FALCONSTOR SOFTWARE INC

Form 10-K March 27, 2019

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

ý ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 For the fiscal year ended December 31, 2018.

OR

"TRANSITION REPORT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 For the transition period from to

Commission file number 0-23970

### FALCONSTOR SOFTWARE, INC.

(Exact name of registrant as specified in its charter)
DELAWARE 77-0216135
(State or other jurisdiction of incorporation or organization) Identification No.)

701 Brazos Street, Suite 400 78701 Austin, Texas (Zip code)

(Address of principal executive offices)

Registrant's telephone number, including area code: 631-777-5188

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

Securities registered pursuant to Section 12(g) of the Act: Common Stock, \$0.001 par value

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.

Yes "No ý

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes "No  $\acute{y}$ 

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

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ý No "

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

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

Large accelerated filer "Accelerated filer

Non-accelerated filer "Smaller Reporting Company ý

Emerging growth company "

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

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes "No  $\acute{y}$ 

The aggregate market value of Common Stock held by non-affiliates of the Registrant as of June 30, 2018 was \$2,768,372 which value, solely for the purposes of this calculation excludes shares held by Registrant's officers and directors. Such exclusion should not be deemed a determination by Registrant that all such individuals are, in fact, affiliates of the Registrant. The number of shares of Common Stock issued and outstanding as of February 28, 2019 was 587,255,165.

### Documents Incorporated by Reference:

The information required by Part III of Form 10-K will be incorporated by reference to certain portions of a definitive proxy statement which is expected to be filed by the Company pursuant to Regulation 14A within 120 days after the close of its fiscal year.

# FALCONSTOR SOFTWARE, INC. AND SUBSIDIARIES

# 2018 ANNUAL REPORT ON FORM 10-K

# TABLE OF CONTENTS

PART I.		Page
Item 1. Item 1A. Item 1B. Item 2. Item 3. Item 4.	Business Risk Factors Unresolved Staff Comments Properties Legal Proceedings Mine Safety Disclosures	3 9 21 21 21 21 21
Item 5.  Item 6.  Item 7.  Item 7A.  Item 8.  Item 9.  Item 9A.  Item 9B.	Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities Selected Financial Data Management's Discussion and Analysis of Financial Condition and Results of Operations Quantitative and Qualitative Disclosures About Market Risk Financial Statements and Supplementary Data Changes in and Disagreements with Accountants on Accounting and Financial Disclosure Controls and Procedures Other Information	22 23 24 35 36 73 73 73
Item 10. Item 11. Item 12. Item 13. Item 14.	Directors, Executive Officers and Corporate Governance  Executive Compensation  Security Ownership of Certain Beneficial Owners and Management and Related Stockholder  Matters  Certain Relationships and Related Transactions, and Director Independence  Principal Accountant Fees and Services	75 75 75 75 75 75
Item 15. Item 16. SIGNATURES	Exhibits and Financial Statement Schedules Form 10-K Summary	76 79 80
2		

PART I Item 1. Business

#### **OVERVIEW**

FalconStor Software, Inc. ("FalconStor", the "Company", "we", "our" or "us") is a leading Software-Defined Storage ("SDS") company offering a converged data services software platform that is hardware agnostic which was founded in 2000. As a global company, our vision is to deliver enterprise class, software-defined, intelligent data services combined with predictive analytics across any primary or secondary storage hardware; in the cloud or on premise. The Company's mission is to help IT organizations realize more economic value out of existing environments and any future storage investments while reducing complexity, maximizing flexibility and improving operational efficiency. Our award-winning solutions are available and supported worldwide by OEMs as well as leading service providers, system integrators, resellers and FalconStor.

FalconStor was incorporated in Delaware as Network Peripherals, Inc., in 1994. Pursuant to a merger with FalconStor Inc., in 2001, the former business of Network Peripherals, Inc., was discontinued, and the newly re-named FalconStor Software, Inc., continued the storage software business started in 2000 by FalconStor, Inc. FalconStor's headquarters are now located at 701 Brazos Street, Suite 400, Austin, TX 78701. The Company also maintains offices in Melville, N.Y., and throughout Europe and Asia Pacific.

#### FALCONSTOR DATA MASTERY PLATFORM

FalconStor® Data Mastery Platform (FDMP) is FalconStor's flagship product with what we believe to be the most complete, software-defined, hardware agnostic platform to deliver a truly heterogeneous data services approach. While virtualization has streamlined some common tasks associated with managing data resources, the introduction of a virtualization layer can introduce a whole new level of complexity to the protection, recovery and integration of both virtual and non-virtualized resources. FDMP helps IT organizations minimize and eliminate that complexity with the availability of four specific use cases which include; migration, continuity, protection/recovery and optimization for any storage environment through a single management interface with "Edge-to-Core" analytics.

FalconStor accomplishes this through its Intelligent Abstraction® core, which provides a scalable storage hypervisor, coupled with a data services engine and automation, to ease the provisioning and management of storage resources with the right level of performance, protection and recovery. The Intelligent Abstraction core optimizes storage resources regardless of type, connectivity, brand or speed, into a storage resource pool that can be provisioned to physical or virtual applications, along with common, unified data services across that pool. FDMP is designed to reduce the complexity and time involved in managing disparate underlying storage found in today's enterprises.

# PRODUCT STRATEGY

FalconStor's strategy is to focus on the development of the advanced FDMP platform to further leverage the company's industry point solutions as core building blocks. Our existing point products can be utilized via the FDMP platform or as stand-alone products. Our Business Continuity and Disaster Recovery products, Network Storage Server (NSS) and Continuous Data Protector (CDP), feature RecoverTrac, which we believe is the industry's most automated and complete recovery tool. Our solutions support physical, virtual, hybrid and private cloud environments. We believe a key differentiator is our ability to allow users to manage and to convert across these environments dynamically, giving them the freedom to optimize their IT infrastructure and to eliminate costly vendor and form-factor lock-in. Our Optimized Backup and Deduplication (OBD) product merges our industry-leading Virtual Tape Library (VTL) and File-interface Deduplication System (FDS) solutions to help customers optimize the performance of their existing backup infrastructure, while reducing the cost of underlying storage and data replication. From Fortune 100

enterprises to medium-size businesses, customers across a vast range of industries worldwide have implemented FalconStor solutions in their production IT environments. Whether it is to meet their recovery time objectives (RTO) or their recovery point objectives (RPO), FalconStor helps end users manage their storage infrastructures with minimal total cost of ownership (TCO) and with optimal return on investment (ROI).

FalconStor's products have been certified by many industry leaders which are available on our website at: www.falconstor.com/certification-matrix.

Deployment options

FalconStor sells its solutions primarily as standalone software.

#### **Solutions**

FalconStor is focused on offering solutions in four specific use-cases:

Data Migration Continuous Availability Data Protection + Recovery Optimization

Our core point solution products enable these solutions as follows:

FalconStor® Data Mastery Platform (FDMP) - An integrated software-defined platform that provides, migration, continuity, protection/recovery and optimization for any storage environment through a single management interface which contains analytics from

Edge-to-Core".

FalconStor® NSS - Migration, storage virtualization, provisioning and management.

FalconStor® CDP - Bootable snapshots, zero-impact backup, both local and remote disaster recovery.

FalconStor® OBD - Optimized backup, archive to tape, block-based deduplication, file-based deduplication and storage capacity optimization

FalconStor solutions are scalable in order to address the needs of medium businesses, large organizations, and global enterprises. Our solutions offer high availability (HA) through RAID, synchronous and asynchronous mirroring, HA failover, and clustering technologies (both 2-NODE and 4-NODE) for those customers requiring the highest levels of IT resiliency.

#### **FDMP**

FDMP is an industry leading software-defined, hardware agnostic platform that delivers a heterogeneous data services approach. FDMP helps IT organizations minimize and eliminate the complexity with the delivery of migration, continuity, protection/recovery and optimization services for any storage environment through a single management interface.

This is accomplished through its Intelligent Abstraction core IO engine, which provides a scalable storage hypervisor, coupled with a data services engine and automation, to ease the provisioning and management of storage resources with the right level of performance, protection and recovery. The Intelligent Abstraction core optimizes storage resources regardless of type, connectivity, brand or speed, into a storage resource pool that can be provisioned to physical or virtual applications, along with common, unified data services across that pool. FDMP is designed to reduce the complexity and time involved in managing disparate underlying storage found in today's enterprise.

FalconStor Network Storage Server (NSS)

FalconStor NSS is a scalable, highly available solution that enables storage virtualization and business continuity in heterogeneous environments. Supporting existing third-party disk arrays, FalconStor NSS eliminates storage boundaries and vendor lock-in, providing fast and easy data storage provisioning and migration. From a small iSCSI virtual server lab to an enterprise-class Fibre Channel SAN running Tier-1 database applications, FalconStor NSS is designed to meet the storage needs of any organization.

Moving data between different storage platforms can be complex, time consuming, and disruptive to business operations. FalconStor's core storage virtualization technology provides a non-disruptive approach to data mobility

across different SAN protocols and vendors. With FalconStor NSS, we believe it becomes a simple operation to move data from older platforms to newer ones or to introduce new storage tiers. This allows organizations to respond to evolving performance and capacity requirements.

### FalconStor Continuous Data Protector (CDP)

We believe FalconStor CDP technology reinvents the way data backup and recovery are implemented and performed. Moving beyond failure-prone once-a-day tape backup models, FalconStor CDP combines local and remote protection into a cost-effective, unified, disk-based solution that allows organizations to recover data back to the most recent transaction. Combining application-aware snapshot agents and continuous journaling functions, FalconStor CDP enables customers to recover data to any point in time. FalconStor CDP delivers instant data availability and reliable recovery, bringing business applications back on line in a matter of minutes after a failure. FalconStor CDP protects application-specific data for Microsoft, Oracle, SAP, and other business applications, ensuring high performance and stability for even the most complex business environments.

# FalconStor RecoverTrac Disaster Recovery Automation Tool

The FalconStor RecoverTrac disaster recovery automation tool is included as a standard feature of the FalconStor NSS and the FalconStor CDP solutions to automate complex, time-consuming and error-prone failover and failback operations of systems, applications, services, and entire data centers. The RecoverTrac tool streamlines the implementation, testing and execution of DR operations. It minimizes service failover time between sites and reduces DR costs by offering full recovery from physical-to-physical, virtual-to-virtual, and physical-to-virtual server infrastructures. This tool can also convert across those environments, enabling organizations to seamlessly migrate locally, remotely or to and from cloud environments.

## FalconStor Optimized Backup and Deduplication (OBD)

The FalconStor OBD solution is one of the industry's leading virtual tape solutions, and we believe it is unmatched in terms of performance and scalability. With virtual tape, backups complete faster and more reliably, with little or no change needed to the backup environment. It enhances backup operations seamlessly without changing any backup processes or policies. Sophisticated physical tape integration and data security complete the solution. Designed from the start as an enterprise-class application, FalconStor OBD can achieve sustained backup speeds of 20TB per hour per node. Up to eight nodes can combine into a single logical unit, scaling performance to a remarkable 160 TB per hour. This sustained performance allows users to solve the single biggest issue in backup: meeting the backup window. To put that in context, with our latest version 9.x product releases, existing customers can now do the same backup job in 2.8 hours compared with what previously took approximately 8 hours. Unlike our competitors who report peak speeds using multiple nodes, FalconStor notes sustained speeds on a single node and on multiple nodes to ensure customers can achieve real-world performance and do more actual work in less time.

Built-in data deduplication significantly reduces the amount of data needed to be stored on disk. Combined with the latest high-speed protocols, including 8Gb Fibre Channel (FC) and 10Gb Ethernet, we believe FalconStor OBD demonstrates the fastest sustained deduplication speeds in the industry: more than 28 terabytes per hour with inline deduplication and more than 40 terabytes per hour with post processing. Because not all data is alike, we believe FalconStor OBD is the only deduplication solution to offer flexible, deduplication options, letting the customer choose from any combination of four deduplication methods (inline, post-process, concurrent, and no deduplication) to align deduplication processes with business goals and unique requirements. By eliminating redundant backup data, the storage footprint can be reduced by as much as 95%, allowing organizations to keep weeks or even months of data on disk for fast, dependable restore without any of the reliability concerns of a tape-based restore.

### **BUSINESS STRATEGY**

FalconStor continues to position itself as a leader in the Software-Defined Storage market serving enterprise IT organizations and service providers worldwide. FalconStor intends to achieve this objective through the following

strategies.

Modernize Existing Enterprise Storage Environments While Protecting Investments

As IT organizations look to modernize existing infrastructure (either refreshing existing technology or introducing new technologies such as All Flash Arrays (AFAs) and Cloud), they are challenged by the cost, risk, and the disruption upgrades and migrations can cause. Because FDMP abstracts the data services from the physical storage infrastructure, additional capabilities can be added to legacy hardware, eliminating the need and cost to replace that hardware. This delivers discrete value in terms of lowering capital and operational costs, reduced risk and disruption and significantly faster time to deployment. For IT organizations needing to deploy new hardware or storage paradigms such as all AFAs and Cloud, FDMP enables the migration of data and workloads to those new platforms, versus being forced to start with a new or "greenfield" deployment required by many of the new HW vendors. FDMP offers these organizations a path forward with an approach that minimizes or eliminates risk and disruption to business processes and workflows, while lowering both capital and operational costs.

FalconStor intends to continue to leverage the protocol-independent, unified architecture, analytics and robust open data services technology of its solution to maintain a leadership position in the enterprise storage software market. FalconStor plans to continue its leadership in this market through its deep commitment to research and development and through continued rapid technology innovation. For information on our research and development expenditures, please see "Management's Discussion and Analysis of Financial Condition and Results of Operations" and our audited consolidated financial statements included in this Annual Report on Form 10-K.

#### **Enable Service Providers**

As the service provider segment continues to grow, they increasingly have a need to support heterogeneous storage environments across their own datacenters and their customer's environments. Further, they often have different hardware and software capabilities, making it significantly challenging to offer consistent data services across these environments. We believe FDMP offers several strategic benefits for service providers:

Seamlessly and non-disruptively move data from the customer premise to the service provider's hosted environment; Offers common data services across customer's environments regardless of underlying hardware or technology; Allows for the introduction and ability to monetize additional data services they may not have previously been able to offer;

Provides a low-cost growth opportunity due to the flexibility of FDMP licensing, while eliminating the need to have multiple feature licenses array by array;

Realize reduced storage management complexity and costs within their own infrastructure by eliminating silos, reducing licensing costs and optimizing hardware with FDMP;

Optimize storage hardware based on price/performance needs of customers; and

Analytics provide the necessary real-time and historical information to achieve SLA's and make economic decisions.

# Expand Software and Hardware Strategic Alliances with Industry Leaders

The Flash/SSD market should be a key opportunity for us on two fronts: targeting customers wanting to integrate new Flash/SSD technology into existing IT environments; and OEMs needing to enhance their software stack in order to offer data movement and protection services on their platform. Cloud Service Providers (CSPs) such as AWS, Azure and Aliyun also represent a growth opportunity. Our mutual customers and partners need help moving data from the customer site to their own facilities as well as a way to deliver common data services across disparate and often incompatible hardware typically found across the provider and end customer environments. We believe FalconStor is positioned to continue to take advantage of these key opportunities in the global marketplace. Our strategic relationships with Dell, DSI, Fujitsu, Hitachi Data Systems, HP, Huawei, Kaminario, X-IO and others should fuel growth across all three major geographies.

### **Expanded Existing Product Offerings**

During 2018, we continued to enhance our products to address the ever changing market dynamics to ensure that FalconStor continues to be a leader in the SDS market place.

#### Market Approach

FalconStor continues to focus on enterprise customers, managed service providers, cloud service providers, as well as OEM partners. These markets offer the greatest opportunity and are best suited to realize the value of FalconStor products.

#### **Growth Drivers**

As evidenced by the adoption of new technologies such as All Flash Arrays and the Cloud and the move to consuming solutions as a service, the IT market continues to show growth in several key market segments. FalconStor continues to focus on and pursue these market segments to deliver software defined storage data services.

#### SALES ROUTES TO MARKET

FalconStor continues to sell products in a number of ways:

Direct to customers

Through Authorized partners, Value-added resellers (VARs), solution providers, and large system integrators

Direct to Direct Market Resellers (DMRs) and Distributors

Direct to Managed Service Providers (MSPs) and Cloud Service Providers (CSPs)

Direct to Original Equipment Manufacturers (OEMs)

VAR and Distributor Relationships: FalconStor has entered into VAR and distributor agreements to help sell our products in various geographic areas. FalconStor's VARs and distributors market various FalconStor products and receive a discount off of the list price on products sold. FalconStor's scalable solutions are also being deployed by MSPs and CSPs to deliver online data protection and recovery services across different vertical markets.

Strategic Alliances: FalconStor has agreements with strategic partners to utilize FalconStor products for use in the strategic partners' special-purpose storage appliances.

OEM Relationships: OEMs collaborate with FalconStor to integrate FalconStor technology into their own product offerings or to resell FalconStor technology under their own label.

Professional Services: FalconStor's Professional Services personnel are also available to assist customers and partners throughout the lifecycle of FalconStor solution deployments. The Professional Services team includes experienced Storage Architects (expert field engineers) who can assist in the assessment, planning/design, deployment, and test phases of the deployment project, and a Technical Support Group for post-deployment assistance and ongoing support.

### **MARKETING**

We re-focused our efforts to increase awareness and demand for FalconStor products during 2018 by targeting our efforts at our extensive installed base. Partner and end-user re-engagement was encouraging during the second half of 2018 and we believe it will serve to create momentum for our growth and product innovation efforts.

#### **COMPETITION**

As data has become as critical an asset as capital and labor, the entrants into the data management and data protection segments continue to rise, as does the demand for services and integration with emerging technologies. Although there are several companies attempting to offer data protection for specific environments, FalconStor believes that only software-defined storage providers are capable of delivering a high level of data protection services across the data center, crossing the infrastructure boundaries between virtual, physical and hybrid environments. FalconStor holds multiple patents on key technologies that enable and optimize our snapshots, data protection, and data reduction platform. We believe that our integrated services and products based on our common storage virtualization platform - including CDP, NSS, OBD, WAN-optimized replication for remote offices and data centers, and disaster recovery automation - are unique to the industry.

Although some of FalconStor's products provide capabilities that put them in competition with products from a number of companies, FalconStor is not aware of any other software company providing the same level of data protection and recovery capabilities for both physical and virtual infrastructures in a common solution. FalconStor believes that the principle competitive factors enhancing its marketability include product features, such as scalability,

high availability, price, reliability, hardware/platform neutrality, and customer service and support.

As FalconStor refines its focus on enterprise and service provider market segments, the products and services offered by its partners may compete with existing or new products and services offered by current and new entrants to the market.

FalconStor's future and existing competitors could conceivably introduce products with superior features, scalability and functionality at lower prices than FalconStor products. They could also bundle existing or new products with other more established products to compete with FalconStor. Increased competition could result in price reductions and reduced gross margins, which in turn could impact FalconStor's business. FalconStor's success will depend largely on its ability to generate market demand and awareness of its products and to enhance or develop new products and services in a timely manner.

When we sell to customers, the competitors we encounter most frequently are HP, Dell, Hitachi Data Systems, IBM, DataCore and a number of niche players. Many of these competitors have significantly greater resources than we do.

#### INTELLECTUAL PROPERTY

FalconStor's success is dependent in part upon its proprietary technology. The IPStor platform forms the core of this proprietary technology. FalconStor currently has twenty-seven patents and numerous pending patent applications. The Company has multiple registered trademarks - including "FalconStor Software", "IPStor", "FDMP" and "Intelligent Abstraction" - as well as pending trademark applications related to FalconStor and its products.

FalconStor seeks to protect its proprietary rights and other intellectual property through a combination of copyright, patents, trademark, and trade secret protection, as well as through contractual protections such as proprietary information agreements and nondisclosure agreements. The technological and creative skills of its personnel, new product developments, frequent product enhancements, and reliable product maintenance are essential to establishing and maintaining a technology leadership.

FalconStor generally enters into confidentiality or license agreements with employees, consultants, and corporate partners and generally controls access to and distribution of its software, documentation, and other proprietary information. Despite the Company's efforts to protect its proprietary rights, unauthorized parties may attempt to copy or otherwise obtain and use FalconStor's products or technology. Monitoring unauthorized use of FalconStor's products is difficult, and there can be no assurance that the steps FalconStor has taken will prevent misappropriation of its technology, particularly in foreign countries where laws may not protect its proprietary rights as fully as do the laws of the United States.

### **MAJOR CUSTOMERS**

For the years ended December 31, 2018 and 2017, we had no customers that accounted for 10% or more of total revenue.

As of December 31, 2018, one customer accounted for 17% of our gross accounts receivable balance. As of December 31, 2017, one customer accounted for 23% of our gross accounts receivable balance.

#### **EMPLOYEES**

As of December 31, 2018, we had 86 full-time and part-time employees, consisting of 27 in research & development, 22 in sales & marketing, 20 in service, and 17 in general and administrative. We are not subject to any collective bargaining agreements and we believe that our employee relations are good.

## INTERNET ADDRESS AND AVAILABILTY OF FILINGS

Our internet address is www.falconstor.com. The Company makes available free of charge, on or through its Internet website, the Company's Annual Report on Form 10-K, Quarterly Reports on Form 10-Q, current Reports on Form 8-K, and amendments to those reports filed or furnished pursuant to Sections 13(a) or (15)(d) of the Securities Exchange Act of 1934, as amended, as soon as reasonably practicable after the Company electronically files such material with, or furnishes it to, the Securities and Exchange Commission. The Company complied with this policy for every Securities Exchange Act of 1934, as amended, report filed during the year ended December 31, 2018.

#### RECENT DEVELOPMENTS

On October 9, 2018, we closed on the final tranche of our previously-announced private placement of Units (as hereinafter defined) to certain eligible stockholders of the Company (the "Financing"). As a result, the Company received an additional \$1,000,000 of gross proceeds from new investors (the "New Investors") which is in addition to the \$3,000,000 of gross proceeds previously received from HCP-FVA, LLC ("HCP-FVA") pursuant to a commitment (the "Commitment") through the subscription of 30,000,000 Units. HCP-FVA is an affiliate of Hale Capital Partners, LP (together with HCP-FVA, "Hale Capital"), the Company's largest stockholder through its ownership of the Company's Series A Redeemable Preferred Stock (the "Series A Preferred Stock") Common Stock, \$.001 par value (the "Common Stock"), and an affiliate of FalconStor director, Martin Hale

In the Financing, the Company offered to FalconStor stockholders as of November 17, 2017 who are accredited investors the opportunity to purchase up to a total of 40 million Units (inclusive of subscriptions by HCP-FVA). Each Unit consisted of the following (each, a "Unit") for a per Unit offering price of \$0.371063:

(i) \$0.10 in senior secured debt (for a total of \$4 million of senior secured debt assuming full subscription of the

Financing), secured by all of the assets of the Company and guaranteed by each of the Company's domestic subsidiaries, having an interest rate of prime plus 0.75% and a maturity date of June 30, 2021 (the "Term Loan");

- warrants to purchase 12.233 shares of the Company's Common Stock for a nominal exercise price (for a total of approximately 489.32 million shares assuming full subscription of the Financing) (the "Financing Warrants"); and
- (iii) 0.0225 shares of Series A Preferred Stock at a per Unit price of \$0.271063, all such shares to be acquired directly from their current holder, HCP-FVA.

In addition to providing the Company with \$1,000,000 of financing, the New Investors purchased \$520,000 of the Term Loan held by HCP-FVA and 342,000 of the 900,000 shares of Series A Preferred Stock held by HCP-FVA. Financing Warrants to purchase 63,610,935 shares of Common Stock held by HCP-FVA were also cancelled. Accordingly, the New Investors hold Financing Warrants to purchase 185,942,009 shares of Common Stock and HCP-FVA now holds Financing Warrants to purchase 303,379,065 shares of Common Stock. The transfer of securities by HCP-FVA to New Investors was subject to certain transfer limitations to ensure the preservation of the Company's net operating loss carry forward.

All New Investors executed a joinder to the Amended and Restated Term Loan Credit Agreement, dated as of February 23, 2018 (the "Amended and Restated Loan Agreement"), with HCP-FVA, the Company and certain other loan parties named therein setting forth the terms of the Term Loan. The terms and conditions of the Amended and Restated Loan Agreement have been previously described in the Company's SEC filings

As part of the Commitment, Hale Capital also agreed to postpone the date of the mandatory redemption of the Series A Preferred Stock from August 5, 2017 to July 30, 2021, and to waive prior breaches of the terms of the Series A Preferred Stock which had also triggered a mandatory redemption right.

In connection with the Commitment and providing initial bridge financing, HCP-FVA received Warrants to purchase an aggregate of 55,436,510 shares (the "Backstop Warrants") of which 53,892,880 Backstop Warrants have been exercised. The Backstop Warrants and the Financing Warrants are sometimes collectively referred to herein as the "Warrants."

The Financing was approved by the Company's Board of Directors, based on a recommendation of a special committee of independent directors, with Mr. Hale recusing himself.

As previously disclosed in the Company's filings with the Securities and Exchange Commission, the Company was actively seeking financing in order to meet the Company's operating cash flow needs.

In December 2018, outstanding Financing Warrants to purchase 489,321,074 were exercised resulting in the issuance of 489,321,074 shares of Common Stock (the "Warrant Exercise"). In connection with the Warrant Exercise, the Company received proceeds of approximately \$489,321 which was used to reduce the outstanding principal due on Amended and Restated Loan Agreement.

## Item 1A. Risk Factors

We are affected by risks specific to us as well as factors that affect all businesses operating in a global market. The significant factors known to us that could materially adversely affect our business, financial condition, or operating results are set forth below.

### Risks Related to Our Financial Condition

We have had limited liquidity as evidenced by our working capital deficiency of \$1.1 million at December 31, 2018 and our future prospects are dependent on our ability to execute our business plan of which there can be no assurance.

We have incurred operating losses in nine of the previous ten years and negative cash flow from operations in six of the previous ten years. As of December 31, 2018, we had a working capital deficiency of \$1.1 million, which is inclusive of current deferred revenue of \$6.9 million, and a stockholders' deficit of \$11.6 million. During the year ended December 31, 2018, we

had a net loss of \$0.9 million and negative cash flow from operations of \$1.5 million. Our cash and cash equivalents at December 31, 2018 was \$3.1 million, an increase of \$2.0 million as compared to December 31, 2017 and such amount at December 31, 2018 includes net proceeds that we received from our previously announced Financing of Units to certain eligible shareholders of the Company and the Warrant Exercise. As of December 31, 2017, the holders of our Series Preferred Stock also had the right to request a redemption of the Series A Preferred Stock. Accordingly, to ensure that the Company could meet its operating cash needs and continue as a going concern, we closed on the Commitment on February 23, 2018. As part of the Commitment, Hale Capital agreed to postpone the date that an option redemption of the Series A Preferred Stock could be requested from August 5, 2017 to July 30, 2021, and to waive prior breaches of the terms of the Series A Preferred Stock which had also triggered a redemption right.

While the Commitment and the postponement of the date of the optional redemption facilitate our ability to meet our operating cash needs and continue as a going concern, our ability to continue as a going concern ultimately depends on whether we execute our business plan. During 2018, we continued to focus on aligning our expense structure with revenue expectations which included tighter expense controls and overall operational efficiencies which better align our current business plan on a run-rate basis. These efficiencies include streamlined personnel related costs and global overhead costs and efficiencies realized on our redesigned go-to-market coverage models. However, the decline in revenue combined with the separation costs related to the headcount reductions have reduced the impact of these reductions in operating expenses and the reduction in our cash burn rate resulting from these reductions was lower than our expectations. Accordingly, our operating cash requirements have been higher than what we expected.

There is no assurance that we will be successful in executing our business plan either through generating sufficient revenue or continuing to reduce operating costs. The failure to execute our business plan would have a material adverse effect on our results of operations. In addition, to the extent that we continue to incur losses or want to expand our operations, we may need to seek additional financing. There can be no assurance that we will be able to obtain additional financing. Moreover, it is likely that the terms of the Amended and Restated Loan Agreement and Series A Preferred Stock will make it more difficult for us to obtain additional financing and any additional financing could be dilutive to our stockholders.

We have had a history of losses since 2008 and our revenues significantly decreased in 2018 as compared to 2017. There is no guarantee that we will be able or to maintain, profitability.

While we had net income in the fiscal year ended December 31,2017, our cash and cash equivalents decreased during that such year, and we have had a history of losses. For the fiscal year ended December 31, 2018, we had a net loss of approximately \$0.9 million, and our revenues decreased to \$17.8 million for the year ended December 31, 2018, as compared with \$25.2 million for the year ended December 31, 2017. If we are unable to stabilize or increase revenue, we will be unable to maintain profitability, we will deplete our available cash and we may not be able to continue to fund effective sales and marketing or research and development activities on which we are dependent.

We have undertaken a restructuring and other cost reduction initiatives to reduce our expenses and to better align our expenses with our business. There can be no assurance that we have made enough reductions or the right reductions. Since the third quarter of 2013 we have taken several actions to reduce expenses significantly in an attempt to help return the Company to profitability. These actions include a reduction in personnel of approximately 60%; closing offices in geographic locations where our expenses have continued to outpace our revenue; and reducing other expenditures. To date, the reduction in expenses has not been sufficient to ensure that the Company can meet its ongoing cash needs for the foreseeable future. In addition, there can be no assurance that the reductions we have made are the right reductions for our business going forward. There is a risk that the restructuring, cost cutting initiatives and reduction in personnel will continue to make it more difficult to grow the business and service our customers. If actual results or events differ materially from our estimates and assumptions, our reported financial condition and results of operations for future periods could be materially affected.

The preparation of consolidated financial statements and related disclosure in accordance with generally accepted accounting principles requires management to establish policies that contain estimates and assumptions that affect the amounts reported in the consolidated financial statements and the accompanying notes. Note 1 to the Consolidated Financial Statements in our Annual Report on Form 10-K for the fiscal year ended December 31, 2017 describes the significant accounting policies and estimates essential to preparing our financial statements. The preparation of these financial statements requires us to make estimates and judgments that affect the reported amounts of assets, liabilities, revenue and expenses, and related disclosures. We base our estimates on historical experience and assumptions that we believe to be reasonable under the circumstances.

Actual future results may differ materially from these estimates. We evaluate, on an ongoing basis, our estimates and assumptions.

Risks Related to Our Business

Our future business, financial and operating results are substantially dependent on the market acceptance of our products.

We have spent considerable resources, both financially and in our research and development efforts, developing CDP/NSS 9.0 and FreeStor. Bookings for FreeStor during the year ended December 31, 2018 exceeded the bookings for this product for the year ended December 31, 2017. However, the bookings associated with our FreeStor platform failed to make up for declines in our traditional product lines. We currently do not have any other products in our pipeline with the same expectations that we had or which we believe have the same potential for market acceptance as CDP/NSS 9.0 and FreeStor. If (i) either CDP/NSS 9.0 or FreeStor do not gain additional market acceptance, (ii) sales of either CDP/NSS 9.0 or FreeStor do not increase, or (iii) the ongoing future feature/functionality sets of both products are delayed, our results may suffer and it could have a material adverse effect on our business, financial condition and operating results.

We continue to have turnover in our senior management.

In August 2017, Todd Brooks became our President and Chief Operating Officer, and in April 2018 Brad Wofe became our Executive Vice President, Chief Financial Officer. In the one year prior to the appointments of Messrs. Brooks and Wolfe, we had two different Chief Executive Officers and Chief Financial Officers.

In addition to these changes, in the past few years we have also had turnover in other senior positions. We have filled these positions with highly qualified individuals with extensive storage and software company experience. However, there can be no guarantee that the new senior management will be able to get up to speed and successfully manage the Company. In addition, with the exception of Messrs. Brooks and Wolfe, we have no employment agreements with any of our senior management and there can be no assurance that we will be able to retain any or all of the members of the senior management team.

The loss of any of our key personnel could harm our business.

Our success depends upon the continued contributions of our key employees, many of whom would be extremely difficult to replace. We do not have key person life insurance on any of our personnel. Worldwide competition for skilled employees in the network storage software industry is extremely intense. In particular, our success is dependent on our executive management team, including Todd Brooks, our President and Chief Executive Officer. If we are unable to retain existing employees or hire and integrate new employees, our business, financial condition and operating results could suffer.

Due to the uncertain and shifting development of the data protection and network storage software markets and our reliance on our partners, we may have difficulty accurately predicting revenue for future periods and appropriately budgeting for expenses.

The rapidly evolving nature of the data protection and network storage software markets in which we sell our products, the degrees of effort and success of our partners' sales and marketing efforts, and other factors that are beyond our control, reduce our ability to accurately forecast our quarterly and annual revenue. However, we must use our forecasted revenue to establish our expense budget. Most of our expenses are fixed in the short term or incurred in advance of anticipated revenue. As a result, we may not be able to decrease our expenses in a timely manner to offset any shortfall in revenue.

If we are unable to develop and manufacture new products that achieve acceptance in the data protection and the network storage software markets, our operating results may suffer.

The data protection and the network storage software markets continue to evolve and as a result there is continuing demand for new products. Accordingly, we may need to develop and manufacture new products that address additional data protection or network storage software market segments and emerging technologies to remain competitive in the data storage software industry. We are uncertain whether we will successfully qualify new data protection or network storage software products with our customers by meeting customer performance and quality

specifications. Any failure to address additional market segments could harm our business, financial condition and operating results.

Our products must conform to industry standards in order to be accepted by customers in our markets.

Our current products are only one part of a storage system. All components of these systems must comply with the same industry standards in order to operate together efficiently. We depend on companies that provide other components of these systems to conform to industry standards. Some industry standards may not be widely adopted or implemented uniformly, and competing standards may emerge that may be preferred by OEM customers or end users. If other providers of components do not support the same industry standards as we do, or if competing standards emerge, our products may not achieve market acceptance, which would adversely affect our business. Our products handle mission-critical data for our end-customers and are highly technical in nature. If our products have defects, failures occur or end-customer data is lost or corrupted, our reputation and business could be harmed. Our products are highly technical and complex and are involved in storing and replicating mission-critical data for our end-customers. Our products may contain undetected defects and failures when they are first introduced or as new versions are released. We have in the past and may in the future discover software errors in new versions of our existing products, new products or product enhancements after their release or introduction, which could result in lost revenue. Despite testing by us and by current and potential end-customers, errors might not be found in new releases or products until after commencement of commercial shipments, resulting in loss of or delay in market acceptance. Our products may have security vulnerabilities and be subject to intentional attacks by viruses that seek to take advantage of these bugs, errors or other weaknesses. If defects or failures occur in our products, a number of negative effects in our business could result, including:

lost revenue or lost end-customers;

increased costs, including warranty expense and costs associated with end-customer support;

delays, cancellations, reductions or rescheduling of orders or shipments;

product returns or discounts;

diversion of management resources;

4egal claims for breach of contract, product liability, tort or breach of warranty; and

damage to our reputation and brand.

Because our end-customers use our products to manage and protect their data, we could face claims resulting from any loss or corruption of our end-customers' data due to a product defect. While our sales contracts contain provisions relating to warranty disclaimers and liability limitations, these provisions might not be upheld. Defending a lawsuit, regardless of its merit, is costly and may divert management's attention from our business and could result in public perception that our products are not effective, even if the occurrence is unrelated to the use of our products. In addition, our business liability insurance coverage might not be adequate to cover such claims. If any data is lost or corrupted in connection with the use or support of our products, our reputation could be harmed and market acceptance of our products could suffer.

We rely on our resellers and our OEM partners for most of our sales.

These resellers and OEM partners have limited resources and sales forces and sell many different products, both in the data protection and the network storage software markets and in other markets. The resellers and OEM partners may choose to focus their sales efforts on other products in the data protection and the network storage software markets or other markets. The OEM partners might also choose not to continue to develop or to market products which include our products. This would likely result in lower revenue to us and would impede our ability to grow our business. The failure of our resellers to sell our products effectively could have a material adverse effect on our revenue and results of operations.

We rely significantly on our value-added resellers, direct market resellers, systems integrators and corporate resellers, which we collectively refer to as resellers, for the marketing and distribution of our software products and our services. However, our agreements with resellers are generally not exclusive, are generally renewable annually and in many cases may be terminated by either party without cause. Many of our resellers carry products that are competitive with ours. These resellers may give a higher priority to other products, including those of our competitors, or may not continue to carry our products at all. If a number of resellers were to discontinue or reduce the sales of our products, or were to promote our competitors' products in lieu of ours, it would have a material adverse effect on our future

revenue. Events or occurrences of this nature could seriously harm our sales and results of operations. In addition, we expect that a significant portion of our sales growth will depend upon our ability to identify and attract new reseller partners. The use of resellers is an integral part of our distribution network. We believe that our competitors also use reseller arrangements. Our competitors may be more successful in attracting reseller partners and could enter into exclusive relationships with resellers that make it difficult to expand our

reseller network. Any failure on our part to expand our network of resellers could impair our ability to grow revenue in the future.

Our growth depends in part on the success of our strategic relationships with third parties.

Our future growth will depend on our ability to enter into successful strategic relationships with third parties. For example, our strategic relationships with DSI, Fujitsu, Hitachi Data Systems, Huawei and X-IO are intended for the Flash/SSD market targeting customers wanting to integrate new Flash/SSD technology into existing IT environments and OEMs needing to enhance their software stack in order to offer data movement and protection services on their platform. In addition, we work with global distributors to streamline and grow our sales channel. These relationships may not result in additional customers or enable us to generate significant revenue. These relationships are typically non-exclusive and do not prohibit the other party from working with our competitors or from offering competing services. If we are unsuccessful in establishing or maintaining our relationships with these third parties, our ability to compete in the marketplace or to grow our revenue could be impaired and our operating results could suffer. We rely on channel partners to sell our solutions, and disruptions to, or our failure to develop and manage our channel partners would harm our business.

Our future success is partially dependent upon establishing and maintaining successful relationships with the right channel partners. A majority of our revenue is generated by sales through our channel partners, and we expect channel sales to continue to make up the majority of our total revenue in the future. Accordingly, our revenue is largely dependent on the effective sales and lead generation activities of these channel partners.

Recruiting and retaining qualified channel partners and training them in our technology and product offerings requires significant time and resources. In order to develop and expand our distribution channel, we must continue to scale and improve our processes and procedures that support our channel, including investment in systems and training. Those processes and procedures may become increasingly complex and difficult to manage as we grow our organization. We have no minimum purchase commitments from any of our channel partners, and our contracts with these channel partners do not prohibit them from offering products or services that compete with ours. Our competitors may provide incentives to existing and potential channel partners to favor their products or to prevent or reduce sales of our solutions. Our channel partners may choose not to offer our solutions exclusively or at all. Establishing relationships with channel partners who have a history of selling our competitors' products may also prove to be difficult. In addition, some of our channel partners are also competitors. Our failure to establish and maintain successful relationships with channel partners would harm our business and operating results.

We face intense competition in our market, especially from larger, well-established companies, and we may lack sufficient financial or other resources to maintain or improve our competitive position.

A number of very large corporations have historically dominated the data management market. We consider our primary competitors to be companies that provide enterprise storage products, including Dell Inc., Hitachi Data Systems, Hewlett-Packard Company ("HPE"), IBM, CommVault, DataCore and Nexenta. We also compete to a lesser extent with a number of other private companies and certain well-established companies. Some of our competitors have made acquisitions of businesses that allow them to offer more directly competitive and comprehensive solutions than they had previously offered. In addition, the emergence of cloud computing and software-defined-storage may impact both short-term and long-term growth patterns in the markets in which we compete. We expect to encounter new competitors domestically and internationally as other companies enter our market or if we enter new markets. Many of our existing competitors have, and some of our potential competitors could have, substantial competitive advantages such as:

potential for broader market acceptance of their storage architectures and solutions;

greater name recognition and longer operating histories;

larger sales and marketing and customer support budgets and resources;

broader distribution and established relationships with distribution partners and end-customers;

the ability to bundle storage products with other technology products and services, or offer a broader range of storage solutions to better fit certain customers' needs;

lower labor and development costs;

larger and more mature intellectual property portfolios;

**s**ubstantially greater financial, technical and other resources; and greater resources to make acquisitions.

Our ability to sell our products is highly dependent on the quality of our services offerings, and our failure to offer high quality support and professional services would have a material adverse effect on our sales of our products and results of operations.

Our services include the assessment and design of solutions to meet our customers' data protection and storage management requirements and the efficient installation and deployment of our products based on specified business objectives. Further, once our products are deployed, our customers depend on us to resolve issues relating to our products. A high level of service is critical for the successful marketing and sale of our software. If our partners or we do not effectively install or deploy our applications, or succeed in helping our customers quickly resolve post-deployment issues, it would adversely affect our ability to sell software products to existing customers and could harm our reputation with potential customers. As a result, our failure to maintain high quality support and professional services would have a material adverse effect on our sales of our products and results of operations.

Failure to achieve anticipated growth could harm our business and operating results.

Achieving our anticipated growth will depend on a number of factors, some of which include: retention of key management, marketing and technical personnel;

• our ability to increase our customer base and to increase the sales of our products; and

competitive conditions in the network storage infrastructure software market.

We cannot assure you that the anticipated growth will be achieved. The failure to achieve anticipated growth could harm our business, financial condition and operating results.

Adverse economic conditions or reduced IT spending may adversely impact our business.

Our business depends on the overall demand for IT and on the economic health of our current and prospective customers. In general, worldwide economic conditions remain unstable, and these conditions make it difficult for our current and prospective customers and us to forecast and plan future business activities accurately, and they could cause our customers or prospective customers to reevaluate their decision to purchase our products or services. Weak global economic conditions, or a reduction in IT spending even if economic conditions improve, could adversely impact our business and operating results in a number of ways, including longer sales cycles, lower prices for our products, reduced bookings and lower or no growth.

Our future quarterly results may fluctuate significantly, which could cause our stock price to decline.

Our previous results are not necessarily indicative of our future performance and our future quarterly results may fluctuate significantly. Our future performance will depend on many factors, including:

fluctuations in the economy;

the timing of securing software license contracts and the delivery of software and related revenue recognition;

the seasonality of information technology, including network storage products, spending;

the average unit selling price of our products;

existing or new competitors introducing better products at competitive prices before we

our ability to manage successfully the complex and difficult process of qualifying our products with our customers; new products or enhancements from us or our competitors;

our ability to release new and innovative products;

import or export restrictions on our proprietary technology; and personnel changes.

Many of our expenses are relatively fixed and difficult to reduce or modify. As a result, the fixed nature of our expenses will magnify any adverse effect of a decrease in revenue on our operating results.

The ability to predict our future effective tax rates could impact our ability to accurately forecast future earnings. We are subject to income taxes in both the United States and the various foreign jurisdictions in which we operate. Judgment is required in determining our provision for income taxes and there are many transactions and calculations where the tax determination may be uncertain. Our future effective tax rates could be affected by changes in our (i) earnings or losses; (ii)

changes in the valuation of our deferred tax assets; (iii) changes in tax laws; and (iv) other factors. Our ability to correctly predict our future effective tax rates based upon these possible changes could significantly impact our forecasted earnings.

Our business could be materially affected as a result of a natural disaster, terrorist acts, or other catastrophic events. While our headquarters facilities contain redundant power supplies and generators, our domestic and foreign operations, and the operations of our industry partners, remain susceptible to fire, floods, power loss, power shortages, telecommunications failures, break-ins and similar events. Terrorist actions domestically or abroad could lead to business disruptions or to cancellations of customer orders or a general decrease in corporate spending on information technology, or could have direct impact on our marketing, administrative or financial functions and our financial condition could suffer. We continually look for alternatives to help mitigate any supply chain disruptions due to natural disasters, terrorist acts or other catastrophic events. However, our failure to mitigate these supply chain disruptions could impact our ability to procure and deliver products to our customers, which could adversely impact our overall financial condition.

We are dependent on a variety of IT and telecommunications systems, and any failure of these systems could adversely impact our business and operating results.

We depend on IT and telecommunications systems for our operations. These systems support a variety of functions including order processing, shipping, shipment tracking, billing, support center and internal information exchange. Failures or significant downtime of our IT or telecommunications systems could prevent us from taking customer orders, shipping products, billing customers, handling support calls, or communication among our offices. The Internet and individual websites have experienced a number of disruptions and slowdowns, some of which were caused by organized attacks. In addition, some websites have experienced security breakdowns. If we were to experience a security breakdown, disruption or breach that compromised sensitive information, it could harm our relationship with our customers. Our support centers are dependent upon telephone and data services provided by third party telecommunications service vendors and our IT and telecommunications system. Any significant increase in our IT and telecommunications costs or temporary or permanent loss of our IT or telecommunications systems could harm our relationships with our customers. The occurrence of any of these events could have an adverse effect on our operations and financial results.

United States Government export restrictions could impede our ability to sell our software to certain end users. Certain of our products include the ability for the end user to encrypt data. The United States, through the Bureau of Industry Security, places restrictions on the export of certain encryption technology. These restrictions may include: the requirement to have a license to export the technology; the requirement to have software licenses approved before export is allowed; and outright bans on the licensing of certain encryption technology to particular end users or to all end users in a particular country. Certain of our products are subject to various levels of export restrictions. These export restrictions could negatively impact our business.

The international nature of our business could have an adverse effect on our operating results.

We sell our products worldwide. Accordingly, our operating results could be materially adversely affected by various factors including regulatory, political, or economic conditions in a specific country or region, trade protection measures and other regulatory requirements, and acts of terrorism and international conflicts.

Additional risks inherent in our international business activities generally include, among others, longer accounts receivable payment cycles, difficulties in managing international operations, decreased flexibility in matching workforce needs as compared with the U.S., and potentially adverse tax consequences. Such factors could materially adversely affect our future international sales and, consequently, our operating results.

Foreign currency fluctuations may impact our revenue.

Our licenses and services in Japan are sold in Yen. Many of our licenses and services in Australia, Canada, and in Europe are sold in Australian dollars, Canadian dollars and European Monetary Units ("Euros"), respectively. Changes in economic or political conditions globally and in any of the countries in which we operate could result in exchange rate movements, new currency or exchange controls or other restrictions being imposed on our operations. Fluctuations in the value of the U.S. dollar may adversely affect our results of operations. Because our consolidated financial results are reported in U.S. dollars, translation of sales or earnings generated in other currencies into U.S.

dollars can

result in a significant increase or decrease in the reported amount of those sales or earnings. Significant changes in the value of these foreign currencies relative to the U.S. dollar could have a material adverse effect on our financial condition or results of operations. For example, the U.S. dollar has weakened against the Japanese Yen by 3% from December 31, 2017 to December 31, 2018.

Fluctuations in currencies relative to currencies in which our earnings are generated make it more difficult to perform period- to-period comparisons of our reported results of operations. For purposes of accounting, the assets and liabilities of our foreign operations, where the local currency is the functional currency, are translated using period-end exchange rates, and the revenue, expenses and cash flows of our foreign operations are translated using average exchange rates during each period.

In addition to currency translation risks, we incur currency transaction risk whenever we enter into either a purchase or a sales transaction using a currency other than the local currency of the transacting entity. Given the volatility of exchange rates, we cannot be assured we will be able to effectively manage our currency transaction and/or translation risks. Volatility in currency exchange rates may have a material effect on our financial condition or results of operations. Currency exchange rate fluctuations have not, in the past, resulted in a material impact on earnings. However, we may experience at times in the future an impact on earnings as a result of foreign currency exchange rate fluctuations.

Because we conduct operations in China, risks associated with economic, political and social events in China could negatively affect our business and operating results.

China is a significant market for our products. We have an OEM agreement with Huawei which has historically provided us with significant revenue. As of December 31, 2018 we have 6 employees in China. Our operations in China are subject to a number of risks relating to China's economic and political systems, including:

 ${\tt government}\ controlled\ foreign\ exchange\ rate\ and\ limitations\ on\ the\ convertibility\ of\ the\ Chinese\ Renminbi;$ 

extensive government regulation;

changing governmental policies relating to tax benefits available to foreign-owned businesses;

the telecommunications infrastructure;

relatively uncertain legal system; and

uncertainties related to continued economic and social reform.

Any significant interruption in our China operations, whether resulting from any of the above uncertainties, natural disasters or otherwise, could result in delays or disruptions in our revenue and our research development operations, either of which could cause our business and operating results to suffer.

If we are unable to protect our intellectual property, our business will suffer.

Our success is dependent upon our proprietary technology. We have 35 patents issued, and numerous pending patent applications, numerous trademarks registered and multiple pending trademark applications related to our products. We cannot predict whether we will receive patents for our pending or future patent applications, and any patents that we own or that are issued to us may be invalidated, circumvented or challenged. In addition, the laws of certain countries in which we sell and manufacture our products, including various countries in Asia, may not protect our products and intellectual property rights to the same extent as the laws of the United States.

We also rely on trade secret, copyright and trademark laws, as well as the confidentiality and other restrictions contained in our respective sales contracts and confidentiality agreements to protect our proprietary rights. These legal protections afford only limited protection and if we are unable to protect our intellectual property our business and operating results may suffer.

Our efforts to protect our intellectual property may cause us to become involved in costly and lengthy litigation, which could seriously harm our business.

In recent years, there has been significant litigation in the United States involving patents, trademarks and other intellectual property rights.

Any litigation, regardless of its outcome, would likely be time consuming and expensive to resolve and would divert management's time and attention and might subject us to significant liability for damages or invalidate our intellectual property rights. Any potential intellectual property litigation against us could force us to take specific actions (any of

which could have a material adverse effect on our business), including:

cease selling our products that use the challenged intellectual property;

obtain from the owner of the infringed intellectual property right a license to sell or use the relevant technology or trademark, which license may not be available on reasonable terms, or at all; or

redesign those products that use infringing intellectual property or cease to use an infringing product or trademark.

Cyber-attacks and breaches could cause operational disruptions, fraud or theft of sensitive information.

Aspects of our operations are reliant upon internet-based activities, such as ordering supplies and back-office functions such as accounting and transaction processing, making and accepting payments, processing payroll and other administrative functions, etc. Although we have taken measures to protect our technology systems and infrastructure, including employee education programs regarding cybersecurity, a breach of the security surrounding these functions could result in operational disruptions, theft or fraud, or exposure of sensitive information to unauthorized parties. Such events could result in additional costs related to operational inefficiencies, or damages, claims or fines.

Developments limiting the availability of Open Source software could impact our ability to deliver products and could subject us to costly litigation.

Many of our products are designed to include software or other intellectual property licensed from third parties, including "Open Source" software. At least one intellectual property rights holder has alleged that it holds the rights to software traditionally viewed as Open Source. In addition, United States courts have not interpreted the terms of many open source licenses, and there is a risk that such licenses could be construed in a manner that could impose unanticipated conditions or restrictions on our ability to commercialize our appliances. We could be required to seek licenses from third parties in order to continue offering our software, to re-engineer our software, to discontinue the sale of our software in the event re-engineering cannot be accomplished on a timely basis or to litigate any disputes relating to our use of open source software, any of which could harm our business. There can be no assurance that the necessary licenses would be available on acceptable terms, if at all. The inability to obtain certain licenses or other rights or to obtain such licenses or rights on favorable terms, or the need to engage in litigation regarding these matters, could have a material adverse effect on our business, operating results, and financial condition. Moreover, the inclusion in our products of software or other intellectual property licensed from third parties on a nonexclusive basis could limit our ability to protect our proprietary rights in our products.

## Risks Related to Our Capitalization

The likelihood of a change of control in our company could be impacted by the fact that we have a significant amount of authorized but unissued preferred stock, outstanding Series A Preferred Stock, a staggered Board of Directors and change of control agreements as well as certain provisions under Delaware law.

Our Board of Directors has the authority, without further action by our common stockholders, to issue up to an additional 1,100,000 shares of preferred stock on such terms and with such rights, preferences and designations, including, without limitation restricting dividends on our common stock, dilution of the voting power of our common stock and impairing the liquidation rights of the holders of our common stock, as the Board may determine without any vote of our common stockholders. Issuance of such preferred stock, depending upon the rights, preferences and designations thereof may have the effect of delaying, deterring or preventing a change in control. Moreover, our outstanding Series A Preferred Stock provides the holders with certain rights in the event of a merger with a third party and if we are unable to redeem the Series A Preferred Stock prior to July 30, 2021 or if the holders of the Series A Preferred Stock elect to exercise their rights to require the Company to redeem the Series A Preferred Stock due to the failure of the Company to comply with the financial covenants covering the Series A Preferred Stock. Certain "antitakeover" provisions of the Delaware General Corporation Law, among other things, may restrict the ability of our stockholders to authorize a merger, business combination or change of control. Further, we have a staggered Board of Directors and have entered into change of control agreements through employment agreements with certain executives. In addition, generally proceeds received upon a change of control will be used first to repay outstanding

principal and interest on the Term Loan and then to the holders of the Series A Preferred Stock, prior to the holders of the common stock, in an amount equal to the amount of unpaid principal and interest on the Term Loan and 100% of the stated value plus accrued and unpaid dividends with respect to the Series A Preferred Stock. As a result of the foregoing, our stockholders may lose opportunities to dispose of their shares at favorable prices generally available in takeover attempts or that may be available under a merger proposal and the market price of our common stock and the voting and other rights of our stockholders may also be affected.

The conversion and exercise of our outstanding securities and the anticipated grant of restricted stock to our employees will dilute the then-existing stockholders' percentage ownership of our common stock.

We have outstanding warrants to purchase 1,543,630 shares, options to purchase 1,353,700 shares of our common stock, an aggregate of 100,000 outstanding unvested restricted shares and outstanding Series A Preferred Stock convertible into 8,781,516 shares of our common stock. Over the next several years a significant number of shares of common stock are potentially issuable as dividends with respect to the Series A Preferred Stock (including 435,438 share of common stock reserved for issuance related to the accrued dividend as of December 31, 2018). We also intend to grant employees up to 15% of the equity of the Company on a fully diluted basis, plus potentially two additional tranches of 2.5% of the equity of the Company on a fully diluted basis.

The exercise of all of the outstanding warrants, options and/or the vesting of all outstanding restricted shares, the conversion of our outstanding Series A Preferred Stock into common stock, the payment of dividends on our Series A Preferred Stock through the issuance of common stock and/or the grant and exercise of additional options and/or the grant and vesting of restricted stock and restricted stock units to our employees would dilute the then-existing stockholders' percentage ownership of common stock, and any sales in the public market of the common stock issuable upon such exercise could adversely affect prevailing market prices for the common stock. Moreover, the terms upon which we would be able to obtain additional equity capital could be adversely affected because the holders of such securities can be expected to exercise or convert them at a time when we would, in all likelihood, be able to obtain any needed capital on terms more favorable than those provided by such securities.

There may be a limited public market for our securities; we presently fail to qualify for listing on any national securities exchanges.

Our common stock was delisted from the NASDAQ Capital Market in September 2017 and we do not meet all of the requirements for initial listing on a national securities exchange. Specifically, the market value and the bid price of our common stock is less than what is required to obtain a listing. Trading in our common stock continues to be conducted in the over-the-counter market. As a result, an investor may find it difficult to dispose of or to obtain accurate quotations as to the market value of our common stock, and our common stock may be less attractive for margin loans, for investment by larger financial institutions, as consideration in possible future acquisition transactions or other purposes.

Our stock price may be volatile.

The market price of our common stock has been volatile in the past and may be volatile in the future. For example, during the twelve months ended December 31, 2018, the closing market price of our common stock as quoted on the OTC MKTS fluctuated between \$0.04 and \$0.20 and recently the closing trading price has been around \$0.05. The market price of our common stock may be significantly affected by the following factors:

actual or anticipated fluctuations in our operating results, including changes in the timing of when we recognize revenue:

failure to meet financial estimates;

changes in market valuations of other technology companies, particularly those in the network storage software market;

• the announcement of any strategic

alternatives;

announcements by us or our competitors of significant technical innovations, acquisitions, strategic partnerships, strategic alternatives, joint ventures or capital commitments;

loss of one or more key customers;

the conversion or exercise into common stock of Backstop Warrants, Series A Preferred Stock or stock options, the vesting of restricted stock and the anticipated grant of equity to employees;

the issuance of additional shares of the Series A Preferred Stock pursuant to dividend rights; and departures of key personnel.

The stock market has experienced extreme volatility that often has been unrelated to the performance of particular companies. These market fluctuations may cause our stock price to fall regardless of our performance.

Our agreements with the holders of the Series A Preferred Stock and/or the Term Loan contain covenants that could limit our ability to obtain financing using our equity. In addition, if we engage in future financings, we may have to use the proceeds to redeem the preferred stock held by such holders. This could cause us to have difficulty in obtaining capital necessary to run our business.

Our agreements with the holders of the Series A Preferred Stock and /or the Term Loan give such holders veto power over certain future financings, and give such holders certain rights to participate in any subsequent financing, whether through debt or equity (subject to certain exclusions). These participation rights could discourage a potential investor or a potential lender from making financing available to us on favorable terms. Because of these covenants, if we determine that we are in need of additional capital, we might not be able to obtain it. In addition, our agreements with the holders of the Series A Preferred Stock provide that if, at the time of certain future debt or equity financings, the proceeds of which exceed \$5 million, the holders of the Series A Preferred Stock still have outstanding Series A Preferred Stock, then we must offer to repurchase their Series A Preferred Stock. The holders of the Series A Preferred Stock have the right to accept the offer or to retain their Series A Preferred Stock. If we do a financing, and the holders of the Series A Preferred Stock repurchased, then the capital raised in excess of \$5 million will go to repurchase the holders' Series A Preferred Stock, instead of being able to be used for our business.

Our agreements with the holders of the Series A Preferred Stock and/or the Term Loan prevent us from undertaking certain transactions or incurring certain indebtedness without such holders' consent or unless the Series A Preferred Stock held by such holders is repurchased and or the Term Loan is repaid. This could hurt our ability to sell underperforming assets or lines of business or to obtain financing.

Our agreements with the holders of the Series A Preferred Stock and/or the Term Loan prevent us from undertaking certain transactions or incurring certain debt without such holders' consent or unless the Series A Preferred Stock held by such holders' is repurchased and or the Term Loan is repaid. These transactions include, but are not limited to:

- •A merger with, or the sale of substantially all of the Company's assets or capital stock, to a third party;
- •Assumption of indebtedness in excess of 80% of the Company's accounts receivable; and
- •The sale, license or other disposition of 10% or more of the tangible assets or capital stock of the Company.

This could limit our ability to sell off underperforming assets or business lines. It could also prevent us from obtaining financing we may need to run or to grow our business.

The holders of the Series A Preferred Stock are entitled to dividends on the Series A Preferred Stock they hold. Depending on whether these dividends are paid in cash or stock, the payment of these dividends will either decrease cash that is available to us to invest in our business or dilute the holdings of all other stockholders.

Our agreements with the holders of the Series A Preferred Stock provide that such holders will receive quarterly dividends on the Series A Preferred Stock at prime rate plus 5%, subject to a maximum dividend rate of 10%. We also have the ability to accrue and roll over dividends. Due to the lack of sufficient surplus to pay dividends as required by the Delaware General Business Corporation Law, the Company was not permitted to pay the fourth quarter 2016 dividend in cash or common stock and has been accruing its quarterly dividends since then. As of December 31, 2018, the Company's liability for dividends to the holders of the Series A Preferred Stock totaled \$2.1 million. While the Term Loan is outstanding, we are only permitted to pay in-kind dividends on the Series A Preferred Stock. If in the future we pay cash dividends on the Series A Preferred Stock, it will reduce the cash that we have available to invest in our business. There can be no assurance that we will have enough cash to pay future dividends in cash. If future dividends are paid in kind, it will dilute the holdings of all other stockholders.

The potential concentration of equity ownership by Hale Capital and ESW Capital LLC may limit your ability to influence corporate matters.

Hale Capital currently owns approximately 60.9% of our outstanding Common Stock and ESW Capital LLC currently owns approximately 24.1% of our outstanding Common Stock. In addition, the beneficial ownership of Hale Capital and ESW Capital LLC is higher when calculated in accordance with Section 13(d) due to their ownership of derivative securities.

Such ownership could enable Hale Capital and ESW Capital LLC to exert significant influence over all corporate activities, including the election or removal of directors and the outcome of tender offers, mergers, proxy contests or other purchases of common stock that could give our stockholders the opportunity to realize a premium over the then-prevailing market price for their shares of common stock. This concentrated control will limit your ability to

influence corporate matters and, as a result, we may take actions that our stockholders do not view as beneficial. In addition, such concentrated control could discourage others from initiating changes of control. In such cases, the perception of our prospects in the market may be adversely affected and the market price of our common stock may decline.

Our indebtedness could adversely affect our financial health and prevent us from fulfilling our obligations under the Amended and Restated Loan Agreement.

Our indebtedness could have important consequences to you. For example, it could:

increase our vulnerability to general adverse economic and industry conditions;

make it more difficult for us to satisfy our other financial obligations, including our obligations relating to the Term Note;

restrict us from making strategic acquisitions or cause us to make non-strategic divestitures;

require us to dedicate a substantial portion of our cash flow from operations to payments on our indebtedness, thereby reducing the availability of our cash flow to fund working capital, capital expenditures and other general corporate purposes;

make it more difficult for us to satisfy our obligations to our lenders, resulting in possible defaults on and acceleration of such indebtedness;

Himit our flexibility in planning for, or reacting to, changes in our business and the industry in which we operate; place us at a competitive disadvantage compared to our competitors that have less debt; and Himit our ability to borrow additional funds or increase our cost of borrowing.

In addition, the terms of the Amended and Restated Loan Agreement contain restrictive covenants that limit our ability to engage in activities that may be in our long-term best interests. Our failure to comply with those covenants could result in an event of default which, if not cured or waived, could result in the acceleration of all of the Term Note. The occurrence of any one of these events could have a material adverse effect on our business, financial condition, results of operations, prospects or ability to satisfy our obligations under the Amended and Restated Loan Agreement.

To service our indebtedness, we will require a significant amount of cash. Our ability to generate cash depends on many factors beyond our control. As such, we may not be able to generate sufficient cash to service the Term Note or our other indebtedness, and may be forced to take other actions to satisfy our obligations under our indebtedness, which may not be successful.

Our ability to make payments on and to refinance the Term Note, to fund planned capital expenditures, maintain sufficient working capital and fund any redemption of the Series A Preferred Stock will depend on our ability to generate cash in the future. This, to a certain extent, is subject to general economic, financial, competitive, legislative, regulatory and other factors that are beyond our control.

We cannot assure you that our business will generate sufficient cash flow from operations or future borrowings from other sources in an amount sufficient to enable us to service the Term Note, or to fund our other liquidity needs. If our cash flows and capital resources are insufficient to allow us to make scheduled payments on our indebtedness, we may need to reduce or delay capital expenditures, sell assets, seek additional capital, restructure or refinance the Term Note, on or before the maturity thereof or seek a waiver of any redemption rights, any of which could have a material adverse effect on our operations. We cannot assure you that we will be able to refinance the Term Note, on commercially reasonable terms or at all, or that the terms of that indebtedness will allow any of the above alternative measures or that these measures would satisfy our scheduled debt service obligations. If we are unable to generate sufficient cash flow to repay or refinance our debt on favorable terms, it could significantly adversely affect our financial condition, and our ability to make any required cash payments under the Term Note or fund any redemption of the Series A Preferred Stock. Our ability to restructure or refinance our debt will depend on the condition of the capital markets and our financial condition at that time. Any refinancing of our debt could be at higher interest rates and may require us to comply with more onerous covenants, which could further restrict our business operations. In addition, any future credit facility may be secured by a priority lien on substantially all of our assets. As such, our ability to refinance the Term Note or seek additional financing could be impaired as a result of such security interest. We are subject to a number of covenants and other conditions, which may restrict our business and financing activities.

The Amended and Restated Loan Agreement has customary representations, warranties and affirmative and negative covenants. The negative covenants include financial covenants by the Company to maintain minimum cash

denominated in U.S. dollars plus accounts receivable outstanding for less than 90 days of \$2 million. The Amended and Restated Loan Agreement also contains customary events of default, including but not limited to payment defaults, cross defaults with certain other indebtedness, breaches of covenants, bankruptcy events and a change of control. In the case of an event of default, as administrative agent under the Loan Agreement, HCP-FVA may (and upon the written request of lenders holding in excess of 50% of the Term Loan, which must include HCP-FVA, is required to) accelerate payment of all obligations under the Loan Agreement, and seek other available remedies.

The restrictions in the Amended and Restated Loan Agreement may prevent us from taking actions that we believe would be in the best interests of our business, and may make it difficult for us to successfully execute our business strategy or effectively compete with companies that are not similarly restricted. In addition, our ability to comply with the financial and other covenants and restrictions in the Amended and Restated Loan Agreement will largely depend on the pricing of our products and services, and our ability to successfully implement our overall business strategy. We cannot assure you that we will be granted waivers or amendments to the Amended and Restated Loan Agreement if for any reason we are unable to comply with these covenants and restrictions. The breach of any of these covenants and restrictions could result in a default under the Amended and Restated Loan Agreement, which could result in an acceleration of our indebtedness.

**Unknown Factors** 

Additional risks and uncertainties of which we are unaware or which currently we deem immaterial also may become important factors that affect us.

Item 1B. Unresolved Staff Comments

None

#### Item 2. Properties

The Company's headquarters are located in an approximately 3,711 square foot facility in Austin, Texas. Offices are also leased for development, support, and sales and marketing personnel, which total an aggregate of approximately 75,465 square feet in Melville, N.Y.,; Munich, Germany; Taichung, Taiwan; Tokyo, Japan; and Beijing, China. Initial lease terms range from one to six years.

#### Item 3. Legal Proceedings

In view of the inherent difficulty of predicting the outcome of litigation, particularly where the claimants seek very large or indeterminate damages, we generally cannot predict what the eventual outcome of the pending matters will be, what the timing of the ultimate resolution of these matters will be, or what the eventual loss, fines or penalties related to each pending matter may be.

In accordance with the authoritative guidance issued by the FASB on contingencies, we accrue anticipated costs of settlement, damages and losses for claims to the extent specific losses are probable and estimable. We record a receivable for insurance recoveries when such amounts are probable and collectable. In such cases, there may be an exposure to loss in excess of any amounts accrued. If, at the time of evaluation, the loss contingency related to a litigation is not both probable and estimable, the matter will continue to be monitored for further developments that would make such loss contingency both probable and estimable and, we will expense these costs as incurred. If the estimate of a probable loss is a range and no amount within the range is more likely, we will accrue the minimum amount of the range.

#### Other Claims

We are subject to various legal proceedings and claims, asserted or unasserted, which arise in the ordinary course of business. While the outcome of any such matters cannot be predicted with certainty, such matters are not expected to have a material adverse effect on our financial condition or operating results.

We continue to assess certain litigation and claims to determine the amounts, if any, that we believe may be paid as a result of such claims and litigation and, therefore, additional losses may be accrued and paid in the future, which could materially adversely impact our financial results, cash flows and cash reserves.

Item 4. Mine Safety Disclosures

Not applicable

#### **PART II**

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

#### **Market Information**

Our Common Stock is quoted on the OTC Markets' OTCQB under the symbol "FALC". Holders

We had approximately 341 holders of record of Common Stock as of February 28, 2019. This does not reflect persons or entities that hold Common Stock in nominee or "street" name through various brokerage firms.

#### Dividends

We have not paid any cash dividends on our common stock since inception. We expect to reinvest any future earnings to finance growth, and therefore do not intend to pay cash dividends on our common stock in the foreseeable future. In addition, the terms of our Series A Preferred Stock and the Amended and Restated Loan Agreement restrict our ability to pay dividends on our common stock. Our board of directors may determine to pay future cash dividends on our common stock if it determines that dividends are an appropriate use of Company capital.

Holders of the Series A Preferred Stock are entitled to receive quarterly dividends at the Prime Rate (Wall Street Journal Eastern Edition) plus 5% (up to a maximum amount of 10%), payable in cash, provided, that if we will not have at least \$1.0 million in positive cash flow for any calendar quarter after giving effect to the payment of such dividends, we, at our election, can pay such dividends in whole or in part in cash, provided that cash flow from operations is not negative, and the remainder can be accrued or paid in common stock to the extent certain equity conditions are satisfied. Due to the lack of sufficient surplus to pay dividends as required by the Delaware General Business Corporation Law, the Company was not permitted to pay the fourth quarter 2016 dividend in cash or common stock and has been accruing its quarterly dividends since then. As of December 31, 2018, the Company's liability for dividends to the holders of the Series A Preferred Stock totaled \$2.1 million. While the Term Loan is outstanding, we are only permitted to pay in-kind dividends on the Series A Preferred Stock.

#### **Equity Compensation Plan Information**

	Number of securities to be issued upon exercise of outstanding options, warrants and rights (1)	Weighted-average exercise price of outstanding options, warrants and rights (1)	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a)) (1)
Plan Category	(a)	(b)	(c)
Equity compensation plans approved by security holders	2,997,330	\$0.69	150,197,028

As of December 31, 2018 we had 150,197,028 shares of our common stock reserved for issuance under our stock plans with respect to outstanding options and warrants and options (or restricted stock or restricted stock units) that have not been granted. See Note (10) Share-Based Payment Arrangements to our consolidated financial statements for further information.

**Issuer Purchases of Equity Securities** 

### None

Unregistered Sales of Equity Securities and Use of Proceeds

In connection with the Financing, the New Investors received 185,942,009 Financing Warrants. The Financing Warrants issued by the Company were issued in accordance with the exemption provided by Section 4(2) of the Securities Act of 1933, as amended.

In December 2018, outstanding Financing Warrants to purchase 489,321,074 were exercised resulting in the issuance of 489,321,074 shares of Common Stock (the "Warrant Exercise"). The Common Stock issuable pursuant to the Warrant Exercise was issued in accordance with the exemption provided by Section 4(2) of the Securities Act of 1933, as amended.

Item 6. Selected Financial Data

Not required.

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

The following Management's Discussion and Analysis of Financial Condition and Results of Operations contains "forward-looking statements" within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. These forward-looking statements can be identified by the use of predictive, future-tense or forward-looking terminology, such as "believes," "anticipates," "expects," "estimates," "plans," "may," "intend "will," or similar terms. Investors are cautioned that any forward-looking statements are not guarantees of future performance and involve significant risks and uncertainties, and that actual results may differ materially from those projected in the forward-looking statements. The following discussion should be read together with the consolidated financial statements and notes to those financial statements included elsewhere in this report.

#### **OVERVIEW**

During 2018, we continued to innovate and enhance our flagship product, FalconStor® Data Mastery Platform (FDMP), and each of our core point solution products, NSS, CDP, and OBD.

FDMP leverages our core NSS, CDP, and OBD technology to give customers the ability to move workloads to the right destination, on-premise or in the cloud, with advanced insight. FalconStor Data Mastery Platform is designed for organizations with complex, heterogeneous IT environments and the full spectrum of data management use cases, including but not limited to large enterprises, universities, health care entities and governmental institutions. The platform is a modern, comprehensive and easy-to-use software solution that enables IT professionals to do what the name suggests - always have complete insight into and control over, or mastery of, their organization's data. Data is an organization's most precious resource which, if managed and protected properly, can help an enterprise unlock competitive advantage, whether by gaining a better understanding of customers, uncovering ways to improve operations and reduce costs, or inventing new products, services and business models.

FDMP provides a central data management console for a holistic view of an enterprise's entire environment - whether legacy data centers, hyper-converged infrastructure, cloud and/or hybrids. With this view, users can easily protect, optimize, recover, locate, analyze and scale resources across their systems. Regarding data recovery, FalconStor gives IT professionals unmatched capabilities on-premises and in the public cloud due to its patented RecoverTrac<sup>TM</sup> Technology, which includes real-time and continuous data recording for superior RPO (Recovery Point Objective) to a specific micro-second in time. Moreover, FalconStor products are vendor- and hardware-agnostic - the only such offering on the market - so they work with an organization's existing IT investments and solve the problems inherent in products from both legacy and narrowly-focused niche vendors.

Legacy hardware vendors lock customers into complicated, rigid and expensive proprietary platforms that require them to rip-and-replace existing technology investments, drain budgets from other priorities, silo their data and use embedded, subpar software. Niche vendors address only a fraction of the data mastery stack which results in fractured data management, multiple vendor relationships and also silo propagation. With the FalconStor Data Mastery Platform, a customer can strengthen data protection while also easily adding and leveraging newer technologies - such as the public cloud - as they become available.

Over the past four years, we have continued to drive FDMP sales through our originally targeted routes to market which included OEMs, Managed Service Providers and Enterprise customers. We have achieved critical customer and marketplace credibility with the early adopter OEMs and Managed Service Providers. Since the introduction and release of FDMP in mid-2015, FDMP has won 11 software-defined storage (SDS) product-of-the-year awards at various leading industry publications, including three publications servicing the Asia markets and six publications servicing the European marketplace and two publications in the Americas.

Most of our revenue comes from sales to customers through resellers. As service providers to companies, resellers' reputations are dependent on satisfying their customers' needs efficiently and effectively. Resellers have wide choices in fulfilling their customers' needs. If resellers determine that a product they have been providing to their customers is not functioning as promised, or is not providing adequate return on investment, or if the customers are not satisfied with the level of support they are receiving from the suppliers, the resellers will move quickly to offer different solutions to their customers. Additional sales by resellers are therefore an important indicator of our business prospects.

Our "Business Partner" program for our resellers provides financial incentives, for those resellers that are willing to make a commitment to FalconStor through training, marketing and revenue. As part of our review of all of our operations to maximize

savings without sacrificing sales, and in connection with our Business Partner program, we continually review our relationship with each of our resellers in all regions. We decided to focus on only those resellers who have the expertise, personnel and networks to identify potential customers and to service our end users.

We offer flexibility in licensing, payment structures and subscription-based offerings, and believe this practice has made and will continue to make us more competitive in the marketplace by allowing us more flexibility to work with partners and customers to design licensing and payment terms that meet their needs. We expect to continue this flexibility going forward, and also expect that the number of transactions with flexible sales terms will increase over time, which could result in variable periods for recognizing the revenue.

Prevailing accounting guidance can also drive fluctuation in reported revenue. Effective January 1, 2018 we adopted the new accounting revenue standard for revenue recognition using the modified retrospective transition method applied to those contracts which were not completed as of January 1, 2018. Results for reporting periods beginning after January 1, 2018 are presented under this new guidance, while prior period amounts are not adjusted and continue to be reported in accordance with our historic accounting under previous revenue guidance. See Note (1) Summary of Significant Accounting Policies.

Fluctuation in revenue is also driven by our volume and mix of sales from period to period. Revenue allocated to perpetual and term software licenses are recognized at a point in time upon electronic delivery of the download link and the license keys, as these products have significant standalone functionality. Product maintenance and support services are satisfied over time as they are stand-ready obligations throughout the support period. As a result, revenues associated with maintenance services are deferred and recognized as revenue ratably over the term of the contract. Revenues associated with professional services are recognized at a point in time upon customer acceptance.

# RESULTS OF OPERATIONS – FOR THE YEAR ENDED DECEMBER 31, 2018 COMPARED WITH THE YEAR ENDED DECEMBER 31, 2017

We adopted the new accounting standard for revenue recognition effective January 1, 2018 using the modified retrospective transition method. This new standard had a material impact on our consolidated financial statements. Beginning in fiscal year 2018, our financial results reflect adoption of the standard including a cumulative effect adjustment on January 1, 2018. The comparative information has not been restated and continues to be reported under the accounting standards in effect for that period. Refer to Note (1) Summary of Significant Accounting Principles of our consolidated financial statements for further information.

Our net loss for the year ended December 31, 2018 was \$0.9 million, as compared with net income of \$1.1 million for the previous year, in part as a result of the impact of this newly adopted accounting standard, in addition to other non cash restructuring charges incurred in connection with our cost reduction efforts. Under previous accounting guidance, the Company delivered net income of \$2.6 million for the year ended December 31, 2018. See Note (1) Summary of Significant Accounting Principles, to our consolidated financial statements for further information.

While our net loss increased as compared to the prior year period, net cash used by operations decreased by \$1.1 million to \$1.5 million for the year ended December 31, 2018, as compared to \$2.6 million of net cash used by operations for the previous year. As a result of improved operational efficiencies, the closing of the commitment from HCP-FVA to provide \$3.0 million in financing (the "Commitment") and \$1.0 million of gross proceeds received in connection with our previously announced private placement and approximately \$0.5 million we received from the warrants exercised in connection with these events, we ended the quarter with \$3.1 million of cash and cash equivalents, as compared to \$1.0 million at December 31, 2017.

Deferred revenue as of December 31, 2018 totaled \$9.4 million, compared with \$18.4 million as of December 31, 2017. This decrease is primarily attributable to our adoption of new revenue recognition accounting guidance on January 1, 2018 using the modified retrospective transition method applied to those contracts which were not

completed as of January 1, 2018. For further information, refer to Note (1) Summary of Significant Accounting Principles, to our consolidated financial statements.

Overall, total revenue for the year ended December 31, 2018 decreased 29.1% to \$17.8 million, compared with \$25.2 million for the year ended December 31, 2017. This decline in revenue was significantly impacted by our adoption of the new revenue recognition guidance on January 1, 2018 using the modified retrospective transition method which resulted in a \$3.5 million decrease in revenue. The remaining decrease in revenue was driven by several factors. First, the volume of new product licenses and maintenance sales, both for expansion of our existing installed base and in the acquisition of new customers declined from the prior year. Second, customer attrition continued which decreased maintenance renewal revenue.

Total cost of revenue for the year ended December 31, 2018 decreased 46% to \$3.0 million for the year ended December 31, 2018, compared with \$5.5 million for the year ended December 31, 2017. Total gross profit decreased \$4.8 million, or 24.3%, to \$14.9 million for the current year, compared with \$19.6 million for 2017. Total gross margin increased to 83% for the current year, compared with 78% for 2017. The decrease in our total gross profit in absolute dollars was primarily due to the decrease in revenue. The increase in total gross margin was primarily due to the mix of sales and our cost reduction initiatives. Generally, our total gross profits and total gross margins fluctuate based on several factors, including (i) revenue growth levels, (ii) changes in personnel headcount and related costs, and (iii) our product offerings and mix of sales.

Our total operating expenses decreased 19.8% from \$18.6 million for the year ended December 31, 2017 to \$14.9 million for the year ended December 31, 2018. This increase was primarily attributable to our tighter expense controls and overall operational efficiencies which better align our current business plan on a run-rate basis. These efficiencies include among other items, stream-lined personnel related costs, global overhead costs and efficiencies realized on our redesigned go-to-market coverage models. We will continue to evaluate the appropriate headcount levels to properly align our resources with our current and long-term outlook and to take actions in areas of the Company that are not performing.

Net loss attributable to common stockholders, which includes the effects of the Series A redeemable convertible preferred stock dividends (including accrued dividends) and accretion, was \$4.5 million for the year ended December 31, 2018, compared with a net income of \$0.2 million for the year ended December 31, 2017.

#### Revenue

	Year ended December 31,			
	2018		2017	
Revenue:				
Product revenue	\$5,766,532		\$8,972,112	
Support and services revenue	12,071,374		16,188,451	
Total Revenue	\$17,837,906	6	\$25,160,563	3
Year-over-year percentage change				
Product revenue	(36	)%	(11	)%
Support and services revenue	(25	)%	(20	)%
Total percentage change	(29	)%	(17	)%

#### Product revenue

Product revenue is comprised of sales of both licenses for our software solutions and sales of the platforms on which the software is installed. This includes stand-alone software applications and software integrated with industry standard hardware, sold as one complete integrated solution or sold on a subscription or consumption basis. The products are sold through our OEMs, and through (i) value-added resellers, (ii) distributors, and/or (iii) directly to end-users (collectively "non-OEMs"). These revenues are recognized when all the applicable criteria under accounting principles generally accepted in the United States are met.

Product revenue decreased 36% from \$9.0 million for the year ended December 31, 2017 to \$5.8 million for the year ended December 31, 2018. This decline in revenue reflects our adoption of the new revenue recognition guidance on January 1, 2018 using the modified retrospective transition method which resulted in a \$3.5 million decrease in product revenue. Under legacy accounting guidance, product revenue increased \$0.3 million, year over year. See Note (1) Summary of Significant Accounting Policies. Product revenue represented 32% and 36% of our total revenue for the years ended December 31, 2018 and 2017, respectively.

We continue to invest in our product portfolio by refreshing and updating our existing product lines and developing our next generation of innovative product offerings to drive our sales volume in support of our long-term outlook.

#### Support and services revenue

Support and services revenue is comprised of revenue from (i) maintenance and technical support services, (ii) professional services primarily related to the implementation of our software, and (iii) engineering services. Revenue derived from maintenance and technical support contracts are deferred and recognized ratably over the contractual maintenance term. Revenues associated with professional and engineering services are recognized at a point in time upon customer acceptance. Support and services revenue decreased 25% from \$16.2 million for the year ended December 31, 2017 to \$12.1 million for the year ended December 31, 2018. The decrease in support and services revenue was attributable to decreases in both maintenance and technical support services revenue and professional services revenue.

Maintenance and technical support services revenue decreased from \$15.6 million for the year ended December 31, 2017 to \$11.8 million for the same period in 2018. Our maintenance and technical support service revenue results primarily from (i) the purchase of maintenance and support contracts by our customers, and (ii) the renewal of maintenance and support contracts by our existing and new customers after their initial contracts expire. Reductions in maintenance and technical support revenue are due to declines product sales which resulted in lower renewal revenue. Additionally, the conversion of existing customers using our legacy products to our FDMP subscription product has resulted and will continue to result in a shift of revenue from maintenance and technical support services revenue to product revenue.

Professional services revenue decreased from \$0.6 million for the year ended December 31, 2017 to \$0.3 million million for the year ended December 31, 2018. Professional services revenue varies from period to period based upon (i) the number of solutions sold during the existing and previous periods, (ii) the number of customers who elect to purchase professional services, (iii) the number of professional services contracts that are performed during the period, and (iv) the number of customers who elect to purchase engineering services and the timing of acceptance from the customer. We expect professional services revenue to continue to vary from period to period based upon the number of customers who elect to utilize our professional services upon purchasing any of our solutions.

Cost of revenue			
	Year ended December 31,		
	2018	2017	
Cost of revenue:			
Product	\$414,149	\$785,535	
Support and service	2,563,755	4,755,464	
Total cost of revenue	\$2,977,904	\$5,540,999	
Total Gross Profit	\$14,860,002	\$19,619,564	
Gross Margin:			
Product	93%	91%	
Support and service	79%	71%	
Total gross margin	83%	78%	

Cost of revenue, gross profit and gross margin

Cost of product revenue consists primarily of industry standard hardware we purchase and integrate with our software for turn-key integrated solutions, personnel costs, amortization of capitalized software and shipping and logistics costs. Cost of support and service consists primarily of personnel and other costs associated with providing software implementations, technical support under maintenance contracts and training.

Cost of product revenue for the year ended December 31, 2018 decreased \$0.4 million, or 47%, to \$0.4 million, compared with \$0.8 million for the same period in 2017. Product gross margin increased to 93% for the year ended December 31, 2018, compared with 91.2% for the same period in 2017. The increase in product gross margin was primarily attributable to an increase in the percentage of our product revenue from sales of our stand-alone software applications, which have higher gross margins than sales of our fully integrated solutions with hardware appliances, compared with the same period in 2017. Our FDMP product is a subscription-based product offering and is primarily sold as a software only solution, which we anticipate will continue to drive higher product gross margins in the future. Our cost of support and service revenue for the year ended December 31, 2018 decreased \$2.2 million, or 46%, to \$2.6 million, compared with \$4.8 million for the same period in 2017. Support and service gross margin increased to 79% for the year ended December 31, 2018 from 71% for the same period in 2017. The increase in support and service gross margin was primarily attributable to a reduction in personnel related costs resulting from our realignment and reduction in workforce and a severance benefit recorded as a result of litigation settlement with a former employee compared with the prior year period.

Total gross profit decreased \$4.8 million, or 24%, from \$19.6 million for the year ended December 31, 2017, to \$14.9 million for the year ended December 31, 2018. However, total gross margin increased to 83% for the year ended December 31, 2018, compared with 78% for the year ended December 31, 2017. Generally, our total gross profits and total gross margins fluctuate based on several factors, including (i) revenue growth levels, (ii) changes in personnel headcount and related costs, and (iii) our product offerings and mix of sales. The decrease in our total gross profit in absolute dollars was primarily due to the decrease in revenue. The increase in total gross margin was primarily due to the mix of sales and our cost reduction initiatives. Generally, our total gross profits and total gross margins fluctuate based on several factors, including (i) revenue growth levels, (ii) changes in personnel headcount and related costs, and (iii) our product offerings and mix of sales.

#### **Operating Expenses**

#### Research and Development Costs

Research and development costs consist primarily of personnel costs for product development, share-based compensation expense, and other related costs associated with the development of new products, enhancements to existing products, quality assurance and testing. Research and development costs decreased \$2.6 million, or 40%, to \$3.9 million for the year ended December 31, 2018, from \$6.5 million in 2017. The decrease was primarily related to a decrease in personnel related costs resulting from our realignment and reduction in workforce and continued efforts to allocate the appropriate level of resources based upon the product development roadmap schedule. We continue to provide substantial resources in support of our research and development activities to continue to enhance and to test our core products and in the development of new innovative products, features and options. The decrease is also due to a reduction in share-based compensation expense included in research and development costs.

#### Selling and Marketing

Selling and marketing expenses consist primarily of sales and marketing personnel and related costs, share-based compensation expense, travel, public relations expense, marketing literature and promotions, commissions, trade show expenses, and the costs associated with our foreign sales offices. Selling and marketing expenses decreased \$1.7 million, or 27%, to \$4.5 million for the year ended December 31, 2018, from \$6.1 million for the year ended December 31, 2017. The decrease in selling and marketing expenses was primarily attributable to a decrease in headcount resulting from our realignment and reduction in workforce as well as continued efforts to optimize our go-to-market coverage models around the world.

#### General and Administrative

General and administrative expenses consist primarily of personnel costs of general and administrative functions, share-based compensation expense, public company related costs, directors and officers insurance, legal and professional fees and other general corporate overhead costs. General and administrative expenses decreased \$0.8 million, or 14%, to \$5.3 million for the year ended December 31, 2018, from \$6.1 million for the year ended December 31, 2017. The decrease in general and administrative expenses was primarily attributable to a decrease in headcount resulting from our realignment and reduction in workforce and continuing to optimize personnel costs, professional fees and other various general and administrative costs within the Company.

#### Restructuring costs

In the third quarter of 2013, we adopted a restructuring plan intended to better align our cost structure with the skills and resources required to more effectively execute our long-term growth strategy and to support revenue levels we expect to achieve

on a go forward basis (the "2013 Plan"). In connection with the 2013 Plan, we eliminated over 100 positions worldwide, implemented tighter expense controls, ceased non-core activities and closed or downsized several facilities.

In June 2017, the Board approved a comprehensive plan to increase operating performance (the "2017 Plan"). The 2017 Plan resulted in a realignment and reduction in workforce. The 2017 Plan was substantially completed by the end of our fiscal year ended December 31, 2017 and when combined with previous workforce reductions in the second quarter of Fiscal 2017 reduced our workforce to approximately 81 employees at December 31, 2017. These actions are anticipated to result in an annualized cost savings of approximately \$10.0 million. As part of this consolidation effort, the Company vacated a portion of the Mellville, NY office space during the three months ended June 30, 2018. In accordance with accounting standards governing costs associated with exit or disposal activities, expenses related to future rental payments for which the Company no longer intends to receive any economic benefit are accrued, net of any anticipated sublease income, when the Company ceases use of the leased space. During the year ended December 31, 2018, the Company incurred lease disposal-related costs for this property of \$1.4 million.

Restructuring expense increased \$1.4 million for the the year ended December 31, 2018 to \$1.3 million, compared to a \$0.2 million restructuring benefit in the prior year period. For further information, refer to Note (14) Restructuring Costs, to our consolidated financial statements.

#### Interest and Other Loss, Net

Interest and other income (loss), net, decreased \$0.7 million to a loss of \$0.6 million for the year ended December 31, 2018, compared with income of \$38,064 in the prior year period. The fluctuation in interest and other income (loss) year over year relates to foreign currency gains and losses, interest expense and the change in fair value our embedded derivatives. The decrease in interest and other income (loss) for the year ended December 31, 2018, as compared to the prior year, was driven primarily by foreign exchange losses, and \$0.4 million of interest expense incurred in connection with our Term Loan.

#### Income Taxes

On December 22, 2017 the U.S. government enacted comprehensive tax reform commonly referred to as the Tax Cuts and Jobs Act ("TCJA"). Under ASC 740, the effects of changes in tax rates and laws are recognized in the period which the new legislation is enacted. Among other things, the TCJA (1) reduces the US statutory corporate income tax rate from 35% to 21% effective January 1, 2018 (2) eliminates the corporate alternative minimum tax (3) requires companies to record/pay a one-time transition tax on earnings of certain foreign subsidiaries that were previously tax deferred (4) creates new taxes on certain foreign sourced earnings (5) changes rules related to uses and limitations of net operating loss carryforwards beginning after December 31, 2017.

In response to the TCJA, the SEC staff issued SAB 118, which provides guidance on accounting for the tax effects of TCJA. SAB 118 provides a measurement period that should not extend beyond one year from the TCJA enactment date for companies to complete the accounting of the TCJA under ASC 740. To the extent that a company's accounting for certain income tax effects of the TCJA is incomplete but is able to determine a reasonable estimate, it must record a provisional estimate in the financial statements.

For the year ended December 31, 2018, we recorded an income tax provision of \$0.2 million, consisting of federal, state and local and foreign taxes. Our effective tax rate for the year ended December 31, 2018 was 34.6%.

#### LIQUIDITY AND CAPITAL RESOURCES

Principal Sources of Liquidity

Our principal sources of liquidity are our cash, cash equivalents generated from operating, investing and financing activities. Our cash and cash equivalents balance as of December 31, 2018 totaled \$3.1 million, compared with \$1.0 million as of December 31, 2017.

### Recent Developments

On October 9, 2018, we closed on the final tranche of our previously-announced private placement of Units (as hereinafter defined) to certain eligible stockholders of the Company (the "Financing"). As a result, the Company received an additional

\$1,000,000 of gross proceeds from new investors (the "New Investors") which is in addition to the \$3,000,000 of gross proceeds previously received from HCP-FVA, LLC ("HCP-FVA") pursuant to a commitment (the "Commitment") through the subscription of 30,000,000 Units. HCP-FVA is an affiliate of Hale Capital Partners, LP (together with HCP-FVA, "Hale Capital"), the Company's largest stockholder through its ownership of the Company's Series A Redeemable Preferred Stock (the "Series A Preferred Stock") Common Stock, \$.001 par value (the "Common Stock"), and an affiliate of FalconStor director, Martin Hale.

In the Financing, the Company offered to FalconStor stockholders as of November 17, 2017 who are accredited investors the opportunity to purchase up to a total of 40 million Units (inclusive of subscriptions by HCP-FVA). Each Unit consisted of the following (each, a "Unit") for a per Unit offering price of \$0.371063:

- \$0.10 in senior secured debt (for a total of \$4 million of senior secured debt assuming full subscription of the (i) Financing), secured by all of the assets of the Company and guaranteed by each of the Company's domestic subsidiaries, having an interest rate of prime plus 0.75% and a maturity date of June 30, 2021 (the "Term Loan");
- (ii) warrants to purchase 12.233 shares of the Company's Common Stock for a nominal exercise price (for a total of approximately 489.32 million shares assuming full subscription of the Financing) (the "Financing Warrants"); and
- (iii) 0.0225 shares of Series A Preferred Stock at a per Unit price of \$0.271063, all such shares to be acquired directly from their current holder, HCP-FVA.

In addition to providing the Company with \$1,000,000 of financing, the New Investors purchased \$520,000 of the Term Loan held by HCP-FVA and 342,000 of the 900,000 shares of Series A Preferred Stock held by HCP-FVA. Financing Warrants to purchase 63,610,935 shares of Common Stock held by HCP-FVA were also cancelled. Accordingly, the New Investors hold Financing Warrants to purchase 185,942,009 shares of Common Stock and HCP-FVA now holds Financing Warrants to purchase 303,379,065 shares of Common Stock. The transfer of securities by HCP-FVA to New Investors was subject to certain transfer limitations to ensure the preservation of the Company's net operating loss carry forward.

All New Investors executed a joinder to the Amended and Restated Term Loan Credit Agreement, dated as of February 23, 2018 (the "Amended and Restated Loan Agreement"), with HCP-FVA, the Company and certain other loan parties named therein setting forth the terms of the Term Loan. The terms and conditions of the Amended and Restated Loan Agreement have been previously described in the Company's SEC filings

As part of the Commitment, Hale Capital also agreed to postpone the date of the mandatory redemption of the Series A Preferred Stock from August 5, 2017 to July 30, 2021, and to waive prior breaches of the terms of the Series A Preferred Stock which had also triggered a mandatory redemption right.

In December 2018, outstanding Financing Warrants to purchase 489,321,074 were exercised resulting in the issuance of 489,321,074 shares of Common Stock (the "Warrant Exercise"). In connection with the Warrant Exercise, the Company received proceeds of approximately \$489,321 which was used to reduce the outstanding principal due on Amended and Restated Loan Agreement.

We believe that our cash flows from operations and existing cash on hand are sufficient to conduct our planned operations and meet our contractual requirements through April 2, 2020.

#### Cash Flow Analysis

Cash flow information is as follows:

	Years Ended December 31,			
	2018	2017		
Cash (used in) provided by:				
Operating activities	\$(1,510,967)	\$(2,574,420)		
Investing activities	(145,081)	(183,718)		
Financing activities	3,760,340	325,945		
Effect of exchange rate changes	(56,087)	52,137		
Net increase (decrease) in cash and cash equivalents	\$2,048,205	\$(2,380,056)		

Net cash used in operating activities totaled \$1.5 million and \$2.6 million for the years ended December 31, 2018 and 2017, respectively. The changes in net cash used in operating activities for each of the years ended December 31, 2018 and 2017, was primarily due to our net loss and adjustments for net changes in operating assets and liabilities, primarily changes in our accounts receivable, deferred revenue, prepaid expenses, inventory, other assets, accounts payable, and other accrued expenses.

Net cash used by investing activities totaled \$0.1 million and \$0.2 million for the years ended December 31, 2018 and 2017, respectively. Included in investing activities for the years ended December 31, 2018 and 2017 are purchases of property and equipment, intangible assets and cash received from security deposits.

Net cash provided by financing activities totaled \$3.8 million for the year ended December 31, 2018 compared with net cash provided by financing activities of \$0.3 million for the prior year period. Included in financing activities for the year ended December 31, 2018 are proceeds from the issuance of long-term debt and the exercise of warrants. Financing activities for the year ended 2017 include proceeds from the Bridge Loan less cash paid for Bridge Loan issuance costs and tax withholdings for employee share-based payment awards.

#### **Contractual Obligations**

As of December 31, 2018, our significant commitments related to (i) the Amended and Restated Loan Agreement, (ii) our office leases, (iii) dividends (including accrued dividends) on our Series A Preferred Stock, and (iv) the potential redemption of the Series A redeemable convertible preferred stock as discussed above.

The following is a schedule summarizing our significant obligations to make future payments under contractual obligations as of December 31, 2018 (at such date, the holder of the Series A Preferred Stock had not exercised their redemption rights):

	Operating Leases	Note Payable (c)	Interest Payments (a) (c)	Lav	Stock Mandatory	Dividends on Series A Preferred Stock
2019	\$1,734,523	<b>\$</b> —	\$250,000	\$ <i>—</i>	\$	\$
2020	1,567,637	_	250,000	_	_	_
2021	596,475	4,000,000	125,000	_	_	_
Other (b)	_	_	_	297,890	9,000,000	5,244,240
Total contractual obligations	\$3,898,635	\$4,000,000	\$625,000	\$ 297,890	\$9,000,000	\$5,244,240
Sublease income	(1,312,746)	)—	_	_		
Net contractual obligations	\$2,585,889	\$4,000,000	\$625,000	\$ 297,890	\$9,000,000	\$5,244,240

- (a) The cash obligations for interest requirements reflect floating rate debt obligations on the balance of our Note Payable at December 31, 2018 using the interest rate in effect at such time.
- (b) Represents our liability for uncertain tax positions. We are unable to make a reasonably reliable estimate of the timing of payments due to uncertainties in the timing of tax audit outcomes.

(c) See Note (7) Notes Payable and Stock Warrants to our consolidated financial statements for further information.

Off-Balance Sheet Arrangements

As of December 31, 2018 and 2017, we had no off-balance sheet arrangements.

Critical Accounting Policies and Estimates

Our critical accounting policies and estimates are those related to revenue recognition, accounts receivable allowances, deferred income taxes, accounting for share-based payments, goodwill and other intangible assets, software development costs, fair value measurements and litigation.

Revenue Recognition. We adopted the new accounting revenue standard for revenue recognition effective January 1, 2018 using the modified retrospective transition method applied to those contracts which were not completed as of January 1, 2018. Results for reporting periods beginning after January 1, 2018 are presented under this new guidance, while prior period amounts are not adjusted and continue to be reported in accordance with our historic accounting under previous revenue guidance. See Note (1) Summary of Significant Accounting Policies.

We recognize revenue in accordance with the authoritative guidance issued by the FASB on revenue recognition when persuasive evidence of an arrangement exists, the fee is fixed or determinable, delivery has occurred, and collection of the resulting receivable is deemed probable. Products delivered to a customer on a trial basis are not recognized as revenue until the trial period has ended and acceptance has occurred by the customer. Reseller and distributor customers typically send us a purchase order when they have an end user identified.

The Company's contracts with customers often include promises to transfer multiple products and services to a customer. Determining whether products and services are considered distinct performance obligations that should be accounted for separately versus together may require significant judgment.

Judgment is required to determine the standalone selling price ("SSP") for each distinct performance obligation. For products and services aside from maintenance and support, the Company estimates SSP by adjusting the list price by historical discount percentages. SSP for software and hardware maintenance and support fees is based on the stated percentages of the fees charged for the respective products.

The Company's perpetual and term software licenses have significant standalone functionality and therefore revenue allocated to these performance obligations are recognized at a point in time upon electronic delivery of the download link and the license keys.

Product maintenance and support services are satisfied over time as they are stand-ready obligations throughout the support period. As a result, revenues associated with maintenance services are deferred and recognized as revenue ratably over the term of the contract.

Revenues associated with professional services are recognized at a point in time upon customer acceptance.

Accounts Receivable. We review accounts receivable to determine which receivables are doubtful of collection. In making the determination of the appropriate allowance for uncollectible accounts and returns, we consider (i) historical return rates, (ii) specific past due accounts, (iii) analysis of our accounts receivable aging, (iv) customer payment terms, (v) historical collections, write-offs and returns, (vi) changes in customer demand and relationships, (vii) actual cash collections on our accounts receivables and (viii) concentrations of credit risk and customer credit worthiness. When determining the appropriate allowance for uncollectable accounts and returns each period, the actual customer collections of outstanding account receivable balances impact the required allowance for returns. We recorded an expense of \$0.0 million and \$0.1 million for the years ended December 31, 2018 and 2017, respectively. These amounts are included within our consolidated statement of operations in each respective year. Changes in the product return rates, credit worthiness of customers, general economic conditions and other factors may impact the

level of future write-offs, revenue and our general and administrative expenses.

Income Taxes. As discussed further in Note (5) Income Taxes, to our consolidated financial statements, in accordance with the authoritative guidance issued by the FASB on income taxes, we regularly evaluate our ability to recover deferred tax assets, and report such deferred tax assets at the amount that is determined to be more-likely-than-not recoverable. The Company records income taxes under the asset and liability method. Deferred tax assets and liabilities are recognized for future tax consequences attributable to differences between the financial statement carrying amounts of existing assets and liabilities and

their respective tax bases. Deferred tax assets and liabilities are measured using enacted tax rates expected to apply to taxable income in the years in which those temporary differences are expected to be realized or settled. The effect on deferred tax assets and liabilities of a change in tax rates is recognized in income in the period that includes the enactment date. In determining the period in which related tax benefits are realized for financial reporting purposes, excess share-based compensation deductions included in net operating losses are realized after regular net operating losses are exhausted.

We account for uncertain tax positions in accordance with the authoritative guidance issued by the FASB on income taxes, which addresses the determination of whether tax benefits claimed or expected to be claimed on a tax return, should be recorded in the financial statements. Pursuant to the authoritative guidance, we may recognize the tax benefit from an uncertain tax position only if it meets the "more likely than not" threshold that the position will be sustained on examination by the taxing authority, based on the technical merits of the position or under statute expirations. The tax benefits recognized in the financial statements from such a position should be measured based on the largest benefit that has a greater than fifty percent likelihood of being realized upon ultimate settlement. In addition, the authoritative guidance addresses de-recognition, classification, interest and penalties on income taxes, accounting in interim periods, and also requires increased disclosures.

Accounting for Share-Based Payments. As discussed further in Note (10) Share-Based Payment Arrangements, to our consolidated financial statements, we account for share-based awards in accordance with the authoritative guidance issued by the FASB on stock compensation.

We have used and expect to continue to use the Black-Scholes option-pricing model to compute the estimated fair value of share-based compensation expense. We have used the Monte Carlo simulation model to compute the estimated fair value of share-based compensation expense for awards with a market condition. The Black-Scholes option-pricing model includes assumptions regarding dividend yields, expected volatility, expected option term and risk-free interest rates. The Monte Carlo simulation model includes assumptions regarding expected volatility, expected option term and risk-free interest rates. The assumptions used in computing the fair value of share-based compensation expense reflect our best estimates, but involve uncertainties relating to market and other conditions, many of which are outside of our control. We estimate expected volatility based primarily on historical daily price changes of our stock and other factors. The expected option term is the number of years that we estimate that the stock options will be outstanding prior to exercise. The estimated expected term of the stock awards issued has been determined pursuant to SEC Staff Accounting Bulletin SAB No. 110. If other assumptions or estimates had been used, the share-based compensation expense that was recorded for the years ended December 31, 2018 and 2017 could have been materially different. Furthermore, if different assumptions or estimates are used in future periods, share-based compensation expense could be materially impacted in the future.

Goodwill. As discussed further in Note (1) Summary of Significant Accounting Policies, to our consolidated financial statements, we account for goodwill and other intangible assets in accordance with the authoritative guidance issued by the FASB on goodwill and other intangibles. The authoritative guidance requires an impairment-only approach to accounting for goodwill and other intangibles with an indefinite life. Absent any prior indicators of impairment, we perform an annual impairment analysis during the fourth quarter of each of our fiscal years.

As of both December 31, 2018 and 2017, we had \$4.2 million of goodwill. As of both December 31, 2018 and 2017, we had \$0.1 million and \$0.1 million (net of accumulated amortization), respectively, of other identifiable intangible assets. We do not amortize goodwill, but we assess for impairment at least annually on December 31st and more often if a trigger event occurs. The Company has early adopted the provisions of ASU 2017-4, "Intangibles-Goodwill and Other (Topic 350): Simplifying the Test for Goodwill Impairment," which eliminates the second step of the goodwill impairment test. As a result, the Company's goodwill impairment test as of December 31, 2018 included only one step, which is a comparison of the carrying value of its one reporting unit to its fair value, and any excess carrying value, up to the amount of goodwill allocated to that reporting unit, is impaired. This new accounting pronouncement

also eliminates the requirements for any reporting unit with a zero or negative carrying amount to perform a qualitative assessment and, if it fails that qualitative test, to perform Step 2 of the goodwill impairment test. The Company has determined there to be no impairment for any of the periods presented. At December 31, 2018 and 2017, the Company's single reporting unit for purposes of its goodwill impairment test had a negative carrying value and thus the Company determined there was no impairment of goodwill.

Software Development Costs. As discussed further in Note (1) Summary of Significant Accounting Policies, to our consolidated financial statements, we account for software development costs in accordance with the authoritative guidance issued by the FASB on costs of software to be sold, leased or marketed.

As of December 31, 2018 and 2017, we had \$0.1 million and \$0.3 million, respectively, of software development costs, net of amortization. The authoritative guidance requires that the costs associated with the development of new software products and enhancements to existing software products be expensed as incurred until technological feasibility of the product has been established. Once technological feasibility is established, all software costs are capitalized until the product is available for general release to customers. Judgment is required in determining when technological feasibility of a product is established and assumptions are used that reflect our best estimates. If other assumptions had been used in the current period to estimate technological feasibility, the reported product development and enhancement expense could have been affected. Annual amortization of capitalized software costs is the greater of the amount computed using the ratio that current gross revenue for a product bear to the total of current and anticipated future gross revenue for that product or the straight-line method over the remaining estimated economic life of the software product, generally estimated to be five years from the date the product became available for general release to customers. Software development costs are reported at the lower of amortized cost or net realizable value. Net realizable value is computed as the estimated gross future revenue from each software solution less the amount of estimated future costs of completing and disposing of that product. Because the development of projected net future revenue related to our software solutions used in our net realizable value computation is based on estimates, a significant reduction in our future revenue could impact the recovery of our capitalized software development costs.

Fair Value Measurement. As discussed further in Note (3) Fair Value Measurements, to our consolidated financial statements, we determine fair value measurements of both financial and nonfinancial assets and liabilities in accordance with the authoritative guidance issued by the FASB on fair value measurements and disclosures. The FASB authoritative guidance establishes three levels of inputs that may be used to measure fair value. Each level of input has different levels of subjectivity and difficulty involved in determining fair value.

Level 1—Valuations based on quoted prices for identical assets and liabilities in active markets.

Level 2—Valuations based on observable inputs other than quoted prices included in Level 1, such as quoted prices for similar assets and liabilities in active markets, quoted prices for identical or similar assets and liabilities in markets that are not active, or other inputs that are observable or can be corroborated by observable market data.

Level 3—Valuations based on unobservable inputs reflecting our own assumptions, consistent with reasonably available assumptions made by other market participants. These valuations require significant judgment.

#### Other-Than-Temporary Impairment

After determining the fair value of our available-for-sale debt instruments, gains or losses on these investments are recorded to other comprehensive income, until either the investment is sold or we determine that the decline in value is other-than-temporary. Determining whether the decline in fair value is other-than-temporary requires management judgment based on the specific facts and circumstances of each investment. For investments in debt instruments, these judgments primarily consider the financial condition and liquidity of the issuer, the issuer's credit rating, and any specific events that may cause us to believe that the debt instrument will not mature and be paid in full; and our ability and intent to hold the investment to maturity.

Litigation. As discussed further in Note (13) Litigation, to our consolidated financial statements, in accordance with the authoritative guidance issued by the FASB on contingencies, we accrue anticipated costs of settlement, damages and losses for claims to the extent specific losses are probable and estimable. We record a receivable for insurance recoveries when such amounts are probable and collectable. In such cases, there may be an exposure to loss in excess of any amounts accrued. If, at the time of evaluation, the loss contingency related to a litigation is not both probable and estimable, the matter will continue to be monitored for further developments that would make such loss contingency both probable and estimable and, we will expense these costs as incurred. If the estimate of a probable

loss is a range and no amount within the range is more likely, we will accrue the minimum amount of the range.

Impact of Recently Issued Accounting Pronouncements

See Item 8 of Part II, Consolidated Financial Statements – Note (1) Summary of Significant Accounting Policies – Recently Issued Accounting Pronouncements.

#### Item 7A. Quantitative and Qualitative Disclosures About Market Risk

Foreign Currency Risk. We have several offices outside the United States. Accordingly, we are subject to exposure from adverse movements in foreign currency exchange rates. For the years ended December 31, 2018 and 2017, approximately 78%, and 70%, respectively, of our sales were from outside North America. Not all of these transactions were made in foreign currencies. Our primary exposure is to fluctuations in exchange rates for the U.S. Dollar versus the Euro and the Japanese Yen, and to a lesser extent the Canadian Dollar, the Korean Won and the British Pound. Changes in exchange rates in the functional currency for each geographic area's revenues are primarily offset by the related expenses associated with such revenues. However, changes in exchange rates of a particular currency could impact the re-measurement of such balances on our balance sheets.

If foreign currency exchange rates were to change adversely by 10% from the levels at December 31, 2018, the effect on our results before taxes from foreign currency fluctuations on our balance sheet would be approximately \$1.6 million. The above analysis disregards the possibility that rates for different foreign currencies can move in opposite directions and that losses from one currency may be offset by gains from another currency.

### Item 8. Financial Statements and Supplementary Data

Index to Consolidated Financial Statements	Page
Report of Independent Registered Public Accounting Firm	<u>37</u>
Consolidated Balance Sheets as of December 31, 2018 and 2017	<u>39</u>
Consolidated Statements of Operations for the years ended December 31, 2018 and 2017	<u>40</u>
Consolidated Statements of Comprehensive Income (Loss) for the years ended December 31, 2018 and 2017	<u>41</u>
Consolidated Statements of Stockholders' Deficit for the years ended December 31, 2018 and 2017	<u>42</u>
Consolidated Statements of Cash Flows for the years ended December 31, 2018 and 2017	<u>43</u>
Notes to Consolidated Financial Statements	<u>44</u>
36	

Report of Independent Registered Public Accounting Firm

To the Board of Directors and Stockholders of Falconstor Software, Inc.

Opinion on the Financial Statements

We have audited the accompanying consolidated balance sheet of Falconstor Software, Inc. (the Company) as of December 31, 2018, and the related consolidated statements of comprehensive income (loss), stockholders' deficit, and cash flows for the year ended December 31, 2018, and the related notes (collectively referred to as the consolidated financial statements). In our opinion, the consolidated financial statements present fairly, in all material respects, the financial positions of the Company as of December 31, 2018, and the consolidated results of its operations and its cash flows for the year ended December 31, 2018, in conformity with accounting principles generally accepted in the United States of America.

#### **Basis for Opinion**

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

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

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

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

/s/RBSM LLP

**RBSM LLP** 

March 27, 2019

Larkspur, CA

Report of Independent Registered Public Accounting Firm

Board of Directors and Stockholders FalconStor Software, Inc.

Opinion on the Consolidated Financial Statements

We have audited the accompanying consolidated balance sheet of FalconStor Software, Inc. and subsidiaries as of December 31, 2017 and the related statements of operations, comprehensive loss, stockholders' deficit and cash flows for the year then ended. In our opinion, the consolidated financial statements present fairly, in all material respects, the financial position of the Company as of December 31, 2017, and the results of their operations and their cash flows for the period ended December 31, 2017, in conformity with accounting principles generally accepted in the United States of America.

#### **Basis for Opinion**

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

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

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

/s/ BDO USA, LLP

Melville, New York April 2, 2018

# FALCONSTOR SOFTWARE, INC. AND SUBSIDIARIES CONSOLIDATED BALANCE SHEETS

	December 31, 2018	2017
Assets		
Current assets:		
Cash and cash equivalents	\$3,059,677	\$1,011,472
Accounts receivable, net of allowances of \$162,112 and \$354,542, respectively	3,605,411	4,168,015
Prepaid expenses and other current assets	1,909,846	1,244,494
Inventory	14,885	_
Deferred tax assets, net		_
Contract assets, net	637,179	_
Total current assets	9,226,998	6,423,981
Property and equipment, net of accumulated depreciation of \$18,194,827 and \$17,926,959, respectively	433,935	636,112
Deferred tax assets, net	545,044	590,977
Software development costs, net	88,769	279,414
Other assets	919,609	992,760
Goodwill	4,150,339	4,150,339
Other intangible assets, net	91,334	141,631
Contract assets, net	516,643	_
Total assets	\$15,972,671	\$13,215,214
Liabilities and Stockholders' Deficit		
Current liabilities:		
Accounts payable	\$551,389	\$1,092,864
Accrued expenses	2,879,473	4,376,235
Short-term loan, net of debt issuance costs and discounts		370,151
Deferred revenue, net	6,859,592	11,760,327
Total current liabilities	10,290,454	17,599,577
Other long-term liabilities	1,549,692	1,154,512
Notes payable, net	3,124,827	_
Deferred tax liabilities, net	297,890	85,559
Deferred revenue, net	2,506,898	6,600,363
Total liabilities	17,769,761	25,440,011
Commitments and contingencies (Note 12)		
Series A redeemable convertible preferred stock, \$.001 par value, 2,000,000 shares		
authorized, 900,000 shares issued and outstanding, redemption value of \$11,104,923 and \$9,000,000, respectively	9,756,706	9,000,000
Stockholders' equity:		
Common stock - \$.001 par value, 800,000,000 and 100,000,000 shares authorized,		
respectively, 587,255,165 and 60,091,560 shares issued, respectively, and 587,255,165	587,254	60,090
and 44,563,490 shares outstanding, respectively		
Additional paid-in capital	112,661,846	168,637,157
Accumulated deficit	(122,907,794)	(130,930,284)
Common stock held in treasury, at cost (0 and 15,528,070 shares, respectively)	_	(57,032,917)
Accumulated other comprehensive loss, net		(1,958,843 )
Total stockholders' deficit		(21,224,797)
Total liabilities and stockholders' deficit	\$15,972,671	\$13,215,214

See accompanying notes to consolidated financial statements.

# FALCONSTOR SOFTWARE, INC. AND SUBSIDIARIES CONSOLIDATED STATEMENTS OF OPERATIONS

	Years Ended 2018	December 31, 2017
Revenue:	2018	2017
Product revenue	\$5,766,532	\$8,972,112
Support and services revenue	12,071,374	16,188,451
Total revenue	17,837,906	25,160,563
Cost of revenue:		
Product	414,149	785,535
Support and service	2,563,755	4,755,464
Total cost of revenue	2,977,904	5,540,999
Gross profit	\$14,860,002	\$19,619,564
Operating expenses:		
Research and development costs	3,913,337	6,517,050
Selling and marketing	4,453,697	6,120,655
General and administrative	5,278,768	6,119,513
Restructuring costs (benefit)	1,261,578	(159,597)
Total operating expenses	14,907,380	18,597,621
Operating income (loss)	(47,378)	1,021,943
Interest and other income (loss), net	(626,048)	38,064
Income (loss) before income taxes	(673,426)	1,060,007
Income tax expense	233,288	7,606
Net income (loss)	\$(906,714)	\$1,052,401
Less: Accrual of Series A redeemable convertible preferred stock dividends	1,035,977	873,043
Less: Accretion to redemption value of Series A redeemable convertible preferred stock	254,212	_
Less: Deemed dividend on Series A redeemable convertible preferred stock	2,269,042	_
Net income (loss) attributable to common stockholders	\$(4,465,945)	\$179,358
Basic net income (loss) per share attributable to common stockholders	\$(0.05)	<b>\$</b> —
Diluted net income (loss) per share attributable to common stockholders	\$(0.05)	<b>\$</b> —
Weighted average basic shares outstanding	93,330,146	44,413,061
Weighted average diluted shares outstanding	93,330,146	46,999,327

See accompanying notes to consolidated financial statements.

# FALCONSTOR SOFTWARE, INC. AND SUBSIDIARIES CONSOLIDATED STATEMENTS OF COMPREHENSIVE INCOME (LOSS)

	Years Ende	d December
	31,	
	2018	2017
Net income (loss)	\$(906,714	) \$1,052,401
Other comprehensive income (loss), net of applicable taxes:		
Foreign currency translation	59,035	(114,552)
Net minimum pension liability	4,706	(6,578)
Total comprehensive income (loss), net of applicable taxes	63,741	(121,130)
Total comprehensive income (loss)	\$(842,973	) \$931,271
Less: Accrual of Series A redeemable convertible preferred stock dividends	1,035,977	873,043
Less: Accretion to redemption value of Series A redeemable convertible preferred stock	254,212	_
Less: Deemed dividend on Series A redeemable convertible preferred stock	2,269,042	_
Total comprehensive income (loss) attributable to common stockholders	\$(4,402,204	1) \$58,228

See accompanying notes to consolidated financial statements.

# FALCONSTOR SOFTWARE, INC. AND SUBSIDIARIES CONSOLIDATED STATEMENTS OF STOCKHOLDERS' DEFICIT

	Common Stock	Additional Paid-In Capital	Accumulated Deficit	Treasury Stock	Accumulated Other Comprehensive Loss, Net	Total Stockholders Deficit	;'
Balance at December 31, 2016	\$59,483	\$169,091,255	\$(131,982,685)	\$(57,032,917)	\$ (1,837,713	\$(21,702,577	7)
Net income Restricted stock issued Warrants issued	 607	— (26,318 ) 22,310	1,052,401	_	_	1,052,401 (25,711 22,310	)
Share-based compensation to non-employees		141,159				141,159	
Share-based compensation to employees Dividends on Series A		281,794				281,794	
redeemable convertible preferred stock		(873,043)				(873,043	)
Foreign currency translation					(114,552	(114,552	)
Net minimum pension liability					(6,578	(6,578	)
Balance at December 31, 2017	\$60,090	\$168,637,157	\$(130,930,284)	\$(57,032,917)	\$ (1,958,843	\$(21,224,797	7)
Net loss Warrants issued Warrants cancelled Warrants exercised		5,213,928 (623,920 ) (57,070,760 )		 57,032,917	_	(906,714 5,213,928 (623,920 489,321	)
Share-based compensation to employees Accretion of Series A		64,672				64,672	
redeemable convertible preferred stock Dividends on Series A		(254,212)				(254,212	)
redeemable convertible preferred stock Deemed dividends on		(1,035,977 )				(1,035,977	)
Series A redeemable convertible preferred stock		(2,269,042 )				(2,269,042	)
Foreign currency translation					59,035	59,035	
Net minimum pension liability					4,706	4,706	
Modified retrospective opening balance adjustment			8,929,204			8,929,204	
Balance at December 31, 2018	\$587,254	\$112,661,846	\$(122,907,794)	\$	\$ (1,895,102	\$(11,553,796	5)

See accompanying notes to consolidated financial statements.

# FALCONSTOR SOFTWARE, INC. AND SUBSIDIARIES CONSOLIDATED STATEMENTS OF CASH FLOWS

CONSOLIDATED STATEMENTS OF CASH FLOWS		
	Years Ended	December
	31,	
	2018	2017
Cash flows from operating activities:		
Net income (loss)	\$(906,714)	\$1,052,401
Adjustments to reconcile net income (loss) to net cash used in operating activities:	,	
Depreciation and amortization	643,639	1,029,481
Share-based payment compensation	64,672	281,794
Non-cash professional services expenses	<del></del>	141,159
Loss on disposal of fixed assets		64,307
Provision for returns and doubtful accounts	(192,430)	93,816
Deferred income tax provision	267,760	(147,791)
Changes in operating assets and liabilities:	207,700	(147,771 )
Accounts receivable	924 029	1 014 504
	834,038	1,014,594
Prepaid expenses and other current assets		44,488
Contract assets	2,003,433	
Inventory		6,181
Other assets	6,045	(787,527 )
Accounts payable	(505,724)	
Accrued expenses and other long-term liabilities	194,253	
Deferred revenue		(5,401,165)
Net cash used in operating activities	(1,510,967)	(2,574,420)
Cash flows from investing activities:		
Purchases of property and equipment	(95,873)	(94,805)
Capitalized software development costs	(32,919)	
Security deposits	58,551	2,052
Purchase of intangible assets	(74,840)	(90,965)
Net cash used in investing activities		(183,718)
Cash flows from financing activities:	,	
Proceeds from exercise of stock warrants	489,321	
Payments for tax withholding for share-based compensation		(25,711)
Proceeds from issuance of short-term debt, net of issuance costs		351,656
Proceeds from issuance of long-term debt, net of issuance costs	3,271,019	_
Net cash provided by financing activities	3,760,340	325,945
Effect of exchange rate changes on cash and cash equivalents		52,137
Net increase (decrease) in cash and cash equivalents	2,048,205	(2,380,056)
•		
Cash and cash equivalents, beginning of year	1,011,472	3,391,528
Cash and cash equivalents, end of year	\$3,059,677	\$1,011,472
Supplemental Disclosures:	Φ.	ф <b>2</b> 00 <b>2</b> 67
Cash paid for income taxes, net	\$—	\$209,267
Non-cash financing activities:	* . *	*
Undistributed Series A redeemable convertible preferred stock dividends	\$1,290,189	\$873,043
Detachable stock warrants issued with short-term debt	<b>\$</b> —	\$(22,310)
Discount on Preferred Stock	\$1,602,429	\$—
Cash paid for interest	\$103,818	<b>\$</b> —
Discount on Notes Payable	\$735,512	<b>\$</b> —
Deemed dividend	\$2,269,042	<b>\$</b> —

Warrants issued \$4,590,008 \$—

See accompanying notes to consolidated financial statements.

#### FALCONSTOR SOFTWARE, INC. AND SUBSIDIARIES

Notes to Consolidated Financial Statements

December 31, 2018

- (1) Summary of Significant Accounting Policies
- (a) The Company and Nature of Operations

FalconStor Software, Inc., a Delaware Corporation (the "Company" or "FalconStor"), is a leading storage software company offering a converged data services software platform that is hardware agnostic. The Company develops, manufactures and sells data migration, business continuity, disaster recovery, optimized backup and de-duplication solutions and provides the related maintenance, implementation and engineering services.

#### (b) Liquidity

As of December 31, 2018, we had a working capital deficiency of \$1.1 million, which is inclusive of current deferred revenue of \$6.9 million, and a stockholders' deficit of \$11.6 million. During the year ended December 31, 2018, while we had net loss of \$0.9 million and negative cash flow from operations of \$1.5 million. Our cash and cash equivalents at December 31, 2018 was \$3.1 million, an increase of \$2.0 million as compared to December 31, 2017.

In June 2017, the Board approved a comprehensive plan to increase operating performance (the "2017 Plan"). The 2017 Plan resulted in a realignment in workforce. The 2017 Plan was substantially completed by the end of the Company's fiscal year ending December 31, 2017, and when combined with previous workforce reductions in the second quarter of Fiscal 2017 reduced the Company's workforce to approximately 81 employees.

On November 17, 2017, HCP-FVA, LLC (the "Lender") provided a commitment letter to the Company agreeing to finance up to \$3 million to the Company (the "Commitment") on the terms, and subject to the conditions, set forth in that certain commitment letter (see Note (7) Short-Term Loan and Commitment). As part of that Commitment, on November 17, 2017, the Company entered into a Loan and Security Agreement (the "Loan Agreement") with Lender and certain other loan parties named therein, pursuant to which the Lender made a short term loan to the Company in the principal amount of \$500,000 (the "Short Term Loan").

On February 23, 2018, the Company closed on the Commitment and the Lender subscribed for the full \$3 million of Units in the Commitment by payment of \$2.5 million in cash and the conversion of the \$500,000 Short Term Loan. The \$3 million term loan has an interest rate of prime plus 0.75% and a maturity date of June 30, 2021. The Lender is an affiliate of Hale Capital Partners, LP (together, "Hale Capital") and the Company's largest shareholder through its ownership of Series A redeemable preferred stock ("Series A Preferred Stock"), and an affiliate of Martin Hale, a Director of the Company. As part of the Commitment, Hale Capital also agreed to postpone the date of the optional redemption of the Series A Preferred Stock from August 5, 2017 to July 30, 2021, and to waive prior breaches of the terms of the Series A Preferred Stock which had triggered a redemption right.

On October 9, 2018, FalconStor closed on the final tranche of its previously-announced Financing of Units (see Note (7) Short-Term Loan and Commitment) to certain eligible stockholders of the Company. As a result, the Company received an additional \$1,000,000 of gross proceeds from new investors (the "New Investors") which is in addition to the \$3,000,000 of gross proceeds previously received from HCP-FVA through the subscription of 30,000,000 Units pursuant to the Commitment on February 23, 2018.

In December 2018, outstanding Warrants to purchase 489,321,074 were exercised resulting in the issuance of 489,321,074 shares of Common Stock (the "Warrant Exercise"). In connection with the Warrant Exercise, the Company received proceeds of approximately \$489,321, which was used to reduce the outstanding principal due on Amended and Restated Loan Agreement.

We believe that our cash flows from operations and existing cash on hand are sufficient to conduct our planned operations and meet our contractual requirements through April 2, 2020.

# (c)Principles of Consolidation

The consolidated financial statements include the accounts of the Company and its wholly-owned subsidiaries. All significant intercompany balances and transactions have been eliminated in consolidation.

#### (d) Use of Estimates

The preparation of financial statements in conformity with GAAP requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. The Company's significant estimates include those related to revenue recognition, accounts receivable allowances, share-based payment compensation, valuation of derivatives, capitalizable software development costs, valuation of goodwill and other intangible assets and income taxes. Actual results could differ from those estimates.

The financial market volatility in many countries where the Company operates has impacted and may continue to impact the Company's business. Such conditions could have a material impact on the Company's significant accounting estimates discussed above.

#### (e) Fair Value of Financial Instruments

Fair value is defined as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. To increase the comparability of fair value measurements, a three-tier fair value hierarchy, which prioritizes the inputs used in the valuation methodologies, is as follows:

Level 1—Valuations based on quoted prices for identical assets and liabilities in active markets.

Level 2—Valuations based on observable inputs other than quoted prices included in Level 1, such as quoted prices for similar assets and liabilities in active markets, quoted prices for identical or similar assets and liabilities in markets that are not active, or other inputs that are observable or can be corroborated by observable market data.

Level 3—Valuations based on unobservable inputs reflecting our own assumptions, consistent with reasonably available assumptions made by other market participants. These valuations require significant judgment.

As of December 31, 2018 and 2017, the fair value of the Company's financial instruments including cash and cash equivalents, accounts receivable, accounts payable and accrued expenses approximated carrying value due to the short maturity of these instruments. See Note (3) Fair Value Measurements for additional information.

## (f) Derivative Financial Instruments

The Company does not use derivative instruments to hedge exposures to cash flow, market or foreign currency risk. Terms of convertible preferred stock are reviewed to determine whether or not they contain embedded derivative instruments that are required under Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC") 815 "Derivatives and Hedging" ("ASC 815") to be accounted for separately from the host contract, and recorded on the balance sheet at fair value. The fair value of derivatives are required to be revalued at each reporting date, with corresponding changes in fair value recorded in current period operating results. See Note (12) Derivative Financial Instruments for additional information.

#### (g) Revenue from Contracts with Customers and Associated Balances

The Company derives its revenue from sales of its products, support and services. Product revenue consists of the Company's software integrated with industry standard hardware and sold as complete turn-key integrated solutions, as stand-alone software applications or sold on a subscription or consumption basis. Depending on the nature of the arrangement revenue, related to turn-key solutions and stand-alone software applications are generally recognized

upon shipment and delivery of license keys. For certain arrangements revenue is recognized based on usage or ratably over the term of the arrangement. Support and services revenue consists of both maintenance revenues and professional services revenues. Revenue is recorded net of applicable sales taxes.

In accordance with the authoritative guidance issued by the FASB on revenue recognition, the Company recognizes revenue when persuasive evidence of an arrangement exists, the fee is fixed or determinable, delivery has occurred, and collection of the resulting receivable is deemed probable. Products delivered to a customer on a trial basis are not recognized as revenue until the trial period has ended and acceptance has occurred by the customer. Reseller and distributor customers typically send the Company a purchase order when they have an end user identified.

Nature of Products and Services

Licenses for on-premises software provide the customer with a right to use the software as it exists when made available to the customer. Customers may purchase perpetual licenses or subscribe to licenses, which provide customers with the same functionality and differ mainly in the duration over which the customer benefits from the software. Revenue from distinct on-premises licenses is recognized upfront at the point in time when the software is made available to the customer. Revenue allocated to software maintenance and support services is recognized ratably over the contractual support period.

Hardware products consist primarily of servers and associated components and function independently of the software products and as such as accounted for as separate performance obligations. Revenue allocated to hardware maintenance and support services is recognized ratably over the contractual support period.

Professional services are primarily related to software implementation services and associated revenue is recognized upon customer acceptance.

#### **Contract Balances**

Timing of revenue recognition may differ from the timing of invoicing to customers. The Company records a contract asset or receivable when revenue is recognized prior to invoicing, or unearned revenue when revenue is recognized subsequent to invoicing. For perpetual licenses with multi-year product maintenance agreements, the Company generally invoices customers at the beginning of the coverage period. For multi-year subscription licenses, the Company generally invoices customers annually at the beginning of each annual coverage period. The Company records a contract asset related to revenue recognized for multi-year on-premises licenses as its right to payment is conditioned upon providing product support and services in future years.

The opening balance of accounts receivable, net of allowance for doubtful accounts, was \$4.2 million as of January 1, 2018. There was no adjustment needed to accounts receivable for the cumulative effect of applying ASC 606 under the modified retrospective method. The opening balance of short and long-term contract assets, net of allowance for doubtful accounts, and adjusted for the cumulative effect of applying ASC 606 under the modified retrospective method, was \$3.1 million as of January 1, 2018.

As of December 31, 2018 and 2017, accounts receivable, net of allowance for doubtful accounts, was \$3.6 million and \$4.2 million, respectively. As of December 31, 2018 and 2017, short and long-term contract assets, net of allowance for doubtful accounts, was \$1.2 million and \$0.0 million, respectively.

The allowances for doubtful accounts reflect the Company's best estimates of probable losses inherent in the accounts receivable and contract assets' balances. The Company determines the allowances based on known troubled accounts, historical experience, and other currently available evidence. Write-offs in the accounts receivable and contract assets allowance accounts during the years ended December 31, 2018 and 2017 were \$0.1 million and \$0.1 million, respectively.

Deferred revenue is comprised mainly of unearned revenue related maintenance and technical support on term and perpetual licenses. Maintenance and technical support revenue is recognized ratably over the coverage period. Deferred revenue also includes contracts for professional services to be performed in the future which are recognized as revenue when the company delivers the related service pursuant to the terms of the customer arrangement.

Changes in deferred revenue were as follows:

Twelve Months Ended December 31, 2018

Balance at December 31, 2017

Cumulative effect of applying ASC 606 under the modified retrospective method\*

(5,359,579)

Deferral of revenue	14,249,597
Recognition of revenue	(17,837,906)
Change in reserves	(46,312 )
Balance at December 31, 2018	\$9.366.490

<sup>\*</sup>See Note (1) Summary of Significant Accounting Policies, section (s) to our Consolidated Financial Statements for further information.

Deferred revenue includes invoiced revenue allocated to remaining performance obligations that has not yet been recognized and will be recognized as revenue in future periods. Deferred revenue was \$9.4 million as of December 31, 2018, of which the Company expects to recognize approximately 73.2% of the revenue over the next 12 months and the remainder thereafter.

Payment terms and conditions vary by contract type, although terms generally include a requirement of payment within 30 to 90 days. In instances where the timing of revenue recognition differs from the timing of invoicing, the Company has determined its contracts generally do not include a significant financing component. The primary purpose of the Company's invoicing terms is to provide customers with simplified and predictable ways of purchasing its products and services, not to receive financing from our customers or to provide customers with financing. Examples include invoicing at the beginning of a subscription term with maintenance and support revenue recognized ratably over the contract period, and multi-year on-premises licenses that are invoiced annually with product revenue recognized upon delivery.

## Significant Judgments

The Company's contracts with customers often include promises to transfer multiple products and services to a customer. Determining whether products and services are considered distinct performance obligations that should be accounted for separately versus together may require significant judgment.

Judgment is required to determine the standalone selling price ("SSP") for each distinct performance obligation. For products and services aside from maintenance and support, the Company estimates SSP by adjusting the list price by historical discount percentages. SSP for software and hardware maintenance and support fees is based on the stated percentages of the fees charged for the respective products.

The Company's perpetual and term software licenses have significant standalone functionality and therefore revenue allocated to these performance obligations are recognized at a point in time upon electronic delivery of the download link and the license keys.

Product maintenance and support services are satisfied over time as they are stand-ready obligations throughout the support period. As a result, revenues associated with maintenance services are deferred and recognized as revenue ratably over the term of the contract.

Revenues associated with professional services are recognized at a point in time upon customer acceptance.

#### Assets Recognized from Costs to Obtain a Contract with a Customer

The Company recognizes an asset for the incremental costs of obtaining a contract with a customer if it expects the benefit of those costs to be longer than one year. The Company has determined that its sales commission program meets the requirements for cost capitalization. Total capitalized costs to obtain a contract were immaterial during the periods presented and are included in other current and long-term assets on our consolidated balance sheets. The Company applies a practical expedient to expense costs as incurred for costs to obtain a contract with a customer when the amortization period would have been one year or less.

### (h)Property and Equipment

Property and equipment are recorded at cost. Depreciation is recognized using the straight-line method over the estimated useful lives of the assets (3 to 7 years). Leasehold improvements are amortized on a straight-line basis over the terms of the respective leases or over their estimated useful lives, whichever is shorter.

#### (i) Goodwill and Other Intangible Assets

Goodwill represents the excess of the purchase price over the estimated fair value of net tangible and identifiable intangible assets acquired in business combinations. The Company has not amortized goodwill related to its acquisitions, but instead tests the balance for impairment. The Company evaluates goodwill for impairment annually or more frequently when an event occurs or circumstances change that indicate that the carrying value may not be recoverable. The Company tests goodwill for impairment by first comparing the book value of net assets to the fair value of the reporting unit. If the fair value is determined to be less than the book value or qualitative factors indicate that it is more likely than not that goodwill is impaired, a second step is performed to compute the amount of

impairment as the difference between the estimated fair value of goodwill and the carrying value.

The Company's annual impairment assessment is performed at December 31st of each year, and the Company has determined there to be no impairment for any of the periods presented. The Company has adopted the provisions of ASU 2017-4, "Intangibles-Goodwill and Other (Topic 350): Simplifying the Test for Goodwill Impairment. " The new accounting pronouncement eliminates the second step of the goodwill impairment test. As a result, the Company's goodwill impairment test as of December 31, 2018 and December 31, 2017 included only one step, which is a comparison of the carrying value of its one reporting unit to its fair value, and any excess carrying value, up to the amount of goodwill allocated to that reporting unit, is impaired. This new accounting

pronouncement also eliminates the requirements for any reporting unit with a zero or negative carrying amount to perform a qualitative assessment and, if it fails that qualitative test, to perform Step 2 of the goodwill impairment test. The fair value of the Company's single reporting unit for purposes of its goodwill impairment test exceeded its carrying value as of December 31, 2018 and thus the Company determined there was no impairment of goodwill. As of December 31, 2017, the Company's single reporting unit for purposes of its goodwill impairment test had a negative carrying value and thus the Company determined there was no impairment of goodwill.

Identifiable intangible assets include (i) assets acquired through business combinations, which include customer contracts and intellectual property, and (ii) patents amortized over three years using the straight-line method.

The gross carrying amount and accumulated amortization of goodwill and other intangible assets as of December 31, 2018 and 2017 are as follows:

	December	December
	31, 2018	31, 2017
Goodwill	\$4,150,339	\$4,150,339
Other intangible assets:		
Gross carrying amount	\$3,891,241	\$3,816,402

Accumulated amortization (3,799,907) (3,674,771)

Net carrying amount \$91,334 \$141,631

For the years ended December 31, 2018 and 2017, amortization expense was \$125,136 and \$158,789, respectively. As of December 31, 2018, amortization expense for existing identifiable intangible assets is expected to be \$42,814, \$38,485 and \$10,035 for the years ended December 31, 2019, 2020 and 2021, respectively. Such assets will be fully amortized at December 31, 2021.

#### (j) Software Development Costs and Purchased Software Technology

In accordance with the authoritative guidance issued by the FASB on costs of software to be sold, leased, or marketed, costs associated with the development of new software products and enhancements to existing software products are expensed as incurred until technological feasibility of the product has been established. Based on the Company's product development process, technological feasibility is established upon completion of a working model. Amortization of software development costs is recorded at the greater of the straight-line basis over the product's estimated life, or the ratio of current period revenue of the related products to total current and anticipated future revenue of these products. The gross carrying amount and accumulated amortization of software development costs as of December 31, 2018 and 2017 are as follows:

During the years ended December 31, 2018 and 2017, the Company recorded \$223,564 and \$268,144, respectively, of amortization expense related to capitalized software costs. As of December 31, 2018, amortization expense for software development costs is expected to be \$55,174 and \$1,146 for the years ended December 31, 2019 and 2020, respectively. Such assets will be fully amortized at December 31, 2020.

#### (k) Income Taxes

The Company records income taxes under the asset and liability method. Deferred tax assets and liabilities are recognized for future tax consequences attributable to differences between the financial statement carrying amounts of existing assets and liabilities and their respective tax bases. Deferred tax assets and liabilities are measured using enacted tax rates expected to apply to taxable income in the years in which those temporary differences are expected to be realized or settled. The effect on deferred tax assets and liabilities of a change in tax rates is recognized in income in the period that includes the enactment date. In determining the period in which related tax benefits are realized for financial reporting purposes, excess share-based compensation deductions included in net operating losses are realized after regular net operating losses are exhausted.

The Company accounts for uncertain tax positions in accordance with the authoritative guidance issued by the FASB on income taxes, which addresses the determination of whether tax benefits claimed or expected to be claimed on a tax return, should be recorded in the financial statements. Pursuant to the authoritative guidance, the Company may recognize the tax benefit from an uncertain tax position only if it meets the "more likely than not" threshold that the position will be sustained on examination by the taxing authority, based on the technical merits of the position or expiration of statutes. The tax benefits recognized in the financial statements from such a position should be measured based on the largest benefit that has a greater than fifty percent likelihood of being realized upon ultimate settlement. In addition, the authoritative guidance addresses de-recognition, classification, interest and penalties on income taxes, accounting in interim periods, and also requires increased disclosures. The Company includes interest and penalties related to its uncertain tax positions as part of income tax expense within its consolidated statement of operations. See Note (5) Income Taxes for additional information.

### (1) Long-Lived Assets

The Company reviews its long-lived assets for impairment whenever events or changes in circumstances indicate that the carrying amount of the asset may not be recoverable. If the sum of the expected future cash flows, undiscounted and without interest, is less than the carrying amount of the asset, an impairment loss is recognized as the amount by which the carrying amount of the asset exceeds its fair value.

#### (m) Share-Based Payments

The Company accounts for share-based payments in accordance with the authoritative guidance issued by the FASB on share-based compensation, which establishes the accounting for transactions in which an entity exchanges its equity instruments for goods or services. Under the provisions of the authoritative guidance, share-based compensation expense is measured at the grant date, based on the fair value of the award, and is recognized as an expense over the requisite employee service period (generally the vesting period), net of actual forfeitures. For share-based payment awards that contain performance criteria share-based compensation, expense is recorded when the achievement of the performance condition is considered probable of achievement and is recorded on a straight-line basis over the requisite service period. If such performance criteria are not met, no compensation cost is recognized and any recognized compensation cost is reversed. The Company estimates the fair value of share-based payments using the Black-Scholes option-pricing model or the Monte Carlo simulation model if a market condition exists. Share-based compensation expense for a share-based payment award with a market condition is recorded on a straight-line basis over the longer of the explicit service period or the service period derived from the Monte Carlo simulation. Additionally, share-based awards to non-employees are expensed over the period in which the related services are rendered at their fair value. All share-based awards are expected to be fulfilled with new shares of common stock.

#### (n) Foreign Currency

Assets and liabilities of foreign operations are translated at rates of exchange at the end of the period, while results of operations are translated at average exchange rates in effect for the period. Gains and losses from the translation of foreign assets and liabilities from the functional currency of the Company's subsidiaries into the U.S. dollar are classified as accumulated other comprehensive loss in stockholders' deficit. Gains and losses from foreign currency transactions are included in the consolidated statements of operations within interest and other loss, net. During the years ended December 31, 2018 and 2017, foreign currency transactional gains (loss) totaled approximately \$(207,242) and \$72,167, respectively.

# (o) Earnings Per Share (EPS)

Basic EPS is computed based on the weighted average number of shares of common stock outstanding. Diluted EPS is computed based on the weighted average number of common shares outstanding increased by dilutive common stock equivalents, attributable to stock option awards, restricted stock awards and Series A redeemable convertible preferred stock outstanding.

The following represents the common stock equivalents that were excluded from the computation of diluted shares outstanding because their effect would have been anti-dilutive for the years ended December 31, 2018 and 2017:

	Year Ended December	
	31,	
	2018	2017
Stock options, warrants and restricted stock	2,997,330	16,434,296
Series A redeemable convertible preferred stock	8,781,516	8,781,516
Total anti-dilutive common stock equivalents	11,778,846	25,215,812

49

The following represents a reconciliation of the numerators and denominators of the basic and diluted EPS computation:

•	Year Ended I 31,	December
	2018	2017
Numerator:		
Net income (loss)	\$(906,714)	\$1,052,401
Effects of Series A redeemable convertible preferred stock:		
Less: Accrual of Series A redeemable convertible preferred stock dividends	1,035,977	873,043
Less: Accretion to redemption value of Series A redeemable convertible preferred stock	254,212	
Less: Deemed dividend on Series A redeemable convertible preferred stock	\$2,269,042	\$
Net income (loss) attributable to common stockholders	\$(4,465,945)	\$179,358
Denominator: Weighted average basic shares outstanding	93,330,146	44,413,061
Effect of dilutive securities:	73,330,140	44,413,001
Stock options, warrants and restricted stock Series A redeemable convertible preferred stock		2,586,266
Weighted average diluted shares outstanding	93,330,146	46,999,327
EPS: Basic net income (loss) per share attributable to common stockholders Diluted net income (loss) per share attributable to common stockholders	\$(0.05 ) \$(0.05 )	\$— \$—
• • •		

#### (p) Investments

As of December 31, 2018 and 2017, the Company did not have any cost-method investments.

## (q) Treasury Stock

The Company accounts for treasury stock under the cost method and includes treasury stock as a component of stockholders' deficit.

#### (s) Recently Adopted Accounting Pronouncements

#### Revenue from Contracts with Customers

In May 2014, the FASB ("Financial Accounting Standards Board") issued new guidance which requires an entity to recognize the amount of revenue to which it expects to be entitled for the transfer of promised goods or services to customers. This new guidance replaces most existing revenue recognition guidance in GAAP in the United States and requires entities to recognize revenue when control of the promised goods or services is transferred to customers at an amount that reflects the consideration to which the entity expects to be entitled to in exchange for those goods or services. In addition, the standard requires disclosure of the nature, amount, timing, and uncertainty of revenue and cash flows arising from contracts with customers. We adopted the new guidance as of January 1, 2018 using the modified retrospective transition method applied to those contracts which were not completed as of January 1, 2018. Results for reporting periods beginning after January 1, 2018 are presented under Topic 606, while prior period amounts are not adjusted and continue to be reported in accordance with our historic accounting under previous revenue guidance.

The most significant impact of the standard relates to our accounting for our term license revenue. Specifically, for Freestor software subscription licenses, revenue is now recognized at the time of delivery rather than ratably over the subscription period.

The adoption of the standard resulted in an increase to the opening balance of accumulated deficit of \$8.9 million, related to the cumulative effect of a decrease in deferred revenue of \$5.4 million, an increase in contract assets of \$3.1 million from the

upfront recognition of term licenses and the general requirement to allocate the transaction price on a relative stand-alone selling price, and an increase of \$0.4 million in prepaid expenses and other current assets.

Following is a summary of the impact to the Company's current financial results from adopting the new revenue recognition standard:

Statements of Operations	Under Previous Guidance	New Revenue Standard Adjustmen	Under Current Accounting t Guidance	g
Year Ended December 31, 2018				
Product revenue	9,250,082	(3,483,550	)5,766,532	
Support and services revenue	12,071,374		12,071,374	1
Selling and marketing	4,461,572	(7,875	)4,453,697	
Income tax expense (benefit)	233,288		233,288	
Net income (loss)	2,568,961	(3,475,675	)(906,714	)
Net loss attributable to common stockholders	(990,270	)(3,475,675	)(4,465,945	)
Basic net loss per share attributable to common stockholders	(0.01	)(0.04	)(0.05	)
Diluted net loss per share attributable to common stockholders	(0.01	)(0.04	)(0.05	)

Balance Sheets	Under Previous Guidance	New Revenue Standard Adjustment	Under Current Accounting Guidance
December 31, 2018			
Prepaid expenses and other current assets	1,488,171	421,675	1,909,846
Contract assets, net, current		637,179	637,179
Contract assets, net, long-term		516,643	516,643
Deferred revenue, net, current	8,735,622	(1,876,030)	6,859,592
Deferred tax liabilities, net	297,890	_	297,890
Deferred revenue, net, long-term	4,510,331	(2,003,433)	2,506,898
Accumulated deficit	(128, 362, 754)	5,454,960	(122,907,794)

The adoption of the revenue recognition standard had no impact to cash from or used in operating, financing, or investing on our condensed consolidated statements of cash flows.

#### (t) Recently Issued Accounting Pronouncements

In August 2018, the FASB issued ASU 2018-14, Compensation—Retirement Benefits—Defined Benefit Plans—General: Disclosure Framework—Changes to the Disclosure Requirements for Defined Benefit Plans. The objective of the guidance is to improve the effectiveness of disclosure requirements on defined benefit pension plans and other postretirement plans. The guidance is effective for fiscal years beginning after December 15, 2020. The Company does not expect adoption of the new standard will have a material impact on its Condensed Consolidated Financial Statements..

In July 2018, the FASB issued ASU 2018-10 Leases (Topic 842), Codification Improvements and ASU 2018-11 Leases (Topic 842), Targeted Improvements, to provide additional guidance for the adoption of Topic 842. ASU

2018-10 clarifies certain provisions and correct unintended applications of the guidance such as the application of implicit rate, lessee reassessment of lease classification, and certain transition adjustments that should be recognized to earnings rather than to stockholders' equity. ASU 2018-11 provides an alternative transition method and practical expedient for separating contract components for the adoption of Topic 842. In February 2016, the FASB issued ASU 2016-02 Leases (Topic 842) which requires an entity to recognize assets and liabilities arising from a lease for both financing and operating leases with terms greater than 12 months. ASU 2018-11, ASU 2018-10, and ASU 2016-02 (collectively, "the new lease standards") are effective for fiscal

years beginning after December 15, 2018, with early adoption permitted. We plan to adopt the standard effective January 1, 2019, applying the package of practical expedients to leases that commenced before the effective date whereby we will elect to not reassess the following: (i) whether any expired or existing contracts contain leases; (ii) the lease classification for any expired or existing leases; and (iii) initial direct costs for any existing leases. We expect to record lease right of use assets of \$2.9 million and related liabilities of \$3.6 million on our balance sheet related to our operating leases. We have no financing leases. We expect no change to our consolidated statements of operations or cash flows.

In July 2018, the FASB issued ASU 2018-09, Codification Improvements. The amendments in ASU 2018-09 affect a wide variety of Topics in the FASB Codification and apply to all reporting entities within the scope of the affected accounting guidance. The Company has evaluated ASU 2018-09 in its entirety and determined that the amendments related to Topic 718-740, Compensation-Stock Compensation-Income Taxes, are the only provisions that currently apply to the Company. The amendments in ASU 2018-09 related to Topic 718-740, Compensation-Stock Compensation-Income Taxes, clarify that an entity should recognize excess tax benefits related to stock compensation transactions in the period in which the amount of the deduction is determined. The amendments in ASU 2018-09 related to Topic 718-740 are effective for fiscal years beginning after December 15, 2018, with early adoption permitted. The Company does not expect the adoption of the new standard to have a material impact on the Company's Condensed Consolidated Financial Statements.

In June 2018, the FASB issued ASU 2018-07, Compensation - Stock Compensation (Topic 718): Improvements to Nonemployee Share-Based Payment Accounting, to expand the scope of Topic 718 to include share-based payment transactions for acquiring goods and services from nonemployees and supersedes the guidance in Subtopic 505-50, Equity - Equity-Based Payments to Non-Employees. Under ASU 2018-07, equity-classified nonemployee share-based payment awards are measured at the grant date fair value on the grant date. The probability of satisfying performance conditions must be considered for equity-classified nonemployee share-based payment awards with such conditions. ASU 2018-07 is effective for fiscal years beginning after December 15, 2018, with early adoption permitted. The Company does not expect the adoption of the new standard to have a material impact on the Company's Condensed Consolidated Financial Statements.

In February 2018, the FASB issued ASU No. 2018-02, Income Statement - Reporting Comprehensive Income (Topic 220): Reclassification of Certain Tax Effects from Accumulated Other Comprehensive Income, which provides entities the option to reclassify tax effects stranded in accumulated other comprehensive income as a result of the 2017 Tax Cuts and Jobs Act (the "TCJA") to retained earnings. The guidance is effective for fiscal years beginning after December 15, 2018, with early adoption permitted. The Company does not expect the adoption of this accounting standard to have a material impact on our financial position, results of operations, cash flows, or presentation thereof.

#### (2) Property and Equipment

Property and equipment consist of the following:

	December	December
	31, 2018	31, 2017
Computer hardware and software	\$16,345,218	\$16,304,037
Furniture and equipment	601,938	571,004
Leasehold improvements	1,681,606	1,688,030
Property and equipment, gross	18,628,762	18,563,071
Less accumulated depreciation	(18,194,827)	(17,926,959)
Property and equipment, net	\$433,935	\$636,112

During the year ended December 31, 2018, the Company wrote off approximately \$0 of fixed assets and \$0 related accumulated depreciation related to assets that were no longer in use. During the year ended December 31, 2017, the Company wrote off \$1,392,453 of fixed assets and \$1,301,408 of related accumulated depreciation related to assets that were no longer in use.

Depreciation expense was \$294,939 and \$602,548 in 2018 and 2017, respectively.

#### (3) Fair Value Measurements

The Company measures its cash equivalents, marketable securities and derivative instruments at fair value. Fair value is an exit price, representing the amount that would be received on the sale of an asset or that would be paid to transfer a liability in an orderly transaction between market participants. As a basis for considering such assumptions, the Company utilizes a three-tier fair value hierarchy, which prioritizes the inputs used in the valuation methodologies in measuring fair value.

#### Fair Value Hierarchy

The methodology for measuring fair value specifies a hierarchy of valuation techniques based upon whether the inputs to those valuation techniques reflect assumptions other market participants would use based upon market data obtained from independent sources (observable inputs) or reflect the Company's own assumptions of market participant valuation (unobservable inputs). As a result, observable and unobservable inputs have created the following fair value hierarchy:

Level 1 – Quoted prices in active markets that are unadjusted and accessible at the measurement date for identical, unrestricted assets or liabilities. At December 31, 2018 and 2017, the Level 1 category included money market funds and commercial paper, which are included within "cash and cash equivalents" in the consolidated balance sheets.

Level 2 – Quoted prices for identical assets and liabilities in markets that are not active, quoted prices for similar assets and liabilities in active markets or financial instruments for which significant inputs are observable, either directly or indirectly. The Company had no Level 2 securities at December 31, 2018 and 2017.

Level 3 – Prices or valuations that require inputs that are both significant to the fair value measurement and unobservable. At December 31, 2018 and 2017, the Level 3 category included derivatives, which are included in "other long-term liabilities" in the consolidated balance sheets with the change in fair value from the period included in "interest and other loss, net" in the consolidated statement of operations. The Company did not hold any cash, cash equivalents or marketable securities categorized as Level 3 as of December 31, 2018 or 2017.

#### Measurement of Fair Value

The Company measures fair value as an exit price using the procedures described below for all assets and liabilities measured at fair value. When available, the Company uses unadjusted quoted market prices to measure fair value and classifies such items within Level 1. If quoted market prices are not available, fair value is based upon financial models that use, when possible, current market-based or independently-sourced market parameters such as interest rates and currency rates. Items valued using financial generated models are classified according to the lowest level input or value driver that is significant to the valuation. Thus, an item may be classified in Level 3 even though there may be inputs that are readily observable. If quoted market prices are not available, the valuation model used generally depends on the specific asset or liability being valued. The determination of fair value considers various factors including interest rate yield curves and time value underlying the financial instruments.

The fair value of the Company's investments in corporate debt and government securities have been determined utilizing third party pricing services and reviewed by management. The pricing services use inputs to determine fair value which are derived from observable market sources including reportable trades, benchmark curves, credit spreads, broker/dealer quotes, bids, offers, and other industry and economic events. These investments are included in Level 2 of the fair value hierarchy.

The fair value of the Company's derivatives were valued using the Black-Scholes pricing model adjusted for probability assumptions, with all significant inputs, except for the probability and volatility assumptions, derived from or corroborated by observable market data such as stock price and interest rates. The probability and volatility assumptions are both significant to the fair value measurement and unobservable. These embedded derivatives are included in Level 3 of the fair value hierarchy.

The fair value of the Company's short-term loan was based upon current rates offered for similar financial instruments to the Company.

Items Measured at Fair Value on a Recurring Basis

The following table presents the Company's assets and liabilities that are measured at fair value on a recurring basis at December 31, 2018:

	Total	Fair Value M Reporting Da Quoted Prices in Activenificant Marthets forInputs Ide(Intervall 2) Assets (Level 1)	Significant Unobservable Inputs
Cash equivalents:	<b>\$</b> —	¢ ¢	¢
Money market funds	<b>3</b> —	\$ <del>-\$</del> -	<b>_</b> p —
Total cash equivalents	_		_
Derivative liabilities:	100.006		400.006
Derivative Instruments	498,086		498,086
Total derivative liabilities	498,086		498,086
Total assets and liabilities measured at fair value	\$498,086	\$ <del>-\$</del>	_\$ 498,086

The following table presents the Company's assets and liabilities that are measured at fair value on a recurring basis at December 31, 2017:

		Fair Value M	easurements at	
		Reporting Date Using Quoted		
		Prices		
		in AcSirgnificant Significant		
	Total Manthens forInputs	Manthetis	Unobservable	
		Inputs		
		Ide(ilitiewaell 2)	(Level 3)	
		Assets		
		(Level		
		1)		
Cash equivalents:				
Money market funds and commercial paper	\$—	\$ <del>-\$</del> -	_\$	
Total cash equivalents				
Derivative liabilities:				
Derivative Instruments	445,838		445,838	
Total derivative liabilities	445,838	<del></del>	445,838	
Total assets and liabilities measured at fair value	\$445,838	\$ <del>-\$</del> -	-\$ 445,838	

The fair value of the Company's derivatives were valued using the Black-Scholes pricing model adjusted for probability assumptions, with all significant inputs, except for the probability and volatility assumptions, derived from

or corroborated by observable market data such as stock price and interest rates. The probability and volatility assumptions are both significant to the fair value measurement and unobservable. These embedded derivatives are included in Level 3 of the fair value hierarchy.

The following table presents the Company's assets measured at fair value on a recurring basis using significant unobservable inputs (Level 3) as of each of the years ended December 31, 2018 and 2017:

Fair Value

Measurements Using

Significant

**Unobservable Inputs** 

(Level 3)

December Becember 31,

2018 2017

Beginning Balance

Total loss recognized in earnings 52,248

**Ending Balance** 

\$445,838 \$ 336,862

108,976

\$498,086 \$ 445,838

#### (4) Accrued Expenses

Accrued expenses are comprised of the following:

	December	December
	31, 2018	31, 2017
Accrued compensation	\$136,446	\$522,057
Accrued consulting and professional fees	1,749,108	1,207,061
Accrued marketing and promotion		
Other accrued expenses	64,775	259,579
Accrued income taxes	47,088	306,419
Accrued other taxes	420,695	378,374
Accrued hardware purchases		31,499
Accrued restructuring costs	461,361	602,299
Accrued Series A redeemable convertible preferred stock dividends		1,068,947
	\$2,879,473	\$4,376,235

### (5) Income Taxes

Information pertaining to the Company's income (loss) before income taxes and the applicable provision for income taxes is as follows:

	December 31,		
	2018	2017	
Income (loss) before income taxes:			
Domestic income (loss)	\$(1,105,447)	\$590,660	
Foreign income	432,021	469,347	
Total income (loss) before income taxes:	(673,426)	1,060,007	
Provision (benefit) for income taxes:			
Current:			
Federal	\$(231,564)	\$2,640	
State and local	(47,304)	(85,972)	
Foreign	244,396	238,729	
	(34,472)	155,397	
Deferred:			
Federal	\$208,709	\$(530,478)	
State and local	308	(8,215)	
Foreign	58,743	390,902	
	267,760	(147,791)	
Total provision for income taxes:	\$233,288	\$7,606	

During 2018 and 2017, the Company recorded a tax provision of \$233,288 and \$7,606, respectively, related to federal, state and local and foreign income taxes. The tax provisions include a tax benefit related to our Minimum Tax Credit carryforwards which are now realizable on a more-likely-than-not basis as such amounts will be refundable under the TCJA, partially offset with the accrual of foreign withholding taxes as the Company is no longer permanently reinvesting its foreign earnings.

Deferred income taxes reflect the net tax effects of temporary differences between the carrying amounts of assets and liabilities for financial reporting purposes and for income tax purposes. Significant components of the Company's deferred tax assets and liabilities are as follows:

	December 31,	
	2018	2017
Deferred Tax Assets:		
Allowance for receivables	\$35,218	\$76,266
Deferred revenue	852,015	1,970,216
Share-based compensation	21,940	517,841
Accrued expenses and other liabilities	341,553	404,316
Domestic net operating loss carryforwards	19,405,651	19,572,148
Foreign net operating loss carryforwards	198,017	17,997
Tax credit carryforwards	3,106,022	3,106,022
AMT tax credit carryforwards	233,007	464,571
Capital loss carryforwards	31,466	57,768
Fixed assets	178,502	218,412
Interest expense carryforwards	63,823	_
Intangibles	287,547	625,126
Sub-total	24,754,761	27,030,683
Valuation allowance	(22,424,26)	1(25,602,357)
Total Deferred Tax Assets	2,330,500	1,428,326
Deferred Tax Liabilities:		
Prepaid commissions and other	(100,569)	
Tax method changes	(1,227,047)	
Deferred state income tax	(279,540)	(450,797)
Foreign withholding taxes	(481,892)	(472,112 )
Total Deferred Tax Liabilities	(2,089,048)	(922,909 )
Net Deferred Tax Assets	\$241,452	\$ 505,417

As of each reporting date, the Company considers new evidence, both positive and negative, that could affect its view of the future realization of deferred tax assets. In assessing the Company's ability to recover its deferred tax assets, the Company evaluated whether it is more likely than not that some portion or the entire deferred tax asset will be realized. The ultimate realization of deferred tax assets is dependent upon the generation of future taxable income in those periods in which temporary differences become deductible and/or net operating losses can be utilized. The Company considered all positive and negative evidence when determining the amount of the net deferred tax assets that are more likely than not to be realized. This evidence includes, but is not limited to, historical earnings, scheduled reversal of taxable temporary differences, tax planning strategies and projected future taxable income. Based on these factors the Company determined that its U.S. deferred tax assets with the exception of its Minimum Tax Credit are not realizable on a more-likely-than-not basis and has recorded a full valuation allowance against such net deferred tax assets. The Company's valuation allowance decreased by \$1.2 million due to operations and an additional \$2.0 million primarily related to the adoption of ASC 606.

As of December 31, 2018, the Company had federal net operating loss carry forwards of approximately \$86.1 million which are set to expire beginning in 2030, if not utilized. As of December 31, 2018, the Company had approximately \$3.1 million of research and development tax credit carryforwards which expire at various dates beginning in 2023, if not utilized.

For U.S. purposes, the Company has not completed its evaluation of net operating losses and credit carryforwards utilization limitations under Internal Revenue Code, as amended (the "Code"), Section 382/383, change of ownership

rules. If the Company has had a change in ownership, the net operating losses and credit carryforwards would be limited as to the amount that could be utilized each year and could be eliminated, based on the Code.

The effective tax rate before income taxes varies from the current statutory federal income tax rate as follows:

	December 31,	
	2018	2017
Tax at Federal statutory rate	\$(141,419)	\$371,003
Increase (reduction) in income taxes resulting from:		
State and local taxes	543,278	355,888
Non-deductible expenses	200,464	(50,579)
Stock compensation	509,951	1,273,956
Net effect of foreign operations	79,607	(14,022 )
Uncertain tax positions	(60,994 )	(41,482)
Impact of U.S tax reform		14,295,386
Change in valuation allowance	(1,241,052)	(15,072,298)
Foreign withholding taxes	143,120	468,376
Decrease in unrecognized tax benefits		(1,427,906)
Other	200,333	(150,716)
	\$233,288	\$7,606

On December 22, 2017 the U.S. government enacted comprehensive tax reform commonly referred to as the Tax Cuts and Jobs Act ("TCJA"). Under ASC 740, the effects of changes in tax rates and laws are recognized in the period which the new legislation is enacted. Among other things, the TCJA (1) reduces the US statutory corporate income tax rate from 35% to 21% effective January 1, 2018 (2) eliminates the corporate alternative minimum tax (3) requires companies to record/pay a one-time transition tax on earnings of certain foreign subsidiaries that were previously tax deferred (4) creates new taxes on certain foreign sourced earnings (5) changes rules related to uses and limitations of net operating loss carryforwards beginning after December 31, 2017.

While the TCJA provides for a modified territorial tax system, beginning in 2018, global intangible low-taxed income ("GILTI") provisions will be applied providing an incremental tax on low taxed foreign income. The GILTI provisions require inclusions in U.S. taxable income related to foreign subsidiary earnings in excess of an allowable return on the foreign subsidiary's tangible assets. Under U.S. GAAP, the Company is allowed to make an accounting policy choice of either (1) treating taxes due on future U.S. inclusions in taxable income elated to GILTI as a current-period expense when incurred (the "period cost method") or (2) factoring such amounts into the Company's measurement of its deferred taxes (the "deferred method"). The Company has selected the "period cost method" as its accounting policy with respect to the new GILTI tax rules.

The TCJA reduces the corporate tax rate to 21% effective January 1, 2018. The Company remeasured its U.S. deferred tax assets and liabilities based on the lower federal rate and recorded a provisional income tax benefit of \$13.5 million, offset by change in its valuation allowance of \$13.6 million. The TCJA also enacted a one-time transition tax, which is based on the Company's total post-1986 earnings and profits ("E&P") that were previously deferred from U.S. income taxes. The Company recorded a provisional amount for the one-time transition tax liability for all of its foreign subsidiaries resulting in an income tax expense of \$0.7 million, offset by valuation allowance. The Company has not yet completed its calculation of the total post-1986 E&P for these foreign subsidiaries as certain information is not readily available. As of December 31, 2018, the Company has completed its 2017 income tax returns and its accounting for the enactment-date income tax effects of the TCJA with no material adjustments to the provisional amounts recorded at December 31, 2017.

Due to the change in U.S. federal tax law, the Company does not intend to indefinitely reinvest any of its unremitted foreign earnings. As of December 31, 2018, the Company has provided for additional foreign withholding taxes totaling approximately \$0.5 million on approximately \$3.4 million of undistributed earnings of its subsidiaries operating outside of the United States for which withholding tax applies.

A reconciliation of the beginning and ending amount of unrecognized tax benefits, excluding interest and penalties, is as follows:

	2018	2017
Balance at January 1,	\$180,202	\$217,461
Increases to tax positions taken in prior years		10,104
Expiration of statutes of limitation	(42,275)	(53,169)
Translation	(3,681)	5,806
Balance at December 31,	\$134,246	\$180,202

At December 31, 2018, \$192,106 including interest, if recognized, would reduce the Company's annual effective tax rate. As of December 31, 2018, the Company had approximately \$57,860 of accrued interest. The Company believes it is reasonably possible that \$77,548 of its unrecognized tax benefits will reverse within the next 12 months due to expiring statute of limitations. The Company records any interest and penalties related to unrecognized tax benefits in income tax expense.

The Company files federal, state, and foreign income tax returns in jurisdictions with varying statutes of limitations. The 2015 through 2018 tax years generally remain subject to examination by federal and most state tax authorities. In addition to the U.S., the Company's major taxing jurisdictions include China, Taiwan, Japan, France and Germany.

#### (6) Accumulated Other Comprehensive Loss

The changes in Accumulated Other Comprehensive Loss, net of applicable tax, for December 31, 2018 are as follows:

	Foreign	Net	
	Cumanay	Minimum	Tatal
		Pension	Total
	Translation	Liability	
Accumulated other comprehensive income (loss) at December 31, 2017	\$(1,980,940)	\$22,097	\$(1,958,843)
Other comprehensive income (loss)			
Other comprehensive income (loss) before reclassifications	59,035	(743)	58,292
Amounts reclassified from accumulated other comprehensive income	_	5,449	5,449
Total other comprehensive income	59,035	4,706	63,741
Accumulated other comprehensive income (loss) at December 31, 2018	\$(1,921,905)	\$26,803	\$(1,895,102)

The changes in Accumulated Other Comprehensive Loss, net of applicable tax, for December 31, 2017 are as follows:

	Foreign Currency Translation	Net Minimum Pension Liability	Total
Accumulated other comprehensive income (loss) at December 31, 2016	\$(1,866,388)	\$28,675	\$(1,837,713)
Other comprehensive income (loss)			
Other comprehensive income (loss) before reclassifications	(114,552)	(12,022)	(126,574)
Amounts reclassified from accumulated other comprehensive income (loss)	_	5,444	5,444
Total other comprehensive income (loss)	(114,552)	(6,578)	(121,130 )
Accumulated other comprehensive income (loss) at December 31, 2017	\$(1,980,940)	\$22,097	\$(1,958,843)

For the year ended December 31, 2018 and 2017, the amounts reclassified to net income (loss) related to the Company's defined benefit plan and maturities of marketable securities. These amounts are included within "Operating income (loss)" within the consolidated statement of operations.

## (7) Notes Payable and Stock Warrants

As previously disclosed in the Company's filings with the Securities and Exchange Commission, the Company was actively seeking financing in order to meet the Company's operating cash flow needs.

On November 17, 2017, HCP-FVA provided the Commitment, whereby it agreed to finance up to \$3 million to the Company on the terms, and subject to the conditions, set forth in the Commitment letter. As part of the commitment, on November 17, 2017, the Company entered into a Loan Agreement with Lender and certain other loan parties named therein, pursuant to which the Lender made a Short Term Loan to the Company in the principal amount of \$500,000. Pursuant to the Short Term Loan, HCP-FVA received warrants to purchase 13,859,128 shares of the Company's common stock at a nominal exercise price ("Backstop Warrants").

The Short Term Loan was secured by all of the assets of the Company and guaranteed by each of the Company's domestic subsidiaries. The Short Term Loan bore interest at a rate equal to the prime rate plus 0.75%. The Short Term Loan was due and payable on May 17, 2018, unless prepaid or satisfied through the issuance by the Company of Units (as defined below) in a proposed private placement (the "Financing") offered to certain eligible stockholders who were stockholders of the Company on November 17, 2017, as described below.

On February 23, 2018, the Company closed on the Commitment from HCP-FVA to purchase up to \$3 million of Units. HCP-FVA subscribed for the full \$3 million of Units (at the Company's election) in the Commitment by payment of \$2.5 million in cash and the conversion of the \$500,000 Short-Term Loan into Units. In consideration for HCP-FVA's subscription of 3 million of Units, HCP-FVA was issued Financing Warrants (as hereinafter defined) to purchase 366,990,000 shares of the Company's common stock for a nominal exercise price.

In the Financing, the Company agreed to offer FalconStor stockholders as of November 17, 2017 who were accredited investors the opportunity to purchase up to a total of 40 million Units (inclusive of subscriptions by HCP-FVA). Each Unit had a purchase price of \$0.371063 and consisted of the following (each, a "Unit"):

\$0.10 in senior secured debt (for a total of \$4 million of senior secured debt assuming full subscription of the i.Financing), secured by all of the assets of the Company and guaranteed by each of the Company's domestic subsidiaries, having an interest rate of prime plus 0.75% and a maturity date of June 30, 2021 (the "Term Loan"); warrants to purchase 12.233 shares of the Company's common stock for a nominal exercise price (for a total of 489.32 million shares assuming full subscription of the Financing) (the "Financing Warrants"); and 0.0225 shares of Series A Preferred Stock at a per Unit price of \$0.271063 (subject to increase to take into account iii. accretion of the Series A Preferred Stock after December 31, 2018), all such shares to be acquired directly from their current holder, HCP-FVA.

The closing of the Commitment effectively constituted HCP-FVA's purchase of 30 million Units in the Financing. As a result, the maximum additional funds that the Company could receive in the Financing was \$1,000,000 through the purchase of 10 million Units by other eligible stockholders. In exchange for serving as the backstop for the Financing, upon the closing of the Commitment, HCP-FVA received additional Backstop Warrants to purchase 41,577,382 shares of the Company's common stock for a nominal exercise price, in addition to the 13,859,128 Backstop Warrants issued to HCP-FVA in connection with the making of the Short Term Loan.

On February 23, 2018, in connection with HCP-FVA's subscription in the Financing, the Company entered into an Amended and Restated Term Loan Credit Agreement, dated as of the same date (the "Amended and Restated Loan Agreement"), with HCP-FVA and certain other loan parties named therein setting forth the terms of the Term Loan. The Amended and Restated Loan Agreement amended and restated the Loan Agreement.

Under the Amended and Restated Loan Agreement, in the event the Term Loan is prepaid for any reason, such prepayment will be subject to the payment of a premium in an amount equal to 5% of the principal amount prepaid. The Term Loan is required to be prepaid upon the occurrence of certain events, including but not limited to certain asset dispositions, the incurrence of additional indebtedness, the receipt of insurance proceeds, and a change of control, subject to certain exceptions.

The Amended and Restated Loan Agreement has customary representations, warranties and affirmative and negative covenants. The negative covenants include financial covenants by the Company to maintain minimum cash denominated in U.S. dollars plus accounts receivable outstanding for less than 90 days of \$2 million. The Amended and Restated Loan Agreement also contains customary events of default, including but not limited to payment defaults, cross defaults with certain other indebtedness,

breaches of covenants, bankruptcy events and a change of control. In the case of an event of default, as administrative agent under the Loan Agreement, HCP-FVA may (and upon the written request of lenders holding in excess of 50% of the Term Loan, which must include HCP-FVA, is required to accelerate payment of all obligations under the Loan Agreement, and seek other available remedies).

On April 23, 2018, HCP-FVA exercised most of its Backstop Warrants on a cash-less basis and was issued 53,370,601 shares of the Company's common stock. HCP-FVA continues to hold Backstop Warrants to purchase 1,543,630 shares of common stock.

The Commitment and the Financing were approved by the Company's Board of Directors, based on a recommendation of a special committee of independent directors, with Mr. Hale recusing himself.

On October 9, 2018, FalconStor closed on the final tranche of its previously-announced Financing of Units to certain eligible stockholders of the Company. As a result, the Company received an additional \$1,000,000 of gross proceeds from new investors (the "New Investors") which is in addition to the \$3,000,000 of gross proceeds previously received from HCP-FVA through the subscription of 30,000,000 Units pursuant to the Commitment on February 23, 2018.

In addition to providing the Company with \$1,000,000 of gross proceeds, the New Investors purchased \$520,000 of the Term Loan held by HCP-FVA and 342,000 of the 900,000 shares of Series A Preferred Stock held by HCP-FVA. Financing Warrants to purchase 63,610,935 shares of Common Stock held by HCP-FVA were also cancelled. Accordingly, the New Investors hold Financing Warrants to purchase 185,942,009 shares of Common Stock and HCP-FVA now holds Financing Warrants to purchase 303,379,065 shares of Common Stock. The transfer of securities by HCP-FVA to New Investors was subject to certain transfer limitations to ensure the preservation of the Company's net operating loss carry forward.

In December 2018, the Company received proceeds of approximately \$489,321 from the exercise of Financing Warrants.

During the fiscal years-ended December 31, 2018 and December 31, 2017, FalconStor was unable to make its Series A Preferred Stock quarterly dividend payments, and was subject to mandatory redemption under the Series A Preferred Stock purchase agreement. In conjunction with the Commitment, Hale Capital agreed to postpone the date of the mandatory redemption of the Series A Preferred Stock from August 5, 2017 to July 30, 2021, and to waive prior breaches of the terms of the Series A Preferred Stock which had also triggered a mandatory redemption right ("Series A Mandatory Redemption Extension"). Accordingly, as a result of these changes, for accounting purposes, the Series A Preferred Stock is considered new Series A Preferred Stock.

As a result, the Company assessed whether the transaction was a troubled debt restructuring. Although the Company meets the criteria of a debtor experiencing financial difficulties as described above in Accounting Standards Code ("ASC") 470-60-55-8, Hale Capital was not granted a concession as defined in ASC 470-60-55-10 as the effective interest rate for both the Series A Preferred Stock and the Original Loan was higher following the restructuring of Series A Preferred Stock and Long-Term Debt compared to the interest rate immediately before the restructuring. Since no concession was granted, Troubled Debt Restructuring accounting guidance does not apply.

As part of the analysis, the present value of the cash flows under the terms of the new Series A Preferred Stock and loans are greater than 10% different than the present value of the old Series A Preferred Stock and loans cash flows, as such extinguishment treatment applies.

There is no beneficial conversion feature associated with the revised Series A Preferred Stock.

When preferred stock is extinguished, the issuer should include the gain or loss on extinguishment in its net income attributable to common shareholders used to calculate earnings per share, as described in ASC 260-10-S99-2.

When multiple instruments are issued in a single transaction, the total proceeds from the transaction should be allocated among the individual freestanding instruments identified. Since Hale Capital previously held all of the debt and Series A Preferred Stock, the restructuring is considered to be a capital transaction as of December 31, 2018. As such the gain or loss was recorded in equity.

ASC 470-20-25-2 requires that debt or stock with detachable warrants issued in a bundled transaction with debt and equity proceeds be accounted for separately, based on the relative fair values of each instrument. The proceeds allocated to the Backstop Warrants and Financing Warrants were valued at \$4,143,000.

Derivative treatment did not apply to the warrants issued in association with the restructuring based upon the warrants being penny warrants (pre-paid stock).

Warrants should be considered outstanding in earnings per share calculation if the Company is profitable to common shareholders; otherwise, warrants should be excluded as the effect would be antidilutive.

At the time of the grant of Warrants in February 2017, the Company had insufficient shares outstanding to accommodate the exercise of the Financing Warrants granted as detailed in the Background section above. ASC 480 "Distinguishing Liabilities from Equity" is referenced below to determine whether such warrants need to be recorded as liabilities or equity.

Warrant grants that do not have associated outstanding common shares should be recorded as liabilities as the Company would be required to settle such obligations using cash settlement (deficient by 368,533,620 shares). Changes in the fair value of the liability from period to period should be reflected within earnings. On June 22, 2018, the Company filed a certificate of amendment to the Company's Restated Certificate of Incorporation to increase the authorized shares of common stock to 800,000,000. As a result, the fair value of these Warrants have been reclassified to equity. The Warrants contain standard antidilution language; therefore, they do not prevent a freestanding instrument from being considered indexed to the issuer's own stock.

The initial transaction was recorded as follows:

At Inception	February 23, 2018	
	Basis	Fair Value
Series A redeemable convertible preferred stock, net	\$10,312,113	3\$8,709,684
Notes payable, net	2,728,778	2,457,249
Warrant liability	_	4,143,000
Total	\$13,040,89	1\$15,309,933

Deemed dividend \$2,269,042

The Series A Preferred Stock consists of the following:

Series A redeemable convertible preferred stock principal balance	\$9,000,000
Accrued dividends	1,312,112
Discount	(1,602,428)
Total Series A redeemable convertible preferred stock, net at inception on February 23, 2018	8,709,684
Accrued dividends	683,742
Accretion of preferred stock	363,280
Total Series A redeemable convertible preferred stock, net at December 31, 2018	\$9,756,706

The notes payable balance consists of the following:

Notes payable principal balance	\$3,000,000	)
Deferred issuance costs	(254,247	)
Discount	(288,504	)
Total notes payable, net at inception on February 23, 2018	2,457,249	
Proceeds from issuance of long-term debt	1,000,000	
Revaluation of long-term debt	(447,008	)
Accretion of discount	202,195	
Deferred issuance costs	(87,609	)
Total notes payable, net at December 31, 2018	\$3,124,827	7

The Company has 900,000 shares of Series A Preferred Stock outstanding. Pursuant to the Amended and Restated Certificate of Designations, Preferences and Rights for the Series A Preferred Stock (the "Certificate of Designations"), each share of Series A Preferred Stock can be converted into shares of the Company's Common Stock, at an initial conversion price equal to \$1.02488 per share, subject to appropriate adjustments for any stock dividend, stock split, stock combination, reclassification or similar transaction, (i) at any time at the option of the holder or (ii) by the Company if, following the first anniversary of the issuance of the Series A Preferred Stock (subject to extension under certain circumstances), the volume weighted average trading price per share of the Company's Common Stock for sixty (60) consecutive trading days exceeds 250% of the conversion price and continues to exceed 225% of the conversion price through the conversion date, subject at all times to the satisfaction of, and the limitations imposed by, the equity conditions set forth in the Certificate of Designations (including, without limitation, the volume limitations set forth therein).

Pursuant to the Certificate of Designations, the holders of the Series A Preferred Stock are entitled to receive quarterly dividends at the prime rate (provided in the Wall Street Journal Eastern Edition) plus 5% (up to a maximum dividend rate of 10%), payable in cash or in kind (i.e., through the issuance of additional shares of Series A Preferred Stock), except that the Company is not permitted to pay such dividends in cash while any indebtedness and the Company's Amendment and Restated Loan Agreement remains outstanding without the consent of the holders of the Series A Preferred Stock. In addition, the declaration and payment of dividends is subject to compliance with applicable law and unpaid dividends will accrue. A holder's right to convert its shares of Series A Preferred Stock and receive dividends in the form of Common Stock is subject to certain limitations including, among other things, that the shares of Common Stock issuable upon conversion or as dividends will not, prior to receipt of stockholder approval, result in any holder beneficially owning greater than 19.99% of the Company's currently outstanding shares of Common Stock. The Series A Preferred dividends shall accrue whether or not the declaration or payment of such Series A Preferred dividends are prohibited by applicable law, whether or not the Company has earnings, whether or not there are funds legally available for the payment of such dividends and whether or not such dividends are authorized or declared. Upon certain triggering events, such as bankruptcy, insolvency or a material adverse effect or failure of the Company to issue shares of Common Stock upon conversion of the Series A Preferred Stock in accordance with its obligations, the holders may require the Company to redeem all or some of the Series A Preferred Stock at a price per share equal to the greater of (i) the sum of 100% of the stated value of a share of Series A Preferred Stock plus accrued and unpaid dividends with respect thereto, and (ii) the product of the number of shares of Common Stock underlying a share of Series A Preferred Stock and the closing price as of the occurrence of the triggering event. On or after July 30, 2021, each holder of Series A Preferred Stock can also require the Company to redeem its Series A Preferred Stock in cash at a per share price equal to 100% of the stated value of a share of Series A Preferred Stock plus accrued and unpaid dividends with respect thereto. Notwithstanding the forgoing, no holder of Series A Preferred Stock is permitted to exercise any rights or remedies upon a Breach Event or to exercise any redemption rights under the Certificate of Designations, unless approved by the holders of a majority of the then outstanding shares of Series A Preferred Stock. Upon consummation of a fundamental sale transaction, the Series A Preferred Stock shall be redeemed at a per share redemption price equal to the greater of (y) 250% of the per share purchase price of the Series A Preferred Stock and (z) the price payable in respect of such share of Series A Preferred Stock if such share of Series A Preferred Stock had been converted into such number of shares of Common Stock in accordance with the Certificate of Designations (but without giving effect to any limitations or restrictions contained therein) immediately prior to such fundamental sale transaction; provided however that the 250% threshold is changed to 100% if the fundamental sale transaction is approved by the two Series A Directors (as defined in the Certificate of Designations). In addition, if the Company consummates an equity or debt financing that results in more than \$5.0 million of net proceeds to the Company and/or its subsidiaries, the holders of Series A Preferred Stock will have the right, but not the obligation, to require the Company to use the net proceeds in excess of \$5.0 million to repurchase all or a portion of the Series A Preferred Stock at a per share price equal to the greater of (i) the sum of 100% of the stated value of such share of Series A Preferred Stock plus accrued and unpaid dividends with respect thereto, and (ii) the number of shares of Common Stock into which such share of Series A Preferred Stock is then convertible multiplied by the greater of (y) the closing price of the Common Stock on the date of announcement of such financing or (z) the closing price of the Common

Stock on the date of consummation of such financing.

Each holder of Series A Preferred Stock has a vote equal to the number of shares of Common Stock into which its Series A Preferred Stock would be convertible as of the record date. In addition, the holders of a majority of the Series A Preferred Stock must approve certain actions, including approving any amendments to the Company's Charter or Bylaws that adversely affects the voting powers, preferences or other rights of the Series A Preferred Stock; payment of dividends or distributions; any liquidation, capitalization, reorganization or any other fundamental transaction of the Company; issuance of any equity security senior to or on parity with the Series A Preferred Stock as to dividend rights, redemption rights, liquidation preference and other rights; issuances of equity below the conversion price; any liens or borrowings other than non-convertible indebtedness from standard commercial

lenders which does not exceed 80% of the Company's accounts receivable; and the redemption or purchase of any of the capital stock of the Company.

The Company has classified the Series A Preferred Stock as temporary equity in the financial statements as it is subject to redemption at the option of the holder under certain circumstances. As a result of the Company's analysis of all the embedded conversion and put features within the Series A Preferred Stock, the contingent redemption put options in the Series A Preferred Stock were determined to not be clearly and closely related to the debt-type host and also did not meet any other scope exceptions for derivative accounting. Therefore, the contingent redemption put options are being accounted for as derivative instruments and the fair value of these derivative instruments was bifurcated from the Series A Preferred Stock and recorded as a liability.

As of December 31, 2018 and December 31, 2017 the fair value of these derivative instruments was \$498,086 and \$445,838, respectively, and were included in "other long-term liabilities" within the consolidated balance sheets. The loss on the change in fair value of these derivative instruments for the twelve months ended December 31, 2018 and December 31, 2017 of 52,248 and \$108,976, respectively, were included in "interest and other loss, net" within the consolidated statement of operations.

The fair value of these derivative instruments and the loss recorded on the change in the fair value of these derivative instruments, which was included in "Interest and other income, net" within the condensed consolidated statement of operations, for the twelve months ended December 31, 2018 and 2017, were as follows:

Years Ended December 31. 2018 2017 \$445,838 \$336,862 Total loss recognized in earnings 52,248 108,976 \$498,086 \$445,838

Beginning Balance

**Ending Balance** 

At the time of issuance, the Company recorded transaction costs, a beneficial conversion feature and the fair value allocated to the embedded derivatives as discounts to the Series A Preferred Stock. These costs were being accreted to the Series A Preferred Stock using the effective interest method through the stated redemption date of August 5, 2017, which represents the earliest redemption date of the instrument. This accretion was accelerated as of December 31, 2016 due to the failure of the financial covenants and the redemption right of the holders at that time. In connection with the Commitment, Hale agreed to the Series A mandatory extension and waived prior breaches of the terms of the Series A Preferred Stock. The Company included deductions for accretion, deemed and accrued dividends on the Series A Preferred Stock as adjustments to net income (loss) attributable to common stockholders on the statement of operations and in determining income (loss) per share for the twelve months ended December 31, 2018 and 2017, respectively. The following represents a reconciliation of net loss attributable to common stockholders for the twelve months ended December 31, 2018 and 2017, respectively:

	Years Ended	l December
	31,	
	2018	2017
Net income (loss)	\$(906,714	) \$1,052,401
Effects of Series A redeemable convertible preferred stock:		
Less: Accrual of Series A redeemable convertible preferred stock dividends	1,035,977	873,043
Less: Accretion to redemption value of Series A redeemable convertible preferred stock	254,212	
Less: Deemed dividend on Series A redeemable convertible preferred stock	2,269,042	
Net income (loss) attributable to common stockholders	\$(4,465,945	) \$179,358

(9) Stockholders' Equity

Amendments to Articles of Incorporation

On June 22, 2018, following stockholder approval, the Company filed a certificate of amendment (the "Charter Amendment") to the Company's Restated Certificate of Incorporation, as amended, with the Delaware Secretary of State to increase the authorized shares of common stock, \$.001 par value per share, to 800,000,000 and filed an Amended and Restated Certificate of Designations, Preferences and Rights of Series A Convertible Preferred Stock (the "Amended and Restated Certificate of Designations") with the Delaware Secretary of State to implement certain modifications to the terms of the Company's Series A Preferred Stock.

### Stock Repurchase Activity

During the year ended December 31, 2018 and December 31, 2017, the Company repurchased no shares of its common stock. As of December 31, 2018, the Company had the authorization to repurchase 4,907,839 shares of its common stock based upon its judgment and market conditions.

### (10) Share-Based Payment Arrangements

On June 22, 2018, the Company's stockholders adopted the FalconStor Software, Inc. 2018 Incentive Stock Plan (the "2018 Plan"). The 2018 Plan is administered by the Compensation Committee and provides for the issuance of up to 147,199,698 shares of the Company's common stock upon the grant of shares with such restrictions as determined by the Compensation Committee to the employees and directors of, and consultants providing services to, the Company or its affiliates. Exercise prices of the options will be determined by the Compensation Committee, subject to the consent of Hale Capital. The vesting terms shall be performance based and determined by the Committee, subject to the consent of Hale Capital, based on various factors, including (i) the return of capital to the holders of the Series A Preferred Stock and the Company's Common Stock in the event of a Change of Control, (ii) the repayment of the Company's obligations under its senior secured debt, and (iii) the Company's free cash flow. Seventy percent (70%) of the Shares issuable under the 2018 Plan shall be granted as stock options. The remaining thirty percent (30%) of the shares subject to the Plan plus any returned shares will be reserved for future grants of awards to new hires.

The 2016 Incentive Stock Plan (the "2016 Plan") was terminated in April 2018.

The following table summarizes the 2018 Plan, which was the only plan under which the Company was able to grant equity compensation as of December 31, 2018:

Name of Plan

Shares Shares Available Shares
Authorized for Grant Outstanding
FalconStor Software, Inc. 2018 Incentive Stock Plan 147,199,698 147,199,698

—

The following table summarizes the Company's equity plans that have expired but that still have equity awards outstanding as of December 31, 2018:

Name of Plan Shares Available for Grant Shares Outstanding FalconStor Software, Inc., 2016 Incentive Stock Plan FalconStor Software, Inc., 2006 Incentive Stock Plan FalconStor Software, Inc., 2000 Stock Option Plan 505,000 944,200 4,500

All outstanding options granted under the Company's equity plans have terms of ten years.

117 a : a la 4 a d

A summary of the Company's stock option activity for 2018 is as follows:

			Weighted		
	Number of	Weighted	Average	Aggrega	ite
		Average	Remaining	Intrinsic	
	Options	Price	Contractual	Value	
			Life (Years)		
Options Outstanding at December 31, 2017	2,026,200	\$ 2.14	5.32	\$	—
Granted		\$ —			
Exercised		\$ —			
Forfeited	(451,000)	\$ 2.55			
Expired	(221,500)	\$ 5.82			
Options Outstanding at December 31, 2018	1,353,700	\$ 1.40	5.60	\$	_
Options Exercisable at December 31, 2018	1,031,500	\$ 1.63	4.90	\$	_
Options Expected to Vest after December 31, 2018	322,200	\$ 0.67	7.47	\$	

Stock option exercises are fulfilled with new shares of common stock.

Related to the 2016 Plan, many share-based compensation awards were forfeited and the related expense reversed accordingly, resulting in negative expense in the period. The following table summarizes the share-based compensation expense for all awards issued under the Company's stock equity plans in the following line items in the consolidated statements of operations:

	Years ended		
	December 31,		
	2018	2017	
Cost of revenue - Support and Service	26,203	64,427	
Research and development costs	77,116	233,955	
Selling and marketing	19,615	48,286	
General and administrative	(58,262)	76,285	
	\$64,672	\$422,953	

The Company did not recognize any tax benefits related to share-based compensation expense during the years ended December 31, 2018 and 2017.

The Company has the ability to issue both restricted stock and restricted stock units. The fair value of the restricted stock awards and restricted stock units are expensed at the fair value per share at date of grant for directors, officers and employees. A summary of the total stock-based compensation expense related to restricted stock awards and restricted stock units, which is included in the Company's total share-based compensation expense for each respective year, is as follows:

Years ended
December 31,
2018 2017
Directors, officers and employees \$(49,289) \$167,369

A summary of the Company's restricted stock activity for 2018 is as follows:

Number of Restricted Stock Awards

Non-Vested at December 31, 2017 548,968

Granted —

Vested (32,300 ) Forfeited (416,668 ) Non-Vested at December 31, 2018 100,000

Restricted stock and restricted stock units are fulfilled with new shares of common stock. The total intrinsic value of restricted stock for which the restrictions lapsed during the years ended December 31, 2018 and 2017 was \$0.

Options granted to non-employee consultants have exercise prices equal to the fair market value of the stock on the date of grant and a contractual term of ten years. Restricted stock awards granted to non-employee consultants have a contractual term equal to the lapse of restriction(s) of each specific award. Vesting periods for share-based awards granted to non-employee consultants range from immediate vesting to three years depending on service requirements. A summary of the total stock-based compensation expense related to share-based awards granted to non-employee consultants, which is included in the Company's total share-based compensation expense for each respective period, is as follows:

Years
ended
December
31,
20**20**17

Non-qualified stock options
Restricted stock awards

\$-\$41,159

\$-\$41,159

The Company estimates the fair value of share-based payments using the Black-Scholes option-pricing model. For awards with market conditions the Company utilizes the Monte Carlo simulation model to estimate the fair value. The Company believes that these valuation techniques and the approach utilized to develop the underlying assumptions are appropriate in estimating the fair value of the Company's share-based payments granted during the years ended December 31, 2018 and 2017. Estimates of fair value are not intended to predict actual future events or the value ultimately realized by the employees who receive equity awards.

No awards were granted during the year ended December 31, 2018. The per share weighted average fair value of share-based payments granted during the years ended December 31, 2017 was \$0.23. In addition to the exercise and grant date prices of the awards, certain weighted average assumptions were used to estimate the fair value of share-based payment grants in the respective periods are listed in the table below:

Years ended
December 31,
2018 2017
N/A 0%

Expected volatility N/A 57 % - 59% Risk-free interest rate N/A 1.94% - 2.02%

Expected term (years) N/A 5.5 Discount for post-vesting restrictions N/A N/A

Expected dividend yield

Options granted to officers, employees and directors during fiscal 2017 have exercise prices equal to the fair market value of the stock on the date of grant, a contractual term of ten years, and a vesting period generally of three years.

The Company estimates expected volatility based primarily on historical daily volatility of the Company's stock and other factors, if applicable. The risk-free interest rate is based on the United States treasury yield curve in effect at the time of grant. The expected option term is the number of years that the Company estimates that options will be outstanding prior to exercise. The expected term of the awards was determined based upon an estimate of the expected term of "plain vanilla" options as prescribed in SEC Staff Accounting Bulletin ("SAB") No. 110.

As of December 31, 2018, there was approximately \$0.0 million total unrecognized compensation cost related to the Company's unvested stock options, restricted stock and restricted stock unit awards granted under the Company's stock plans. The unrecognized compensation cost is expected to be recognized over a weighted-average period of 0.25

years.

As of December 31, 2018, the Company had 150,197,028 shares of common stock reserved for issuance upon the exercise or vesting of stock options, restricted stock, restricted stock units and warrants.

## (11) Commitments and Contingencies

The Company's headquarters are located in Austin, Texas. The Company has an operating lease covering its Melville, N.Y. office facility that expires in April 2021. The Company also has several additional operating leases related to offices in foreign countries. The expiration dates for these leases range from 2018 through 2021. The following is a schedule of future minimum lease payments for all operating leases as of December 31, 2018:

2019 \$1,734,523 2020 1,567,637 2021 596,475 2022 — Thereafter— \$3,898,635

These leases require the Company to pay its proportionate share of real estate taxes and other common charges. Total rent expense for operating leases was \$1.1 million and \$2.0 million for the years ended December 31, 2018 and 2017, respectively.

The Company typically provides its customers a warranty on its software products for a period of no more than 90 days. Such warranties are accounted for in accordance with the authoritative guidance issued by the FASB on contingencies. For the year ended December 31, 2018, the Company has not incurred any costs related to warranty obligations.

Under the terms of substantially all of its software license agreements, the Company has agreed to indemnify its customers for all costs and damages arising from claims against such customers based on, among other things, allegations that the Company's software infringes the intellectual property rights of a third party. In most cases, in the event of an infringement claim, the Company retains the right to (i) procure for the customer the right to continue using the software; (ii) replace or modify the software to eliminate the infringement while providing substantially equivalent functionality; or (iii) if neither (i) nor (ii) can be reasonably achieved, the Company may terminate the license agreement and refund to the customer a pro-rata portion of the license fee paid to the Company. Such indemnification provisions are accounted for in accordance with the authoritative guidance issued by the FASB on guarantees. From time to time, in the ordinary course of business, the Company receives claims for indemnification, typically from OEMs. The Company is not currently aware of any material claims for indemnification.

As described under Note 8, the holders of the Series A Preferred Stock have redemption rights upon certain triggering events. As of December 31, 2018, the Company did not fail any non-financial covenants related to the Company's Series A Preferred Stock.

As of August 14, 2017, the Board appointed Todd Brooks as Chief Executive Officer effective August 14, 2017.

In connection with Mr. Brooks' appointment as Chief Executive Officer, the Board approved an offer letter to Mr. Brooks (the "Brooks Agreement"), which was executed on August 14, 2017. The Brooks Offer Letter provides that Mr. Brooks is entitled to receive an annualized base salary of \$350,000, payable in regular installments in accordance with the Company's general payroll practices. Mr. Brooks will also be eligible for a cash bonus of \$17,500 for any quarter that is free cash flow positive on an operating basis and additional incentive compensation of an annual bonus of up to \$200,000, subject to attainment of performance objectives to be mutually agreed upon and established. Pursuant to the Brooks Agreement, the Company created the 2018 Plan, which was adopted by the Company's stockholders on June 22, 2018. The 2018 Plan provides for the issuance of up to 147,199,698 shares which is based on up to 15% of the equity of the Company on a fully diluted basis, plus potentially two additional tranches of 2.5% of the equity of the Company on a fully diluted basis. Mr. Brooks' employment can be terminated at will. If Mr. Brooks' employment is

terminated by the Company other than for cause he is entitled to receive severance equal to twelve (12) months of his base salary if (i) he has been employed by the Company for at least twelve (12) months at the time of termination or (ii) a change of control has occurred within six (6) months of Mr. Brooks' employment. Except as set forth in the preceding sentence, Mr. Brooks is entitled to receive severance equal to six (6) months of his base salary if he has been employed by the Company for less than six (6) months and his employment was terminated by the Company without cause. Mr. Brooks is also entitled to vacation and other employee benefits in accordance with the Company's policies as well as reimbursement for an apartment.

On April 5, 2018, the Company announced the appointment of Brad Wolfe to serve as the Company's Executive Vice President, Chief Financial Officer and Treasurer, effective April 9, 2018. Mr. Wolfe shall also assume the roles of principal financial officer and principal accounting officer of the Company.

In connection with Mr. Wolfe's appointment as Chief Financial Officer, the Board approved an offer letter to Mr. Wolfe (the "Wolfe Offer Letter"), which was executed on April 4, 2018. The Wolfe Offer Letter provides that Mr. Wolfe is entitled to receive an annualized base salary of \$240,000, payable in regular installments in accordance with the Company's general payroll practices. Mr. Wolfe will also be eligible for a cash bonus of \$10,000 for any quarter which has net working capital cash in excess of \$27,500 and additional incentive compensation of an annual bonus of up to \$70,000, subject to attainment of performance objectives to be mutually agreed upon and established.

As described under Note 14, the Company has incurred certain restructuring costs in connection with restructuring plans adopted in 2013 and 2017.

In addition, as of December 31, 2018, our liability for uncertain tax positions totaled \$262,711. At this time, the settlement period for the positions, including related accrued interest, cannot be determined.

### (12) Derivative Financial Instruments

The Company does not use derivative financial instruments for trading or speculative purposes. As of December 31, 2018 and 2017, the Company had no foreign currency forward contracts outstanding. The Company did not utilize foreign currency forward contracts during the years ended December 31, 2018 and 2017.

As a result of the Company's analysis of all the embedded conversion and put features within its Series A redeemable convertible preferred stock, the contingent redemption put options in the Series A redeemable convertible preferred stock were determined to not be clearly and closely related to the debt-type host and also did not meet any other scope exceptions for derivative accounting. Therefore the contingent redemption put options are being accounted for as derivative instruments and the fair value of these derivative instruments were bifurcated from the Series A redeemable convertible preferred stock and recorded as a liability. At the time of issuance of the Series A redeemable convertible preferred stock the fair value of these derivative instruments were recorded as a reduction to preferred stock. As of December 31, 2018 and 2017, the fair value of these derivative instruments was \$498,086 and \$445,838, respectively, and were included in "other long-term liabilities" within the consolidated balance sheets. The loss on the change in fair value of these derivative instruments for 2018 of \$52,248 and the loss on the change in fair value of these derivative instruments for 2017 of \$108,976, were included in "interest and other loss, net" within the consolidated statement of operations.

# (13) Litigation

In view of the inherent difficulty of predicting the outcome of litigation, particularly where the claimants seek very large or indeterminate damages, the Company generally cannot predict what the eventual outcome of the pending matters will be, what the timing of the ultimate resolution of these matters will be, or what the eventual loss, fines or penalties related to each pending matter may be.

In accordance with the authoritative guidance issued by the FASB on contingencies, the Company accrues anticipated costs of settlement, damages and losses for claims to the extent specific losses are probable and estimable. The Company records a receivable for insurance recoveries when such amounts are probable and collectable. In such cases, there may be an exposure to loss in excess of any amounts accrued. If, at the time of evaluation, the loss contingency related to a litigation is not both probable and estimable, the matter will continue to be monitored for further developments that would make such loss contingency both probable and estimable and, the Company will expense these costs as incurred. If the estimate of a probable loss is a range and no amount within the range is more likely, the Company will accrue the minimum amount of the range.

# Other Claims

The Company is subject to various legal proceedings and claims, asserted or unasserted, which arise in the ordinary course of business. While the outcome of any such matters cannot be predicted with certainty, such matters are not expected to have a material adverse effect on the Company's financial condition or operating results.

The Company continues to assess certain litigation and claims to determine the amounts, if any, that the Company believes may be paid as a result of such claims and litigation and, therefore, additional losses may be accrued and paid in the future, which could materially adversely impact the Company's financial results, its cash flows and its cash reserves.

### (14) Restructuring Costs

In the third quarter of 2013, the Company adopted the 2013 Plan to better align the Company's cost structure with the skills and resources required to more effectively execute the Company's long-term growth strategy and to support revenue levels the Company expected to achieve on a go forward basis. In connection with the 2013 Plan, the Company eliminated over 100 positions worldwide, implemented tighter expense controls, ceased non-core activities and closed or downsized several facilities. The 2013 Plan was substantially completed by December 31, 2014; however, the Company expects the remaining accrued severance related costs to be paid once final settlement litigation is completed, which can be at various times over the next twelve months.

In June 2017, the Board approved a comprehensive plan to increase operating performance (the "2017 Plan"). The 2017 Plan resulted in a realignment and reduction in workforce. The 2017 Plan was substantially completed by the end of the Company's fiscal year ending December 31, 2018, and when combined with previous workforce reductions in the second quarter of Fiscal 2017 reduced the Company's workforce to approximately 81 employees. In connection with the 2017 Plan, the Company incurred severance expense of \$1.2 million. In making these changes, the Company prioritized customer support and development while consolidating operations and streamlining direct sales resources allowing the company to focus on the install base and develop alternate channels to the market.

Accrued restructuring costs as of December 31, 2018 associated with the 2013 and 2017 Plans is as follows:

	Severance related costs	Facility and other costs	Total
Original charge	\$3,179,131	\$426,889	\$3,606,020
Utilized/Paid	(2,067,554)	(231,973)	(2,299,527)
Balance at December 31, 2013	\$1,111,577	\$194,916	\$1,306,493
Provisions/Additions	365,174	770,136	1,135,310
Utilized/Paid	(653,325)	(759,563)	(1,412,888)
Balance at December 31, 2014	\$823,426	\$205,489	\$1,028,915
Provisions/Additions	55,527	117,468	172,995
Utilized/Paid	(161,313 )	(307,935)	(469,248 )
Balance at December 31, 2015	\$717,640	\$15,022	\$732,662
Provisions/Additions	165,228	12,161	177,389
Utilized/Paid	(36,531)	(27,183)	(63,714)
Balance at December 31, 2016	\$846,337	<b>\$</b> —	\$846,337
Provisions/Additions	(159,597)	_	(159,597)
Utilized/Paid	(38,341)	_	(38,341)
Balance at December 31, 2017	\$648,399	<b>\$</b> —	\$648,399
Provisions/Additions	(173,265)	1,434,843	1,261,578
Utilized/Paid	(13,773)	(981,396)	(995,169 )
Balance at December 31, 2018	\$461,361	\$453,447	\$914,808

The severance related liabilities and facility and other liabilities are included within "accrued expenses" and "accounts payable" in the accompanying consolidated balance sheets. The expenses under the 2013 and 2017 Plans are included within "restructuring costs" in the accompanying consolidated statements of operations.

# (15) Employee Benefit Plans

### Defined Contribution Plan

Effective July 2002, the Company established a voluntary savings and defined contribution plan (the "Plan") under Section 401(k) of the Internal Revenue Code. This Plan covers all U.S. employees meeting certain eligibility requirements and allows participants to contribute a portion of their annual compensation. Employees are 100% vested in their own contributions. For the years ended December 31, 2018 and 2017, the Company did not make any contributions to the Plan.

Effective July 1, 2007, the Company, in accordance with the labor pension system in Taiwan, contributes 6% of salaries to individual pension accounts managed by the Bureau of Labor Insurance. The plan covers all Taiwan employees that elect the new pension system and all employees hired after July 1, 2005. For the years ended December 31, 2018 and 2017, the Company contributed approximately \$5,000 and \$39,000, respectively.

#### Defined Benefit Plan

The Company has a defined benefit plan covering employees in Taiwan. The Company accounts for its defined benefit plan in accordance with the authoritative guidance issued by the FASB on retirement benefits, which requires the Company to recognize the funded status of its defined benefit plan in the accompanying consolidated balance sheet, with the corresponding adjustment to accumulated other comprehensive income, net of tax.

At December 31, 2018 and 2017, \$26,802 and \$22,096, respectively, is included in accumulated other comprehensive (loss) income for amounts that have not yet been recognized in net periodic pension cost. These amounts include the following: unrecognized transition obligation of \$0 and \$5,778 at December 31, 2018 and 2017, respectively, and unrecognized actuarial gains of \$26,802 and \$33,545 at December 31, 2018 and 2017, respectively. During 2018, the total amount recorded in other comprehensive (loss) income related to the pension plan was \$4,706 (net of tax), which consisted of an actuarial loss of \$983 and the recognition of \$5,689 of transition obligations recognized during 2018 as a component of net periodic pension cost. The transition obligation and actuarial gain included in accumulated other comprehensive (loss) income and expected to be recognized in net periodic pension cost for the year ended December 31, 2019, is \$5,689 and \$594 respectively.

Pension information for the years ended December 31, 2018 and 2017, is as follows:

Ž		2018	2017
Accumulated benefit obligation		\$165,031	\$222,113
Changes in projected benefit obligation:			
Projected benefit obligation at beginning of	year	231,618	203,168
Interest cost		2,509	3,242
Actuarial loss		10,248	7,050
Benefits paid		(64,016)	_
Service cost			_
Currency translation		(6,098)	18,158
Projected benefit obligation at end of year		\$174,261	\$231,618
Changes in plan assets:			
Fair value of plan assets at beginning of year	ar	\$190,950	\$136,902
Actual return on plan assets		7,161	1,486
Benefits paid		(64,016)	_
Employer contributions		5,148	39,547
Currency translation		(4,892)	13,015
Fair value of plan assets at end of year		\$134,351	\$190,950
Funded status		\$(39,910)	\$(40,668)
Components of net periodic pension cost:			
Interest cost	\$2,509	\$3,242	
Expected return on plan assets	(2,068	) (2,185)	
Amortization of net loss	5,008	4,387	
Service cost	_	_	
Net periodic pension cost	\$5,449	\$5,444	

The Company makes contributions to the plan so that minimum contribution requirements, as determined by government regulations, are met. Company contributions of approximately \$5,000 are expected to be made during 2019. Benefit payments of \$177,000 are expected to be paid through 2028.

The Company utilized the following assumptions in computing the benefit obligation at December 31, 2018 and 2017 as follows:

	Years ended	
	December 31,	
	2018 2017	
Discount rate	0.85% 1.10%	
Rate of increase in compensation levels	1.00% 1.00%	
Expected long-term rate of return on plan assets	0.85% 1.10%	

### (16) Segment Reporting and Concentrations

The Company is organized in a single operating segment for purposes of making operating decisions and assessing performance. Revenues from the United States to customers in the following geographical areas for the years ended December 31, 2018 and 2017, and the location of long-lived assets as of December 31, 2018 and 2017, are summarized as follows:

summarized as follows.			
	Years ended December		
	31,		
	2018	2017	
Revenues:			
Americas	\$3,997,620	\$7,629,508	
Asia Pacific	6,867,306	9,147,888	
Europe, Middle East, Africa and Other	6,972,980	8,383,167	
Total Revenues	\$17,837,906	\$25,160,563	
	December 31		
	2018	2017	
Long-lived assets:			
Americas	\$5,852,995	\$5,754,977	
Asia Pacific	736,970	822,885	
Europe, Middle East, Africa and Other	155,708	213,371	
Total long-lived assets	\$6,745,673	\$6,791,233	

For the years ended December 31, 2018 and 2017, the Company had no customers that accounted for more than 10% of total revenue.

As of December 31, 2018, the Company had one customer that accounted for 17% of the gross accounts receivable balance. As of December 31, 2017, the Company had one customer that accounted for 23% of the gross accounts receivable balance, respectively.

### (17) Valuation and Qualifying Accounts – Allowance for Returns and Doubtful Accounts

Period Ended	Balance at Beginning of Period	Charges / (Benefits) to Revenue	(Increases) Deductions	Balance at End of Period
December 31, 2018	\$ 354,542	(23,080)	169,350	\$162,112
December 31, 2017	\$ 260,676	141,234	47,368	\$354,542

Note: Charges/benefits to the allowance for doubtful accounts are recorded within "general and administrative expenses" within the consolidated statements of operations. Charges/benefits to the return reserve for product and service are

recorded within "product revenue" within the consolidated statements of operations.

### (18) Related Party Transactions

William Miller, a member of the Company's Board of Directors, is the Chairman and Chief Executive Officer of X-IO Technologies, Inc. ("X-IO Technologies"), an enterprise storage company. For the year ended December 31, 2018, the Company sold product to X-IO Technologies totaling \$40,519.

Martin M. Hale, Jr., a member of the Company's Board of Directors, is a general partner of HCP-FVA, the holder in excess of 50% of the Company's Series A redeemable convertible preferred stock. The Series A redeemable convertible preferred stock was purchased by Hale Capital Partners, LP, of which Mr. Hale is a general partner, pursuant to a September 16, 2013 stock purchase agreement with the Company at a time when Mr. Hale was not a director of the Company. Hale Capital Partners, LP subsequently assigned all of its rights in the Series A redeemable convertible preferred stock to HCP-FVA. Under the terms of the Certificate of Designations, the holders of the Series A convertible preferred stock are entitled, as a group, to nominate and to elect up to two directors so long as at least 85% of the Company's Series A redeemable convertible preferred stock is outstanding. HCP-FVA, the sole holder of the Series a convertible preferred stock, nominated and elected Mr. Hale in September 2013 and Michael P. Kelly on October 29, 2014, to the Company's Board of Directors.

On November 17, 2017, HCP-FVA provided a commitment letter to the Company agreeing to finance up to \$3 million to the Company (the "Commitment") on the terms, and subject to the conditions, set forth in that certain commitment letter. As part of that Commitment, on November 17, 2017, the Company entered into a Loan and Security Agreement with Lender and certain other loan parties named therein, pursuant to which the Lender made a short term loan to the Company in the principal amount of \$500,000 payable on May 17, 2018. In connection with the Bridge Loan, the Company issued HCP-FVA Backstop Warrants to purchase 13,859,128 shares of Common Stock. See Note (7) Notes Payable and Stock Warrants for more information.

On February 23, 2018, we closed on the Commitment whereby HCP-FVA purchased \$3 million of Units (as defined in Note (7) Notes Payable and Stock Warrants) to backstop a proposed private placement of Units to certain eligible stockholders of the Company. HCP-FVA subscribed for the full \$3 million of Units (at the Company's election) in the Commitment by payment of \$2.5 million in cash and the conversion of the \$500,000 Bridge Loan In connection therewith, the Company issued HCP-FVA additional BackStop Warrants to purchase 41,577,383 shares of Common Stock and Financing Warrants to purchase 366,990,000 shares of Common Stock.

On October 9, 2018, FalconStor closed on the final tranche of its previously-announced Financing of Units to certain eligible stockholders of the Company. As a result, the Company received an additional \$1,000,000 of gross proceeds from new investors (the "New Investors") which is in addition to the \$3,000,000 of gross proceeds previously received from HCP-FVA through the subscription of 30,000,000 Units pursuant to the Commitment on February 23, 2018.

In addition to providing the Company with \$1,000,000 of gross proceeds, the New Investors purchased \$520,000 of the Term Loan held by HCP-FVA and 342,000 of the 900,000 shares of Series A Preferred Stock held by HCP-FVA. Financing Warrants to purchase 63,610,935 shares of Common Stock held by HCP-FVA were also cancelled. Accordingly, the New Investors hold Financing Warrants to purchase 185,942,009 shares of Common Stock and HCP-FVA now holds Financing Warrants to purchase 303,379,065 shares of Common Stock. The transfer of securities by HCP-FVA to New Investors was subject to certain transfer limitations to ensure the preservation of the Company's net operating loss carry forward.

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

The required disclosure related to our previous registered public accounting firm can be found in our Current Report on Form 8-K filed with the SEC on April 23, 2018.

Item 9A. Controls and Procedures

Disclosure Controls and Procedures

The Company maintains "disclosure controls and procedures," as such term is defined in Rules 13a-15e and 15d-15e of the Securities and Exchange Act of 1934, as amended (the "Exchange Act"), that are designed to ensure that information required to be disclosed in its reports, pursuant to the Exchange Act, is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms, and that such information is accumulated and communicated to its management, including its Chief Executive Officer and Chief Financial Officer, as appropriate, to allow timely decisions regarding the required disclosures. In designing and evaluating the disclosure controls and procedures, management has recognized that any controls and procedures, no matter how well designed and operated, can provide only reasonable assurances of achieving the desired control objectives, and management necessarily is required to apply its judgment in evaluating the cost benefit relationship of possible controls and procedures.

The Company's Chief Executive Officer (its principal executive officer) and Chief Financial Officer (its principal finance officer and principal accounting officer) have evaluated the effectiveness of its "disclosure controls and procedures" as of the end of the period covered by this Annual Report on Form 10-K. Based on their evaluation, the principal executive officer and principal financial officer concluded that its disclosure controls and procedures are not effective as of the end of the period covered by this report. We describe this deficiency and the steps we have taken to remedy such deficiency in our discussion of internal control over financial reporting below.

Internal Control Over Financial Reporting

Management's Report on Internal Control Over Financial Reporting

The Company's management is responsible for establishing and maintaining adequate internal control over financial reporting for the Company; as such term is defined in Rules 13a-15(f) under the Securities and Exchange Act of 1934, as amended. To evaluate the effectiveness of the Company's internal control over financial reporting, the Company's management uses the Integrated Framework (2013) adopted by the Committee of Sponsoring Organizations of the Treadway Commission ("COSO").

The Company's management has assessed the effectiveness of the Company's internal control over financial reporting as of December 31, 2018, using the COSO framework (2013). The Company's management has determined that the Company's internal control over financial reporting is not effective as of that date because of the following deficiency:

During the twelve months ended December 31, 2018, the Company did not have all the COSO framework (2013) mandated system controls in place nor did the Company have an independent party complete testing of the controls as of December 31, 2018. The company has implemented certain mitigating controls such as secondary reviews by senior management, variance analysis reporting and cash-flow monitoring, which insured that both internal and external financial reporting included all the information and disclosures required by generally accepted accounting principles in the United States of America.

Notwithstanding the above, the Principal Executive Officer and the Principal Financial Officer believe that the consolidated financial statements and other information contained in this Annual Report present fairly, in all material

respects, our business, financial condition and results of operations.

## Remediation

The Company is implementing the appropriate system controls mandated by the COSO framework (2013) for 2019 and plans to conduct independent audit testing of these controls which are implemented.

Item 9B. Other Information

In February 2019, Todd Brooks, our President and Chief Executive Officer, was appointed to our Board of Directors to serve until our 2019 Annual Meeting of Stockholders and until his successor is duly elected and qualified.

### **PART III**

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

Information called for by Part III, Item 10, regarding the Registrant's directors will be included in our Proxy Statement relating to our annual meeting of stockholders scheduled to be held in May 2018, and is incorporated herein by reference. The information appears in the Proxy Statement under the captions "Election of Directors", "Management", "Executive Compensation", "Section 16 (a) Beneficial Ownership Reporting Compliance", and "Committees of the Board of Directors." The Proxy Statement will be filed within 120 days of December 31, 2018, our year-end.

### Item 11. Executive Compensation

Information called for by Part III, Item 11, will be included in our Proxy Statement relating to our annual meeting of stockholders scheduled to be held in June 2019, and is incorporated herein by reference. The information appears in the Proxy Statement under the captions "Executive Compensation", "Director Compensation", "Compensation Committee Interlocks and Insider Participation", Compensation Committee Report" and "Committees of the Board of Directors." The Proxy Statement will be filed within 120 days of December 31, 2018, our year-end.

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

Information regarding Securities Authorized for Issuance Under Equity Compensation Plans is included in Item 4 and is incorporated herein by reference. All other information called for by Part III, Item 12, will be included in our Proxy Statement relating to our annual meeting of stockholders scheduled to be held in June 2019, and is incorporated herein by reference. The information appears in the Proxy Statement under the caption "Beneficial Ownership of Shares." The Proxy Statement will be filed within 120 days of December 31, 2018, our year-end.

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

Information regarding our relationships and related transactions will be included in our Proxy Statement relating to our annual meeting of stockholders scheduled to be held in June 2019, and is incorporated by reference. The information appears in the Proxy Statement under the caption "Certain Relationships and Related Transactions." The Proxy Statement will be filed within 120 days of December 31, 2018, our year-end.

### Item 14. Principal Accountant Fees and Services

Information called for by Part III, Item 14, will be included in our Proxy Statement relating to our annual meeting of stockholders scheduled to be held in June 2019, and is incorporated herein by reference. The information appears in the Proxy Statement under the caption "Principal Accountant Fees and Services." The Proxy Statement will be filed within 120 days of December 31, 2018, our year-end.

#### **PART IV**

### Item 15. Exhibits and Financial Statement Schedules

The information required by subsections (a)(1) and (a)(2) of this item are included in the response to Item 8 of Part II of this annual report on Form 10-K.

- (b) Exhibits
- 3.1 Restated Certificate of Incorporation, incorporated herein by reference to Exhibit 3.1 to the Registrant's registration statement on Form S-1 (File no. 33-79350), filed on April 28, 1994.
- 3.2 Amended and Restated By-Laws of FalconStor Software, Inc., incorporated herein by reference to Exhibit 3.2 to the Registrant's annual report on Form 10-K for the year ended December 31, 2010, filed on March 14, 2011.

  Certificate of Amendment to the Restated Certificate of Incorporation, incorporated herein by reference to Exhibit
- 3.3 3.3 to the Registrant's the quarterly report on Form 10-Q for the period ended June 30, 2000 filed on August 11, 2000.
- 3.4 Certificate of Amendment to the Restated Certificate of Incorporation, incorporated herein by reference to Exhibit 3.4 to the Registrant's annual report on Form 10-K for the year ended December 31, 2001, filed on March 27, 2002.
- 3.5 Certificate of Designations, Preferences and Rights of Series A Convertible Preferred Stock, incorporated herein by reference to Exhibit 4.1 to the Registrant's report on Form 8-K dated September 16, 2013.
- 3.6 Certificate of Amendment of the Restated Certificate of Incorporation of FalconStor Software, Inc., incorporated by reference to Exhibit 3.1 to the Registrant's report on Form 8-K dated June 25,2018.
- Amended and Restated Certificate of Designations, Preferences and Rights of Series A Convertible Preferred

  3.7 Stock of FalconStor Software, Inc., incorporated by reference to Exhibit 3.2 to the Registrant's report on Form

  8-K dated June 25, 2018.
- 4.1s Amended and Restated 2006 Incentive Stock Plan incorporated herein by reference to Exhibit 4.1 to the Registrant's quarterly report on Form 10-Q for the quarter ended March 31, 2007, filed on May 10, 2007.
- 4.3s Form of Restricted Stock Letter Agreement, incorporated herein by reference to Exhibit 4.1 to the Registrant's current report on Form 8-K filed on April 7, 2014.

  FalconStor Software Inc., 2013 Outside Directors Equity Compensation Plan, incorporated herein by reference to
- 4.4s the Registrant's Proxy Statement on Schedule 14a for the 2013 Annual meeting of Stockholders, filed on March 29, 2013.
- 4.5s FalconStor Software, Inc. 2016 Incentive Stock Plan, incorporated by reference to Exhibit A to the Proxy Statement on Schedule 14A dated March 18, 2016.
- 10.1 Intentionally omitted.
  - Agreement of Lease between Huntington Quadrangle 2 LLC and FalconStor Software Inc., dated May 30, 2013,
- 10.2 with a commencement date of March 1, 2014, incorporated herein by reference to Exhibit 99.1 to the Registrant's quarterly report on Form 10-Q for the period ended June 30, 2013 filed on August 7, 2013.
  - Preferred Stock Purchase Agreement dated as of September 16, 2013 between the Company and Hale Capital
- 10.3 Partners, LP, incorporated herein by reference to Exhibit 10.1 to the Registrant's report on Form 8-K dated September 16, 2013.
- 10.4 Intentionally omitted.
- 10.5s Agreement between FalconStor Software, Inc. and Todd Brooks, dated August 14, 2017,incorporated by reference to Exhibit 10.2 to the Registrant's current report on Form 8-K filed August 17,2017.

10.6	Intentionally omitted.
10.7s	Agreement between FalconStor Software, Inc. and Patrick McClain, dated August 17, 2017, incorporated by reference to Exhibit 10.4 to the Registrant's current report on Form 8-K filed August 17, 2017.
10.8	Intentionally omitted.
10.9	Intentionally omitted.
10.10	Intentionally omitted.
10.11	Amended and Restated Term Loan Credit Agreement, dated as of February 23, 2018, by and among FalconStor Software, Inc., HCP-FVA, LLC, as Administrative Agent and as a Lender, and the other Loan Parties named therein, incorporated herein by reference to Exhibit 10.1 to Registrant's current report on Form 8-K filed on February 26, 2018).
10.12	Intentionally omitted.
10.13	Backstop Warrant, dated February 23, 2018 issued by FalconStor Software, Inc. to HCP-FVA, LLC, incorporated herein by reference to Exhibit 10.3 to Registrant's current report on Form 8-K filed on February 26, 2018.
10.14	Agreement between FalconStor Software, Inc. and Brad Wolfe, dated April 4, 2018, incorporated by reference to Exhibit 10.2 to the Registrant's current report on Form 8-K filed April 11, 2018.
10.15	Falconstor Software Inc. 2018 Stock Incentive Plan, incorporated by reference to the Definitive Proxy Statement on Schedule 14A filed on June 5, 2018.
10.16	Joinder to Amended and Restated Term Loan Credit Agreement, dated as of February 23, 2018, by and among FalconStor Software, Inc., HCP-FVA, LLC, as Administrative Agent and as a Lender, and the other Loan Parties named therein, incorporated by reference to Exhibit 10.2 to the Registrant's current report on Form 8-K filed October 11, 2018.
21.1 Subsidia	ries of Registrant – FalconStor, Inc., FalconStor AC, Inc., FalconStor Software (Korea), Inc.
23.1*Conser	at of RBSM LLP

- 23.2\*Consent of BDO USA, LLP
- 31.1\* Certification of the Chief Executive Officer
- 31.2\* Certification of the Chief Financial Officer
- 32.1\* Certification of Chief Executive Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1350)
- 32.2\* Certification of Chief Financial Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1350)
- The following financial statements from FalconStor Software, Inc's Annual Report on Form 10-K for the year ended December 31, 2018, formatted in XBLR (eXtensible Business Reporting Language):
- (i) Consolidated Balance Sheets December 31, 2018 and December 31, 2017
- (ii) Consolidated Statements of Operations Years Ended December 31, 2018 and 2017

- (iii) Consolidated Statements of Comprehensive Income (Loss) Years Ended December 31, 2018 and 2017
- (iv) Consolidated Statements of Stockholders' Deficit Years Ended December 31, 2018 and 2017
- (v) Consolidated Statements of Cash Flows Years Ended December 31, 2018 and 2017
- (vi) Notes to Consolidated Financial Statements December 31, 2018
- \*- Filed herewith.

s- Denotes management contract or compensatory plan or arrangement.

Item 16. Form 10-K Summary

None.

#### **SIGNATURES**

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized in Melville, State of New York on March 27, 2019.

### FALCONSTOR SOFTWARE, INC.

By:/s/ Brad Wolfe March 27, 2019

Executive Vice President, Chief Financial Officer and Treasurer Date

(principal financial and accounting officer)

### POWER OF ATTORNEY

FalconStor Software, Inc. and each of the undersigned do hereby appoint Todd Brooks and Brad Wolfe, and each of them severally, its or his true and lawful attorney to execute on behalf of FalconStor Software, Inc. and the undersigned any and all amendments to this Annual Report on Form 10-K and to file the same with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission; each of such attorneys shall have the power to act hereunder with or without the other.

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

By:/s/ Todd Brooks March 27, 2019

Todd Brooks, President & Chief Executive Officer and Director (principal executive officer)

Date

March 27,

2019

Brad Wolfe, Executive Vice President, Chief Financial Officer and Treasurer (principal financial

and accounting officer)

By:/s/ Brad Wolfe

Date

By:/s/ Martin Hale Jr. March 27, 2019

Martin Hale Jr., Director Date

By:/s/ Michael Kelly March 27, 2019

Michael Kelly, Director Date

By:/s/ Barry A. Rudolph March 27, 2019

Barry A. Rudolph, Director Date

By:/s/ William D. Miller March 27, 2019

William D. Miller, Director Date