates for the number of full shares of Common Stock issuable on such conversion in accordance with the provisions hereof. Such converted Series A Preferred Stock shall be retired and cancelled and may not be reissued as shares of such series, and the Corporation may thereafter take such appropriate action (without the need for stockholder action) as may be necessary to reduce the authorized number of shares of Series A Preferred Stock accordingly.

Section 6.

Certain Adjustments.

a) Stock Splits. If the Corporation, at any time while this Series A Preferred Stock is outstanding: (i) subdivides outstanding shares of Common Stock into a larger number of shares, (ii) combines (including by way of a reverse stock split) outstanding shares of Common Stock into a smaller number of shares, or (iii) issues, in the event of a reclassification of shares of the Common Stock, any shares of capital stock of the Corporation, then the Conversion Ratio shall be adjusted on an identical basis. Any adjustment made pursuant to this Section 6(a) shall become effective immediately after the record date for the determination of stockholders entitled to receive such dividend or distribution and shall become effective immediately after the effective date in the case of a subdivision, combination or re-classification.

b) Calculations. All calculations under this Section 6 shall be made to the nearest cent or the nearest 1/100th of a share, as the case may be. For purposes of this Section 6, the number of shares of Common Stock deemed to be issued and outstanding as of a given date shall be the sum of the number of shares of Common Stock (excluding any treasury shares of the Corporation) issued and outstanding.

c) Notice to the Holders.

i. Adjustment to Conversion Ratio. Whenever the Conversion Ratio is adjusted pursuant to any provision of this Section 6, the Corporation shall promptly deliver to each Holder or the Agent a notice setting forth the Conversion Ratio after such adjustment and setting forth a brief statement of the facts requiring such adjustment.

ii. Notice to Allow Conversion by Holder. If (A) the Corporation shall declare a dividend (or any other distribution in whatever form) on the Common Stock, (B) the Corporation shall declare a special nonrecurring cash dividend on or a redemption of the Common Stock, (C) the Corporation shall authorize the granting to all holders of the Common Stock of rights or warrants to subscribe for or purchase any shares of capital stock of any class or of any rights, (D) the approval of any stockholders of the Corporation shall be required in connection with any reclassification of the Common Stock, any consolidation or merger to which the Corporation is a party, any sale or transfer of all or substantially all of the assets of the Corporation, or any compulsory share exchange whereby the Common Stock is converted into other securities, cash or property or (E) the Corporation shall authorize the voluntary or involuntary dissolution, liquidation or winding up of the affairs of the Corporation, then, in each case, the Corporation shall cause to be filed at each office or agency maintained for the purpose of conversion of this Series A Preferred Stock, and shall cause to be delivered to each Holder or the Agent at its last address as it shall appear upon the stock books of the Corporation, at least ten (10) calendar days prior to the applicable record or effective date hereinafter specified, a notice stating (x) the date on which a record is to be taken for the purpose of such dividend, distribution, redemption, rights or warrants, or if a record is not to be taken, the date as of which the holders of the Common Stock of record to be entitled to such dividend, distributions, redemption, rights or warrants are to be determined or (y) the date on which such reclassification, consolidation, merger, sale, transfer or share exchange is expected to become effective or close, and the date as of which it is expected that holders of the Common Stock of record shall be entitled to exchange their shares of the Common Stock for securities, cash or other property deliverable upon such reclassification, consolidation, merger, sale, transfer or share exchange, provided that the failure to deliver such notice or any defect therein or in the delivery thereof shall not affect the validity of the corporate action required to be specified in such notice. To the extent that any notice provided hereunder constitutes, or contains, material, non-public information

regarding the Corporation or any of the Subsidiaries, the Corporation shall simultaneously file such notice with the Commission pursuant to a Current Report on Form 8-K as such rules are applicable to the Corporation at the time that such notice filing is required hereunder.

Section 7. Vote to Change the Terms of or Issue Series A Preferred Stock. In addition to any other rights provided by law, except where the vote or written consent of the holders of a greater number of shares is required by law or by another provision of the Certificate of Incorporation, without first obtaining either the affirmative vote at a meeting duly called for such purpose or the written consent without a meeting of the Requisite Holders, voting together as a single class, the Corporation shall not: (a) amend or repeal any provision of, or add any provision to, its Certificate of Incorporation or bylaws, file any certificate of designations or certificate of amendment, or issue or agree to issue any security or debt instrument if such action would adversely alter or change in any respect the preferences, rights, privileges or powers, or restrictions provided for the benefit, of the Holders of Series A Preferred Stock, regardless of whether any such action shall be by means of amendment to the Certificate of Incorporation or by merger, consolidation or otherwise; or (b) without limiting any provision of Section 5, whether or not prohibited by the terms of the Series A Preferred Stock, circumvent a right of the Series A Preferred Stock.

Section 8. Noncircumvention. The Corporation hereby covenants and agrees that the Corporation will not, by amendment of its Certificate of Incorporation, bylaws or through any reorganization, transfer of assets, consolidation, merger, scheme of arrangement, dissolution, issue or sale of securities, or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of this Certificate of Designations, and will at all times in good faith carry out all the provisions of this Certificate of Designations and take all action as may be required to protect the rights of the Holders.

Section 9.

Miscellaneous.

a) Notices. Any and all notices or other communications or deliveries to be provided by the Holders hereunder including, without limitation, any Notice of Conversion, shall be in writing and delivered personally, by email, or sent by a nationally recognized overnight courier service, addressed to the Corporation, at 5400 Trinity Road, Suite 208, Raleigh, North Carolina 27607 Attention: Legal Department, email address legal@mobilesmith.com or such other email address or address as the Corporation may specify for such purposes by notice to the Holders delivered in accordance with this Section 9(a). Any and all notices or other communications or deliveries to be provided by the Corporation hereunder shall be in writing and delivered personally, by facsimile or e-mail, or sent by a nationally recognized overnight courier service addressed to each Holder or the Agent at the facsimile number or address of such Holder or the Agent appearing on the books of the Corporation, or if no such facsimile number or e-mail address or address appears on the books of the Corporation, at the principal place of business of such Holder or the Agent, as set forth in the Series A Exchange Agreement. Any notice or other communication or deliveries hereunder shall be deemed given and effective on the earliest of (i) the date of transmission, if such notice or communication is delivered via facsimile at the facsimile number or e-mail attachment at the e-mail address set forth in this Section 9(a) prior to 5:30 p.m. (North Carolina time) on any date, (ii) the next Trading Day after the date of transmission, if such notice or communication is delivered via facsimile at the facsimile number or e-mail attachment at the e-mail address set forth in this Section 9(a) on a day that is not a Trading Day or later than 5:30 p.m. (North Carolina time) on any Trading Day, (iii) the second Trading Day following the date of mailing, if sent by U.S. nationally recognized overnight courier service, or (iv) upon actual receipt by the party to whom such notice is required to be given.

b) Absolute Obligation. Except as expressly provided herein, no provision of this Certificate of Designation shall alter or impair the obligation of the Corporation, which is absolute and unconditional, to pay liquidated damages and accrued dividends, as applicable, on the shares of Series A Preferred Stock at the time, place, and rate, and in the coin or currency, herein prescribed.

c) Lost or Mutilated Series A Preferred Stock Certificate. If a Holder's Series A Preferred Stock certificate shall be mutilated, lost, stolen or destroyed, the Corporation shall execute and deliver, in exchange and substitution for and upon cancellation of a mutilated certificate, or in lieu of or in substitution for a lost, stolen or destroyed certificate, a new certificate for the shares of Series A Preferred Stock so mutilated, lost, stolen or destroyed, but only upon receipt of evidence of such loss, theft or destruction of such certificate, and of the ownership hereof reasonably satisfactory to the Corporation.

d) Governing Law. All questions concerning the construction, validity, enforcement and interpretation of this Certificate of Designation shall be governed by and construed and enforced in accordance with the internal laws of the State of Delaware, without regard to the principles of conflict of laws thereof. Each party agrees that all legal proceedings concerning the interpretation, enforcement and defense of the transactions contemplated by any of the Transaction Documents (whether brought against a party hereto or its respective Affiliates, directors, officers, shareholders, employees or agents) shall be commenced in the state and federal courts sitting in the City of Raleigh, North Carolina (the "North Carolina Courts"). Each party hereto hereby irrevocably submits to the exclusive jurisdiction of the North Carolina Courts for the adjudication of any dispute hereunder or in connection herewith or with any transaction contemplated hereby or discussed herein (including with respect to the enforcement of any of the Transaction Documents), and hereby irrevocably waives, and agrees not to assert in any suit, action or proceeding, any claim that it is not personally subject to the jurisdiction of such North Carolina Courts, or such North Carolina Courts are improper or inconvenient venue for such proceeding. Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy thereof via registered or certified mail or overnight delivery (with evidence of delivery) to such party at the address in effect for notices to it under this Certificate of Designation and agrees that such service shall constitute good and sufficient service of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any other manner permitted by applicable law. Each party hereto hereby irrevocably waives, to the fullest extent permitted by applicable law, any and all right to trial by jury in any legal proceeding arising out of or relating to this Certificate of Designation or the transactions contemplated hereby. If any party shall commence an action or proceeding to enforce any provisions of this Certificate of Designation, then the prevailing party in such action or proceeding shall be reimbursed by the other party for its attorneys' fees and other costs and expenses incurred in the investigation, preparation and prosecution of such action or proceeding.

e) Waiver. Any waiver by the Corporation or a Holder or the Agent of a breach of any provision of this Certificate of Designation shall not operate as or be construed to be a waiver of any other breach of such provision or of any breach of any other provision of this Certificate of Designation or a waiver by any other Holders. The failure of the Corporation or a Holder or the Agent to insist upon strict adherence to any term of this Certificate of Designation on one or more occasions shall not be considered a waiver or deprive that party (or any other Holder) of the right thereafter to insist upon strict adherence to that term or any other term of this Certificate of Designation on any other occasion. Any waiver by the Corporation or a Holder must be in writing.

f) Severability. If any provision of this Certificate of Designation is invalid, illegal or unenforceable, the balance of this Certificate of Designation shall remain in effect, and if any provision is inapplicable to any Person or circumstance, it shall nevertheless remain applicable to all other Persons and circumstances. If it shall be found that any interest or other amount deemed interest due hereunder violates the applicable law governing usury, the applicable rate of interest due hereunder shall automatically be lowered to equal the maximum rate of interest permitted under applicable law.

g) Next Business Day. Whenever any payment or other obligation hereunder shall be due on a day other than a Business Day, such payment shall be made on the next succeeding Business Day.

h) Headings. The headings contained herein are for convenience only, do not constitute a part of this Certificate of Designation and shall not be deemed to limit or affect any of the provisions hereof.

i) Status of Converted or Redeemed Series A Preferred Stock. Shares of Series A Preferred Stock may only be issued pursuant to this Certificate of Designation and the Series A Exchange Agreement. If any shares of Series A Preferred Stock shall be converted, redeemed or reacquired by the Corporation, such shares shall resume the status of authorized but unissued shares of preferred stock and shall no longer be designated as Series A Convertible Preferred Stock.

RESOLVED, FURTHER, that the Chairman, the chief executive officer, the president or any vice-president, and the secretary or any assistant secretary, of the Corporation be and they hereby are authorized and directed to prepare and file this Certificate of Designation of Preferences, Rights and Limitations in accordance with the foregoing resolution and the provisions of Delaware law.

IN WITNESS WHEREOF, the undersigned have executed this Certificate this 23rd day of December, 2020.

/s/ Jerry Lepore _____
Name: Jerry Lepore
Title: President

/s/ Gleb Mikhailov _____
Name: Gleb Mikhailov
Title: Secretary

ANNEX A

NOTICE OF CONVERSION

(TO BE EXECUTED BY THE REGISTERED HOLDER IN ORDER TO CONVERT SHARES OF SERIES A PREFERRED STOCK)

The undersigned hereby elects to convert the number of shares of Series A Convertible Preferred Stock indicated below into shares of common stock, par value \$0.001 per share (the "Common Stock"), of MobileSmith, Inc., a Delaware corporation (the "Corporation"), according to the conditions hereof, as of the date written below. If shares of Common Stock are to be issued in the name of a Person other than the undersigned, the undersigned will pay all transfer taxes payable with respect thereto and is delivering herewith such certificates as may be required by the Corporation in accordance with the Series A Exchange Agreement. No fee will be charged to the Holders for any conversion, except for any such transfer taxes.

Conversion calculations:

Date to Effect Conversion: _____

Number of shares of Series A Preferred Stock owned prior to Conversion: _____

Number of shares of Series A Preferred Stock to be Converted: _____

Stated Value of shares of Series A Preferred Stock to be Converted: _____

Number of shares of Common Stock to be Issued: _____

Applicable Conversion Ratio: _____

Number of shares of Series A Preferred Stock subsequent to Conversion: _____

Address for Delivery: _____

or

DWAC Instructions:

Broker no: _____

Account no: _____

HOLDER

By: _____

Name:

Title:

Exhibit 10.1

Form of Series A Exchange Agreement between MobileSmith, Inc. and various entities.

SERIES A EXCHANGE AGREEMENT

THIS SERIES A EXCHANGE AGREEMENT (this “Agreement”), dated as of December 23, 2020 (the “Closing Date”), is entered into by and between MobileSmith, Inc., a Delaware corporation (the “Company”), and the parties identified as “Holder(s)” on the signature page hereto (the “Holder(s)”).

BACKGROUND

WHEREAS, the Company and the Holders have entered into various convertible and non-convertible promissory note agreements (the “Note Agreements”) whereby the Company has issued to the Holders various convertible and non-convertible promissory notes (the “Notes”);

WHEREAS, the outstanding Note Agreements and the Notes held by Holders, including all amendments thereto, are set forth on Exhibit A that is attached hereto and incorporated herein by reference, which include certain documents related to the Note Agreements and the Notes including but not limited to certain security agreements relating to a secured interest in all of the Company’s assets (collectively, the “Note Transaction Documents”); and

WHEREAS, pursuant and subject to the terms herein, the Company and Holders have agreed to exchange the Notes (including all outstanding but unpaid principal and interest) for new securities of the Company.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Company and the Holder hereby agrees as follows:

1. Incorporation of Preliminary Statements and Acknowledgement; Definitions. The preliminary statements set forth above by this reference hereto are hereby incorporated into this Agreement. Terms used as defined terms herein and not otherwise defined shall have the meanings provided therefor in the Purchase Agreement. In addition, the following terms shall have the following meanings:

“Affiliate” means any Person that, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with a Person, as such terms are used in and construed under Rule 405 under the Securities Act.

“Common Stock” means the Company’s common stock, par value \$0.001 per share, and stock of any other class of securities into which such securities may hereafter be reclassified or changed.

“Exchange Act” means the Securities Exchange Act of 1934, as amended.

“Exchange Transaction Documents” means this Agreement and the Certificate of Designation (as defined in Section 2 below).

“Lien” means a lien, charge pledge, security interest, encumbrance, right of first refusal, preemptive right or other restriction.

“Material Adverse Effect” shall have the meaning assigned to such term in Section 4(a).

“Person” means an individual or corporation, partnership, trust, incorporated or unincorporated association, joint venture, limited liability company, joint stock company, government (or an agency or subdivision thereof) or other entity of any kind.

“Proceeding” means an action, claim, suit, investigation or proceeding (including, without limitation, an informal investigation or partial proceeding, such as a deposition), whether commenced or threatened.

“Securities” means the Series A Preferred Stock (as defined in Section 2 below) and the Underlying Shares.

“Securities Act” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

“Trading Day” means a day on which the principal Trading Market is open for trading.

“Trading Market” means any of the following markets or exchanges on which the Common Stock is listed or quoted for trading on the date in question: the NYSE MKT, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the New York Stock Exchange, the OTC Bulletin Board, the OTCQB or the OTCQX (or any successors to any of the foregoing).

“Underlying Shares” means the shares of Common Stock issued and issuable upon conversion of the Series A Preferred Stock.

2. Exchange. Subject to the conversion election set forth in this Section 2, the Company agrees to issue to the Holder **695,728** shares of Series A Convertible Preferred Stock of the Company (the “Series A Preferred Stock”) with the terms set forth in the certificate of designation of preferences, rights and limitations (the “Certificate of Designation”) that is attached hereto as Exhibit B and incorporated herein by reference, in exchange for the Notes (including all outstanding but unpaid principal and interest). On the Closing Date, the Company shall file the Certificate of Designation with the State of Delaware and shall deliver to the Agent (as defined in the Certificate of Designation) evidence of such filing and the acceptance thereof by the State of Delaware, which shall be reasonably satisfactory to the Agent, and shall deliver to the Holder an original Series A Preferred Stock certificate dated as of the Closing Date in the name and denomination of shares of Series A Preferred Stock set forth on the signature page hereto within ten Trading Days from the Closing Date. Provided, however, a Holder may within two Trading Days after the Closing Date provide a written notice to the Company that such Holder is electing to convert all or part of the Note(s) held by such Holder pursuant to the terms of such Note. In the event a Holder elects to convert all or a portion of such Holder’s Notes, such Holder shall not be entitled to any shares of Series A Preferred Stock with respect to the portion of the Notes so converted and this Agreement shall be deemed null, void and of no further force or effect with respect to the portion of the Notes so converted.

3. Cancellation of the Notes. The Company and the Holder agree that, upon issuance of the Series A Preferred Stock, the Note Transaction Documents shall be cancelled in full and of no further force or effect and will destroy all certificates and/or documents with the Company’s original signature evidencing the Note Transaction Documents. The Holder agrees that, upon issuance and delivery by the Company of the Series A Preferred Stock, all executory and other provisions of the Note Transaction Documents (including all agreements and documents relating to any amendments and exchanges thereto) shall be deemed cancelled in full and of no further force or effect with respect to the Company or the Holder. Additionally, simultaneously with the issuance and delivery by the Company of the Series A Preferred Stock, the Holder, or in the alternative the Company, shall cause the filing of UCC-3’s to terminate all of the UCC-1’s filed pursuant to the Note Transaction Documents.

4. Representations and Warranties. Except as otherwise described in the Company’s Annual Report on Form 10-K for the year ended December 31, 2019 (and any amendments thereto filed at least two (2) Trading Days prior to the Closing Date), the Company’s Quarterly Reports on Form 10-Q for the quarters ended September 30, 2020, June 30, 2020 and March 31, 2007 (and any amendments thereto filed at least two (2) Trading Days prior to the Closing Date),, and any of the Company’s Current Reports on Form 8-K filed since January 1, 2020 (and any amendments thereto filed at least two (2) Trading Days prior to the Closing Date) (all collectively, the “SEC Reports”), the Company hereby represents and warrants to, and covenants with, each Holders as of the date hereof and the applicable Closing Date, as follows:

(a) Subsidiaries. All of the direct and indirect subsidiaries of the Company are set forth on Schedule 4.1(a) (individually, a “Subsidiary” and collectively, the “Subsidiaries”). The Company owns, directly or indirectly, all of the capital stock or other equity interests of each Subsidiary free and clear of any Liens, and all of the issued and outstanding shares of capital stock of each Subsidiary are validly issued and are fully paid, non-assessable and free of preemptive and similar rights to subscribe for or purchase securities.

(b) Organization and Qualification. The Company and each of the Subsidiaries is an entity duly incorporated or otherwise organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation or organization, with the requisite power and authority to own and use its properties and assets and to carry on its business as currently conducted. Neither the Company nor any Subsidiary is in violation nor default of any of the provisions of its respective certificate or articles of incorporation, bylaws or other organizational or charter documents. Each of the Company and the Subsidiaries is duly qualified to conduct business and is in good standing as a foreign corporation or other entity in each jurisdiction in which the nature of the business conducted or property owned by it makes such qualification necessary, except where the failure to be so qualified or in good standing, as the case may be, could not have or reasonably be expected to result in: (i) a material adverse effect on the legality, validity or enforceability of any Exchange Transaction Document, (ii) a material adverse effect on the results of operations, assets, business, prospects or condition (financial or otherwise) of the Company and the Subsidiaries, taken as a whole, or (iii) a material adverse effect on the Company’s ability to perform in any material respect on a timely basis its obligations under any Exchange Transaction Document (any of (i), (ii) or (iii), a “Material Adverse Effect”) and no Proceeding has been instituted in any such jurisdiction revoking, limiting or curtailing or seeking to revoke, limit or curtail such power and authority or qualification.

(c) Authorization; Enforcement. The Company has all requisite power and authority to execute, deliver and perform its obligations under the Transaction Agreements. The execution and delivery of the Exchange Transaction Documents, and the consummation by the Company of the transactions contemplated hereby, have been duly authorized by all necessary corporate action and no further action on the part of the Company or its Board of Directors or stockholders is required. The

Exchange Transaction Documents have been validly executed and delivered by the Company and constitute legal, valid and binding agreements of the Company enforceable against the Company in accordance with their terms, except to the extent (i) rights to indemnity and contribution may be limited by state or federal securities laws or the public policy underlying such laws, (ii) such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' and contracting parties' rights generally and (iii) such enforceability may be subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

(d) No Conflicts. The execution, delivery and performance by the Company of this Agreement and the other Exchange Transaction Documents to which it is a party, the issuance and sale of the Securities and the consummation by it of the transactions contemplated hereby and thereby do not and will not: (i) conflict with or violate any provision of the Company's or any Subsidiary's certificate or articles of incorporation, bylaws or other organizational or charter documents, (ii) conflict with, or constitute a default (or an event that with notice or lapse of time or both would become a default) under, result in the creation of any Lien upon any of the properties or assets of the Company or any Subsidiary, or give to others any rights of termination, amendment, acceleration or cancellation (with or without notice, lapse of time or both) of, any agreement, credit facility, debt or other instrument (evidencing a Company or Subsidiary debt or otherwise) or other understanding to which the Company or any Subsidiary is a party or by which any property or asset of the Company or any Subsidiary is bound or affected, or (iii) conflict with or result in a violation of any law, rule, regulation, order, judgment, injunction, decree or other restriction of any court or governmental authority to which the Company or a Subsidiary is subject (including federal and state securities laws and regulations), or by which any property or asset of the Company or a Subsidiary is bound or affected; except in the case of each of clauses (ii) and (iii), such as could not have or reasonably be expected to result in a Material Adverse Effect.

(e) Issuance of the Securities. The Securities are duly authorized and, when issued and paid for in accordance with the applicable Exchange Transaction Documents, will be duly and validly issued, fully paid and nonassessable, free and clear of all Liens imposed by the Company other than restrictions on transfer provided for in the Exchange Transaction Documents. The Underlying Shares, when issued in accordance with the terms of the Exchange Transaction Documents, will be validly issued, fully paid and nonassessable, free and clear of all Liens imposed by the Company other than restrictions on transfer provided for in the Exchange Transaction Documents.

(f) Capitalization. The outstanding capital stock of the Company is as described in the SEC Reports. The Company has not made any material issuances of capital stock since December 10, 2020, other than pursuant to the purchase of shares under the Company's employee stock equity plans and the exercise of outstanding warrants or stock options, in each case as disclosed in the SEC Reports, as well as the issuance of restricted shares to certain of its directors as part of its director compensation program and the issuance of restricted shares to certain of the Company's employees and consultants under the Company's employee stock equity plans. There are not (i) any outstanding preemptive rights, or (ii) any rights, warrants or options to acquire, or instruments convertible into or exchangeable for, any unissued shares of capital stock or other equity interest in the Company not disclosed in the SEC Reports, or (iii) any contract, commitment, agreement, understanding or arrangement of any kind to which the Company is a party that would provide for the issuance or sale of any capital stock of the Company, any such convertible or exchangeable securities or any such rights, warrants or options not disclosed in the SEC Reports. There are no shareholders agreements, voting agreements or other similar agreements with respect to the Common Stock to which the Company is a party.

(g) Financial Statements. The financial statements of the Company and the related notes contained in the SEC Reports present fairly and accurately in all material respects the financial position of the Company as of the dates therein indicated, and the results of its operations, cash flows and the changes in shareholders' equity for the periods therein specified, subject, in the case of unaudited financial statements for interim periods, to normal year-end audit adjustments. Such financial statements (including the related notes) have been prepared in accordance with generally accepted accounting principles applied on a consistent basis at the times and throughout the periods therein specified, except that unaudited financial statements may not contain all footnotes required by generally accepted accounting principles.

(h) Material Changes; Undisclosed Events, Liabilities or Developments. Except as disclosed in the SEC Reports or in any press releases issued by the Company at least two (2) Business Days prior to the Closing Date, there has not been (i) an event, circumstance or change that has had or is reasonably likely to have a Material Adverse Effect upon the Company, (ii) any obligation incurred by the Company that is material to the Company, (iii) any dividend or distribution of any kind declared, paid or made on the capital stock of the Company, or (iv) any loss or damage (whether or not insured) to the physical property of the Company which has had a Material Adverse Effect.

(i) Litigation. There is no material legal or governmental proceeding pending, or to the knowledge of the Company, threatened, to which the Company is a party or of which the business or property of the Company is subject that is required to be disclosed and that is not so disclosed in the SEC Reports or in the supplemental written disclosure on material legal proceedings provided to the Holders. Other than the information disclosed in the SEC Reports, the Company is not subject to any injunction, judgment, decree or order of any court, regulatory body, administrative agency or other government body.

(j) No Violations. To the knowledge of the Company, it is not in violation of its Certificate of Incorporation, bylaws or other organizational documents, as amended. To the knowledge of the Company, it is not in violation of any law, administrative regulation, ordinance or order of any court or governmental agency, arbitration panel or authority applicable to the Company, which violation, individually or in the aggregate, is reasonably likely to have a Material Adverse Effect. The Company is not in default (and there exists no condition which, with the passage of time or otherwise, would constitute a default) in the performance of any bond, debenture, note or any other evidence of indebtedness or any indenture, mortgage, deed of trust or any other material agreement or instrument to which the Company is a party or by which the Company is bound, which such default would have a Material Adverse Effect upon the Company.

(k) Governmental and Regulatory Permits. The Company and the Subsidiaries possess all certificates, authorizations and permits issued by the appropriate federal, state, local or foreign regulatory authorities necessary to conduct their respective businesses as described in the SEC Reports, except where the failure to possess such permits could not reasonably be expected to result in a Material Adverse Effect ("Material Permits"), and neither the Company nor any Subsidiary has received any notice of proceedings relating to the revocation or modification of any Material Permit.

(l) Title to Assets. The Company and the Subsidiaries have good and marketable title in fee simple to all real property owned by them and good and marketable title in all personal property owned by them that is material to the business of the Company and the Subsidiaries, in each case free and clear of all Liens, except for (i) Liens as do not materially affect the value of such property and do not materially interfere with the use made and proposed to be made of such property by the Company and the Subsidiaries and (ii) Liens for the payment of federal, state or other taxes, for which appropriate reserves have been made therefor in accordance with GAAP and, the payment of which is neither delinquent nor subject to penalties. Any real property and facilities held under lease by the Company and the Subsidiaries are held by them under valid, subsisting and enforceable leases with which the Company and the Subsidiaries are in compliance.

(m) Intellectual Property.

(i) Except for matters which are not reasonably likely to have a Material Adverse Effect, (i) each of the Company has ownership of, or a license or other legal right to use, all patents, copyrights, trade secrets, trademarks, customer lists, designs, manufacturing or other processes, computer software, systems, data compilation, research results or other proprietary rights used in the business of the Company (collectively, "Intellectual Property") and (ii) all of the Intellectual Property owned by the Company consisting of patents, registered trademarks and registered copyrights have been duly registered in, filed in or issued by the United States Patent and Trademark Office, the United States Register of Copyrights or the corresponding offices of other jurisdictions and have been maintained and renewed in accordance with all applicable provisions of law and administrative regulations in the United States and/or such other jurisdictions.

(ii) Except for matters which are not reasonably likely to have a Material Adverse Effect, all material licenses or other material agreements under which (i) the Company employs rights in Intellectual Property, or (ii) the Company has granted rights to others in Intellectual Property owned or licensed by the Company are in full force and effect, and there is no default by the Company with respect thereto.

(iii) The Company believes that it has taken all steps reasonably required in accordance with sound business practice and business judgment to establish and preserve the ownership of the Company's material Intellectual Property.

(iv) Except for matters which are not reasonably likely to have a Material Adverse Effect, to the knowledge of the Company, (i) the present business, activities and products of the Company do not infringe any intellectual property of any other person; (ii) neither the Company is making unauthorized use of any confidential information or trade secrets of any person; and (iii) the activities of any of the employees of the Company, acting on behalf of the Company, do not materially violate any agreements or arrangements related to confidential information or trade secrets of third parties.

(v) Except for matters which are not reasonably likely to have a Material Adverse Effect, and except as disclosed in the SEC Reports, no proceedings are pending, or to the knowledge of the Company, threatened, which challenge the rights of the Company to the use the Company's Intellectual Property.

(n) Insurance. The Company maintains insurance of the types and in the amounts that the Company reasonably believes is adequate for its businesses, including, but not limited to, insurance covering real and personal property owned or leased by the Company against theft, damage, destruction, acts of vandalism and all other risks customarily insured against by similarly situated companies, all of which insurance is in full force and effect.

(o) Transactions With Related Parties. Other than described in the SEC Reports, to the knowledge of the Company, no transaction has occurred between or among the Company or any of its Affiliates, officers or directors or any Affiliate or Affiliates of any such officer or director that with the passage of time are reasonably likely be required to be disclosed pursuant to Section 13, 14 or 15(d) of the Exchange Act.

(p) Private Placement. Assuming the accuracy of the Holder's representations and warranties set forth in Section 5, no registration under the Securities Act is required for the exchange, offer and sale of the Securities by the Company to the Holder as contemplated hereby. The issuance and sale of the Securities hereunder does not contravene the rules and regulations of the Trading Market.

(q) Investment Company. The Company is not, and is not an Affiliate of, and immediately after receipt of payment for the Securities, will not be or be an Affiliate of, an "investment company" within the meaning of the Investment

Company Act of 1940, as amended. The Company shall conduct its business in a manner so that it will not become an “investment company” subject to registration under the Investment Company Act of 1940, as amended.

(r) Listing and Maintenance Requirements. The Company’s Common Stock is listed on the OTCQB maintained by the OTC Markets Group, Inc. under the symbol TAPM. The Company has not, in the 12 months preceding the date hereof, received notice from any Trading Market on which the Common Stock is or has been listed or quoted to the effect that the Company is not in compliance with the listing or maintenance requirements of such Trading Market. The Company is, and has no reason to believe that it will not in the foreseeable future continue to be, in compliance with all such listing and maintenance requirements.

(s) Tax Status. Except for matters that would not, individually or in the aggregate, have or reasonably be expected to result in a Material Adverse Effect, the Company and its Subsidiaries each (i) has made or filed all United States federal, state and local income and all foreign income and franchise tax returns, reports and declarations required by any jurisdiction to which it is subject, or has properly filed extensions with respect thereto, (ii) has paid all taxes and other governmental assessments and charges that are material in amount, shown or determined to be due on such returns, reports and declarations except for taxes due for which appropriate extensions have been filed, and (iii) has set aside on its books provision reasonably adequate for the payment of all material taxes for periods subsequent to the periods to which such returns, reports or declarations apply. There are no unpaid taxes in any material amount claimed to be due by the taxing authority of any jurisdiction, and the officers of the Company or of any Subsidiary know of no basis for any such claim.

(t) Contracts. Except for matters which are not reasonably likely to have a Material Adverse Effect and those contracts that are substantially or fully performed or expired by their terms, the contracts listed as exhibits to or described in the SEC Reports that are material to the Company and all amendments thereto, are in full force and effect on the date hereof, and neither the Company nor, to the Company’s knowledge, any other party to such contracts is in breach of or default under any of such contracts.

(u) Offering Prohibitions. Neither the Company nor any person acting on its behalf or at its direction has in the past or will in the future take any action to sell, offer for sale or solicit offers to buy any securities of the Company which would bring the offer or sale of the Series A Preferred Stock as contemplated by this Agreement or the issuance of the Conversion Shares as contemplated by the Series A Preferred Stock within the provisions of Section 5 of the Securities Act.

(v) Books and Records. The books, records and accounts of the Company accurately and fairly reflect, in reasonable detail, the transactions in, and dispositions of, the assets of, and the operations of, the Company. The Company maintains a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management’s general or specific authorizations, (ii) transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles and to maintain asset accountability, (iii) access to assets is permitted only in accordance with management’s general or specific authorization and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(w) Survival. The foregoing representations and warranties shall survive the Closing Date.

5. Representations and Warranties of the Holder. The Holder hereby represents and warrants as of the date hereof to the Company as follows (unless as of a specific date therein):

(a) Organization; Authority. The Holder is an entity duly incorporated or formed, validly existing and in good standing under the laws of the jurisdiction of its incorporated or formed with full right, corporate, partnership, limited liability company or similar power and authority to enter into and to consummate the transactions contemplated by this Agreement and otherwise to carry out its obligations hereunder and thereunder. The execution and delivery of this Agreement and performance by the Holder of the transactions contemplated herein have been duly authorized by all necessary corporate, partnership, limited liability company or similar action, as applicable, on the part of the Holder. This Agreement has been duly executed by the Holder, and when delivered by the Holder in accordance with the terms hereof, will constitute the valid and legally binding obligation of the Holder, enforceable against it in accordance with its terms, except: (i) as limited by general equitable principles and applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors' rights generally, (ii) as limited by laws relating to the availability of specific performance, injunctive relief or other equitable remedies and (iii) insofar as indemnification and contribution provisions may be limited by applicable law.

(b) Experience of Holder. Each Holder, either alone or together with its representatives, has such knowledge, sophistication and experience in business and financial matters so as to be capable of evaluating the merits and risks of the prospective investment in the Securities, and has so evaluated the merits and risks of such investment. Each Holder is able to bear the economic risk of an investment in the Securities and, at the present time, is able to afford a complete loss of such investment.

(c) Communication of Offer. No Holder is purchasing the Securities as a result of any "general solicitation" or "general advertising," as such terms are defined in Regulation D, which includes, but is not limited to, any advertisement, article, notice or other communication regarding the Securities published in any newspaper, magazine or similar media or on the internet or broadcast over television, radio or the internet or presented at any seminar or any other general solicitation or general advertisement.

(d) Information on Company. Each Holder has been furnished with or has had access to the SEC Reports during the period from the date that is two years preceding the date hereof through the tenth Trading Day preceding the Closing Date in which such Holder purchases Securities. Holders are not deemed to have any knowledge of any information not included in the SEC Reports unless such information is delivered in the manner described in the next sentence. In addition, such Holder may have received in writing from the Company such other information concerning its operations, financial condition and other matters as such Holder has requested under a confidentiality agreement (such other information is collectively, the "Other Written Information"), and considered all factors such Holder deems material in deciding on the advisability of investing in the Securities. Such Holder was afforded (i) the opportunity to ask such questions as such Holder deemed necessary of, and to receive answers from, representatives of the Company concerning the merits and risks of acquiring the Securities; (ii) the right of access to information about the Company and its financial condition, results of operations, business, properties, management and prospects sufficient to enable such Holder to evaluate the Securities; and (iii) the opportunity to obtain such additional information that the Company possesses or can acquire without unreasonable effort or expense that is necessary to make an informed investment decision with respect to acquiring the Securities.

(e) Securities Act Representations. The Holder understands that the Securities are "restricted securities" and have not been registered under the Securities Act or any applicable state securities law. The Holder acknowledges it is contemplating selling certain of the Series A Preferred Stock immediately subsequent to the execution of this Agreement but that such transfer shall be accomplished in full compliance with the provisions of the Securities Act.

(f) Holder Status. At the time the Holder was offered the Securities, it was, and as of the date hereof it is, and on each date on which it converts the Series A Preferred Stock it will be, an "accredited investor" as defined in Rule 501(a)(1), (a)(2), (a)(3), (a)(7) or (a)(8) under the Securities Act.

(g) Survival. The foregoing representations and warranties shall survive the Closing Date.

The Company acknowledges and agrees that the representations contained in Section 5 shall not modify, amend or affect the Holder's right to rely on the Company's representations and warranties contained in this Agreement or any other document or instrument executed and/or delivered in connection with this Agreement or the consummation of the transaction contemplated hereby.

6. Covenants in Favor of the Holders. The Company covenants and agrees with the Holders that, so long as any shares of the Series A Preferred Stock shall be outstanding, unless waived by the Agent (as defined in the Certificate of Designation) will perform the obligations set forth in this Section 6:

(a) Taxes and Levies. The Company will promptly pay and discharge all taxes, assessments, and governmental charges or levies imposed upon the Company or upon its income and profits, or upon any of its property, before the same shall become delinquent, as well as all claims for labor, materials and supplies which, if unpaid, might become a lien or charge upon such properties or any part thereof; provided, however, that the Company shall not be required to pay and discharge any such tax, assessment, charge, levy or claim so long as the validity thereof shall be contested in good faith by appropriate proceedings and the Company shall set aside on its books adequate reserves in accordance with GAAP with respect to any such tax, assessment, charge, levy or claim so contested.

(b) Maintenance of Existence. The Company will do or cause to be done all things reasonably necessary to preserve and keep in full force and effect its corporate existence, rights and franchises and comply with all laws applicable to the Company, except where the failure to comply would not have a Material Adverse Effect.

(c) Maintenance of Property. The Company will at all times maintain, preserve, protect and keep its property used or useful in the conduct of its business in good repair, working order and condition, and from time to time make all needful and proper repairs, renewals, replacements and improvements thereto as shall be reasonably required in the conduct of its business.

(d) Insurance. The Company will, to the extent necessary for the operation of its business, keep adequately insured by financially sound reputable insurers, all property of a character usually insured by similarly situated corporations and carry such other insurance as is usually carried by similar corporations.

(e) Books and Records. The Company will maintain a system of accounting sufficient to enable the Company to prepare financial statements in accordance with GAAP and will furnish to the Holders such books, records and accounts reflecting all of the business affairs and transactions of the Company as the Holders may reasonably request.

(f) Notice of Certain Events. The Company will give prompt written notice (with a description in reasonable detail) to the Holders upon becoming aware of the occurrence of any Event of Default (as hereinafter defined) or any event which, with the giving of notice or the lapse of time, would constitute an Event of Default.

(g) Matters Requiring Agent Approval. So long as any of shares of the Series A Preferred Stock remain outstanding, the Company will not, without the approval of the Agent:

- (i) make any loan or advance to, or own any stock or other securities of, any subsidiary or other corporation, partnership, or other entity unless it is wholly owned by the Company;
- (ii) make any loan or advance to any person, except advances and similar expenditures in the ordinary course of business or under the terms of an employee stock or option plan approved by the Company's Board of Directors;
- (iii) guarantee any indebtedness except for trade accounts of the Company or any subsidiary arising in the ordinary course of business;
- (iv) make any investment other than investments in prime commercial paper, money market funds, certificates of deposit in any United States bank having a net worth in excess of \$100,000,000 or obligations issued or guaranteed by the United States of America, in each case having a maturity not in excess of two years;
- (v) incur any indebtedness in excess of \$25,000 individually or in the aggregate, other than trade credit incurred in the ordinary course of business;
- (vi) increase or approve the compensation of the named executive officers, including benefits, bonuses and issuances of equity compensation; provided, however, that approval by the Agent of a pool of compensation benefits to be allocated by the Company will constitute approval of each specific allocation of such benefits by the Company;
- (vii) change the principal business of the Company, enter new lines of business, or exit the current line of business;
- (viii) sell, transfer, exclusively license, pledge or encumber any material Intellectual Property of the Company, except in the ordinary course of business;
- (ix) create or authorize the creation of or issue any other security convertible into or exercisable for any equity security of the Company, other than issuances to officers, directors, employees, consultants or advisors pursuant to equity compensation plans approved by the Company's Board of Directors;
- (x) purchase or redeem or pay any dividend on any capital stock, other than stock repurchased from former employees or consultants in connection with the cessation of their employment or consulting services, at the lower of fair market value or cost; or
- (xi) increase the number of shares authorized for issuance to officers, directors, employees, consultants and advisors pursuant to equity incentive plans or other similar compensatory agreements or arrangement.

7. Miscellaneous.

(a) Waivers and Amendments. Any provision of this Agreement may be amended, waived or modified only upon the written consent of the Company and Holders the written consent or approval of at least a majority of the then outstanding Series A Preferred Stock ("Requisite Percentage").

(b) Governing Law. This Agreement and all actions arising out of or in connection with this Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to the conflicts of law provisions of the State of Delaware or of any other state.

(c) Survival. The representations, warranties, covenants and agreements made herein shall survive the execution and delivery of this Agreement.

(d) Successors and Assigns. Subject to the restrictions on transfer described in Sections 9(e) below, the rights and obligations of the Company and the Holders shall be binding upon and benefit the successors, assigns, heirs, administrators and transferees of the parties.

(e) Assignment by the Company. The rights, interests or obligations hereunder may not be assigned, by operation of law or otherwise, in whole or in part, by the Company without the prior written consent of Holders holding a Requisite Percentage.

(f) Entire Agreement. This Agreement together with the other Transaction Agreements constitute and contain the entire agreement among the Company and Holders and supersede any and all prior agreements, negotiations, correspondence, understandings and communications among the parties, whether written or oral, respecting the subject matter hereof.

(g) Notices. Except as set forth in Section 1(c), all notices, requests, demands, consents, instructions or other communications required or permitted hereunder shall in writing and faxed, mailed or delivered to each party as follows: (i) if to a Holder, at such Holder's address or facsimile number set forth in the Schedule of Holders attached as Schedule I, or at such other address as such Holder shall have furnished the Company in writing, or (ii) if to the Company, at 5400 Trinity Road, Suite 208, Raleigh, North Carolina 27607 Attention: Legal Department, email address legal@mobilesmith.com, with a copy to Quick Law Group PC, 1035 Pearl Street, Suite 403, Boulder, CO 80302, Attn: Jeffrey M. Quick, Esq., fax: (303) 845-7315, email: jquick@quicklawgroup.com or at such other address or facsimile number as the Company shall have furnished to the Holders in writing. All such notices and communications will be deemed effectively given the earlier of (i) when received, (ii) when delivered personally, (iii) one Trading Day after being delivered by facsimile (with receipt of appropriate confirmation), (iv) one Trading Day after being deposited with an overnight courier service of recognized standing or (v) two days after being deposited in the U.S. mail, first class with postage prepaid.

(h) Expenses. Each of the parties hereto shall bear its own expenses in connection with the preparation, execution and delivery of this Agreement and the other Transaction Agreements.

(i) Separability of Agreements; Severability of this Agreement. The Company's agreement with each of the Holders is a separate agreement and the sale of the Series A Preferred Stock to each of the Holders is a separate sale. Unless otherwise expressly provided herein, the rights of each Holder hereunder are several rights, not rights jointly held with any of the other Holders. Any invalidity, illegality or limitation on the enforceability of the Agreement or any part thereof, by any Holder whether arising by reason of the law of the respective Holder's domicile or otherwise, shall in no way affect or impair the validity, legality or enforceability of this Agreement with respect to other Holders. If any provision of this Agreement shall be judicially determined to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

(j) Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same agreement. Facsimile copies of signed signature pages will be deemed binding originals.

(Signature Pages Follow)

IN WITNESS WHEREOF, this Series A Exchange Agreement is executed as of the date first set forth above.

MOBILESMITH, INC.

By: /s/ Jerry Lepore

Name: Jerry Lepore

Title:

Chief Executive Officer

[signature page of Holder to follow]

[HOLDER SIGNATURE PAGE TO MOBILESMITH, INC.
SERIES A EXCHANGE AGREEMENT]

IN WITNESS WHEREOF, the undersigned have caused this Series A Exchange Agreement to be duly executed by their respective authorized signatories as of the date first indicated above.

Name of Holder:

Address of Holder:

Signature of Authorized Signatory of Holder: _____

Name of Authorized Signatory: _____

Title of Authorized Signatory: _____

Address for Delivery of Securities to Holder (if not same as address for notice): _____

Number of Series A Preferred Stock Shares:

EXHIBIT A

SCHEDULE OF NOTE PURCHASE AGREEMENTS AND NOTES

SCHEDULE B

CERTIFICATE OF DESIGNATION