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

Form 10-Q

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

For the quarterly period ended September 30, 2022

OR

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

For the transition period from to

Commission file number: 1-37897

RESHAPE LIFESCIENCES INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction
of incorporation or organization)

26-1828101
(IRS Employer
Identification No.)

1001 Calle Amanecer, San Clemente, California 92673

(Address of principal executive offices, including zip code)

(949) 429-6680

(Registrant's telephone number, including area code)

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

Title of Each Class	Trading Symbol	Name of Each Exchange on which Registered
Common stock, \$0.001 par value per share	RSL5	The Nasdaq Capital Market

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

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

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, 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.

Large Accelerated Filer	<input type="checkbox"/>	Accelerated Filer	<input type="checkbox"/>
Non-accelerated Filer	<input checked="" type="checkbox"/>	Smaller Reporting Company	<input checked="" type="checkbox"/>
Emerging Growth Company	<input type="checkbox"/>		

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

As of November 10, 2022, 24,176,434 shares of the registrant's Common Stock were outstanding.

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PART I – FINANCIAL INFORMATION

ITEM 1. CONDENSED CONSOLIDATED FINANCIAL STATEMENTS (Unaudited)

RESHAPE LIFESCIENCES INC.
Condensed Consolidated Balance Sheets
(unaudited)
(dollars in thousands, except per share amounts)

	September 30, 2022	December 31, 2021
ASSETS		
Current assets:		
Cash and cash equivalents	\$ 6,146	\$ 22,765
Restricted cash	100	50
Accounts and other receivables (net of allowance for doubtful accounts of \$947 and \$1,172 respectively)	2,230	2,815
Inventory	4,171	3,003
Prepaid expenses and other current assets	926	1,622
Total current assets	13,573	30,255
Property and equipment, net	896	1,454
Operating lease right-of-use assets	255	266
Other intangible assets, net	12,513	20,827
Other assets	1,219	1,456
Total assets	<u>\$ 28,456</u>	<u>\$ 54,258</u>
LIABILITIES AND STOCKHOLDERS' EQUITY		
Current liabilities:		
Accounts payable	\$ 1,992	\$ 3,468
Accrued and other liabilities	4,848	3,169
Warranty liability, current	418	415
Operating lease liabilities, current	255	279
Total current liabilities	7,513	7,331
Warranty liability, noncurrent	—	300
Deferred income taxes, net	—	555
Total liabilities	<u>7,513</u>	<u>8,186</u>
Commitments and contingencies (Note 13)		
Stockholders' equity:		
Preferred stock, 10,000,000 shares authorized:		
Series C convertible preferred stock, \$0.001 par value; 95,388 shares issued and outstanding at September 30, 2022 and December 31, 2021	—	—
Common stock, \$0.001 par value; 100,000,000 shares authorized at both September 30, 2022 and December 31, 2021; 22,595,748 and 17,831,875 shares issued and outstanding at September 30, 2022 and December 31, 2021, respectively	23	18
Additional paid-in capital	627,350	622,906
Accumulated deficit	(606,362)	(576,760)
Accumulated other comprehensive loss	(68)	(92)
Total stockholders' equity	20,943	46,072
Total liabilities and stockholders' equity	<u>\$ 28,456</u>	<u>\$ 54,258</u>

See accompanying notes to Condensed Consolidated Financial Statements.

RESHAPE LIFESCIENCES INC.

Condensed Consolidated Statements of Operations
(unaudited)
(dollars in thousands, except per share amounts)

	Three Months Ended September 30,		Nine Months Ended September 30,	
	2022	2021	2022	2021
Revenue	\$ 2,798	\$ 3,708	\$ 8,130	\$ 10,458
Cost of revenue	697	1,573	2,928	3,886
Gross profit	2,101	2,135	5,202	6,572
Operating expenses:				
Sales and marketing	2,619	3,496	11,990	6,186
General and administrative	3,872	12,052	13,488	19,085
Research and development	588	1,571	2,096	2,245
Impairment of intangible assets	6,947	—	6,947	—
Loss on disposal of assets, net	1	—	383	—
Total operating expenses	14,027	17,119	34,904	27,516
Operating loss	(11,926)	(14,984)	(29,702)	(20,944)
Other expense (income), net:				
Interest (income) expense, net	(31)	33	(47)	804
Warrant expense	—	2,813	—	2,813
Loss on extinguishment of debt, net	—	—	—	2,061
Loss (Gain) on foreign currency exchange, net	279	(101)	467	(170)
Other	—	—	(9)	—
Loss before income tax provision	(12,174)	(17,729)	(30,113)	(26,452)
Income tax (benefit) expense	(363)	(30)	(511)	23
Net loss	\$ (11,811)	\$ (17,699)	\$ (29,602)	\$ (26,475)
Net loss per share - basic and diluted:				
Net loss per share - basic and diluted (as revised for the three and nine months ended September 30, 2021, see Note 1)	\$ (0.52)	\$ (1.04)	\$ (1.47)	\$ (3.07)
Shares used to compute basic and diluted net loss per share (as revised for the three and nine months ended September 30, 2021, see Note 1)	22,559,072	17,088,254	20,155,117	8,614,321

See accompanying notes to Condensed Consolidated Financial Statements.

RESHAPE LIFESCIENCES INC.

**Condensed Consolidated Statements of Comprehensive Loss
(unaudited)
(dollars in thousands)**

	Three Months Ended September 30,		Nine Months Ended September 30,	
	2022	2021	2022	2021
Net loss	<u>\$ (11,811)</u>	<u>\$ (17,699)</u>	<u>\$ (29,602)</u>	<u>\$ (26,475)</u>
Foreign currency translation adjustments	<u>4</u>	<u>2</u>	<u>24</u>	<u>14</u>
Other comprehensive income, net of tax	<u>4</u>	<u>2</u>	<u>24</u>	<u>14</u>
Comprehensive loss	<u>\$ (11,807)</u>	<u>\$ (17,697)</u>	<u>\$ (29,578)</u>	<u>\$ (26,461)</u>

See accompanying notes to Condensed Consolidated Financial Statements.

RESHAPE LIFESCIENCES INC.

Condensed Consolidated Statements of Stockholders' Equity
(unaudited)
(dollars in thousands)

	Three Months Ended September 30, 2022							Total Stockholders' Equity
	Series C Convertible Preferred Stock		Common Stock		Additional Paid-in Capital	Accumulated Deficit	Accumulated Other Comprehensive Loss	
	Shares	Amount	Shares	Amount				
Balance June 30, 2022	95,388	\$ —	19,629,708	\$ 20	\$ 626,965	\$ (594,551)	\$ (72)	\$ 32,362
Net loss	—	—	—	—	—	(11,811)	—	(11,811)
Other comprehensive income, net of tax	—	—	—	—	—	—	4	4
Stock compensation	—	—	—	—	388	—	—	388
Issuance of stock from RSUs	—	—	116,040	—	—	—	—	—
Exercise of warrants	—	—	2,850,000	3	(3)	—	—	—
Balance September 30, 2022	<u>95,388</u>	<u>\$ —</u>	<u>22,595,748</u>	<u>\$ 23</u>	<u>\$ 627,350</u>	<u>\$ (606,362)</u>	<u>\$ (68)</u>	<u>\$ 20,943</u>

	Nine Months Ended September 30, 2022							Total Stockholders' Equity
	Series C Convertible Preferred Stock		Common Stock		Additional Paid-in Capital	Accumulated Deficit	Accumulated Other Comprehensive Loss	
	Shares	Amount	Shares	Amount				
Balance December 31, 2021	95,388	\$ —	17,831,875	\$ 18	\$ 622,906	\$ (576,760)	\$ (92)	\$ 46,072
Net loss	—	—	—	—	—	(29,602)	—	(29,602)
Other comprehensive income, net of tax	—	—	—	—	—	—	24	24
Stock compensation	—	—	—	—	1,957	—	—	1,957
Issuance of stock from RSUs	—	—	1,025,231	1	(1)	—	—	—
Exercise of warrants	—	—	3,738,642	4	2,488	—	—	2,492
Balance September 30, 2022	<u>95,388</u>	<u>\$ —</u>	<u>22,595,748</u>	<u>\$ 23</u>	<u>\$ 627,350</u>	<u>\$ (606,362)</u>	<u>\$ (68)</u>	<u>\$ 20,943</u>

See accompanying Notes to Condensed Consolidated Financial Statements.

RESHAPE LIFESCIENCES INC.

Condensed Consolidated Statements of Stockholders' Equity (Continued)
(unaudited)
(dollars in thousands)

	Three Months Ended September 30, 2021									
	Series B Convertible Preferred Stock		Series C Convertible Preferred Stock		Common Stock		Additional Paid-in Capital	Accumulated Deficit	Accumulated Comprehensive Income (Loss)	Total Stockholders' Equity
	Shares	Amount	Shares	Amount	Shares	Amount				
Balance June 30, 2021	—	\$ —	95,388	\$ —	8,168,622	\$ 8	\$ 564,118	\$ (523,603)	\$ (109)	\$ 40,414
Net loss	—	—	—	—	—	—	—	(17,699)	—	(17,699)
Other comprehensive income, net of tax	—	—	—	—	—	—	—	—	2	2
Stock compensation	—	—	—	—	—	—	10,720	—	—	10,720
Stock options exercised	—	—	—	—	90,832	—	201	—	—	201
Issuance of stock from RSUs	—	—	—	—	1,755,710	2	(2)	—	—	—
Issuance of warrants	—	—	—	—	—	—	1,535	—	—	1,535
Institutional exercise of warrants	—	—	—	—	7,635,667	8	43,433	—	—	43,441
Warrant liability reclassified to equity	—	—	—	—	—	—	476	—	—	476
Restricted shares issued for consulting services	—	—	—	—	37,500	—	130	—	—	130
Balance September 30, 2021	—	\$ —	95,388	\$ —	17,688,331	\$ 18	\$ 620,611	\$ (541,302)	\$ (107)	\$ 79,220

	Nine Months Ended September 30, 2021									
	Series B Convertible Preferred Stock		Series C Convertible Preferred Stock		Common Stock		Additional Paid-in Capital	Accumulated Deficit	Accumulated Other Comprehensive Loss	Total Stockholders' Equity
	Shares	Amount	Shares	Amount	Shares	Amount				
Balance December 31, 2020	3	\$ —	95,388	\$ 1	3,486,253	\$ 4	\$ 529,431	\$ (514,827)	\$ (121)	\$ 14,488
Net loss	—	—	—	—	—	—	—	(26,475)	—	(26,475)
Other comprehensive income, net of tax	—	—	—	—	—	—	—	—	14	14
Issuance of common stock pursuant to reverse acquisition	(3)	—	—	(1)	3,340,035	3	30,559	—	—	30,561
Stock compensation	—	—	—	—	—	—	10,457	—	—	10,457
Stock options exercised	—	—	—	—	182,696	—	416	—	—	416
Issuance of stock from RSUs	—	—	—	—	1,755,710	2	(2)	—	—	—
Issuance of warrants	—	—	—	—	—	—	4,508	—	—	4,508
Institutional exercise of warrants	—	—	—	—	8,886,137	9	44,636	—	—	44,645
Warrant liability reclassified to equity	—	—	—	—	—	—	476	—	—	476
Restricted shares issued for consulting services	—	—	—	—	37,500	—	130	—	—	130
Balance September 30, 2021	—	\$ —	95,388	\$ —	17,688,331	\$ 18	\$ 620,611	\$ (541,302)	\$ (107)	\$ 79,220

See accompanying Notes to Condensed Consolidated Financial Statements.

RESHAPE LIFESCIENCES INC.
**Condensed Consolidated Statements of Cash Flows
(unaudited)
(dollars in thousands)**

	Nine Months Ended September 30,	
	2022	2021
Cash flows from operating activities:		
Net loss	\$ (29,602)	\$ (26,475)
Adjustments to reconcile net loss to net cash used in operating activities:		
Depreciation expense	271	132
Amortization of intangible assets	1,367	1,284
Noncash interest expense	—	104
Impairment of intangible assets	6,947	—
Loss on extinguishment of debt, net	—	2,061
Loss on disposal of assets, net	383	—
Stock-based compensation	1,957	10,457
Bad debt (recoveries) expense	(72)	62
Provision for inventory excess and obsolescence	148	162
Deferred income tax	(555)	—
Warrant expense	—	2,813
Amortization of debt discount and deferred debt issuance costs	—	494
Other noncash items	(21)	12
Change in operating assets and liabilities, net of business combination:		
Accounts and other receivables	657	(900)
Inventory	(1,317)	21
Prepaid expenses and other current assets	696	(399)
Accounts payable and accrued liabilities	129	(1,838)
Warranty liability	(297)	(347)
Other	237	408
Net cash used in operating activities	(19,072)	(11,949)
Cash flows from investing activities:		
Capital expenditures	(52)	(285)
Proceeds from acquisition	—	5,207
Proceeds from sale of capital assets	39	—
Cash (used in) provided by investing activities:	(13)	4,922
Cash flows from financing activities:		
Payments of financing costs	—	(3,234)
Proceeds from warrants exercised	2,492	45,616
Proceeds from stock options exercised	—	417
Proceeds from credit agreement	—	1,000
Payment of credit agreement	—	(10,500)
Net cash provided by financing activities	2,492	33,299
Effect of currency exchange rate changes on cash and cash equivalents	24	14
Net (decrease) increase in cash, cash equivalents and restricted cash	(16,569)	26,286
Cash, cash equivalents and restricted cash at beginning of period	22,815	3,007
Cash, cash equivalents and restricted cash at end of period	\$ 6,246	\$ 29,293
Supplemental disclosure:		
Cash paid for income taxes	\$ —	\$ 37
Cash paid for interest	—	296
Noncash investing and financing activities:		
Capital expenditures accruals	\$ 79	\$ 68
Purchase price, net of cash received	—	25,355
Fair value of warrants included as a component of loss on extinguishment of debt	—	2,974

See accompanying notes to Condensed Consolidated Financial Statements.

ReShape Lifesciences Inc.

Notes to Condensed Consolidated Financial Statements
(dollars in thousands, except per share amounts; unaudited)

(1) Basis of Presentation

The accompanying interim condensed consolidated financial statements and related disclosures of Reshape Lifesciences Inc. (the "Company" or "ReShape") have been prepared pursuant to the rules and regulations of the Securities and Exchange Commission ("SEC") and should be read in conjunction with the consolidated financial statements and notes included in the Company's Annual Report on Form 10-K for the year ended December 31, 2021, filed on April 8, 2022. Certain information and footnote disclosures normally included in financial statements prepared in accordance with generally accepted accounting principles in the United States of America ("GAAP") have been condensed or omitted.

In the opinion of management, the interim consolidated condensed financial statements reflect all adjustments considered necessary for a fair statement of the interim periods. All such adjustments are of a normal, recurring nature. The results of operations for the interim periods are not necessarily indicative of the results of operations to be expected for the full year.

Revision of Previously Issued Financial Statement for Correction of Immaterial Errors

The Company revised the statement of operations for the periods ended December 31, 2020, March 31, 2021, June 30, 2021, September 30, 2021, December 31, 2021, and March 31, 2022, to reflect the correction of an immaterial error in the computation of the weighted average shares used to compute basic and diluted net loss per share. This revision has no impact on the Company's net loss or accumulated deficit.

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The following table summarizes the effect of the revision on each financial statement line item for the periods ended as indicated:

	Condensed Consolidated Statement of Operations		
	As Previously Reported	Adjustment	As Revised
For the year ended December 31, 2020			
Net loss per share - basic and diluted:			
Net loss per share - basic and diluted	\$ (5.54)	\$ (0.01)	\$ (5.55)
Shares used to compute basic and diluted net loss per share	3,904,762	(6,612)	3,898,150
Three months ended March 31, 2021			
Net loss per share - basic and diluted:			
Net loss per share - basic and diluted	\$ (1.24)	\$ —	\$ (1.24)
Shares used to compute basic and diluted net loss per share	3,927,986	10,159	3,938,145
Three months ended June 30, 2021			
Net loss per share - basic and diluted:			
Net loss per share - basic and diluted	\$ (0.47)	\$ (0.39)	\$ (0.86)
Shares used to compute basic and diluted net loss per share	8,226,144	(3,672,168)	4,553,976
Six months ended June 30, 2021			
Net loss per share - basic and diluted:			
Net loss per share - basic and diluted	\$ (1.11)	\$ (0.96)	\$ (2.07)
Shares used to compute basic and diluted net loss per share	7,928,702	(3,682,642)	4,246,060
Three months ended September 30, 2021			
Net loss per share - basic and diluted:			
Net loss per share - basic and diluted	\$ (1.48)	\$ 0.44	\$ (1.04)
Shares used to compute basic and diluted net loss per share	11,997,370	5,090,884	17,088,254
Nine months ended September 30, 2021			
Net loss per share - basic and diluted:			
Net loss per share - basic and diluted	\$ (2.51)	\$ (0.56)	\$ (3.07)
Shares used to compute basic and diluted net loss per share	10,546,683	(1,932,362)	8,614,321
For the year ended December 31, 2021			
Net loss per share - basic and diluted:			
Net loss per share - basic and diluted	\$ (5.00)	\$ (0.67)	\$ (5.67)
Shares used to compute basic and diluted net loss per share	12,378,502	(1,452,519)	10,925,983
Three months ended March 31, 2022			
Net loss per share - basic and diluted:			
Net loss per share - basic and diluted	\$ (0.44)	\$ 0.00	\$ (0.44)
Shares used to compute basic and diluted net loss per share	18,539,568	11,700	18,551,268

Reverse Stock Split and Merger Exchange Ratio

On June 15, 2021, and immediately prior to the closing of the merger of Obalon Therapeutics, Inc. and ReShape Lifesciences Inc., the Company effected a 1-for-3 reverse stock split. Accordingly, all share and per share amounts for the period presented in the accompanying condensed consolidated financial statements and notes thereto have been adjusted retroactively, where applicable, to reflect the reverse stock split. No fractional shares were issued in connection with the reverse stock split. Unless otherwise noted, all references to shares of the Company's common stock and per share amounts have also been adjusted to reflect the exchange ratio of 0.5367 Obalon shares for one ReShape share in connection with the merger.

Summary of Significant Accounting Policies

The Company's significant accounting policies are described in Note 2 to its audited consolidated financial statements for the year ended December 31, 2021, which are included in the Company's Annual Report on Form 10-K which was filed with the SEC on April 8, 2022.

Use of Estimates

The preparation of financial statements in conformity with GAAP requires management to make estimates and judgments that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities as of the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. The Company bases its estimates on historical experience and on various other assumptions that are believed to be reasonable under the circumstances. Actual results may materially differ from these estimates. The Company reviews its estimates on an ongoing basis or as new information becomes available to ensure that these estimates appropriately reflect changes in its business.

Acquisition

The Company accounts for business combinations in accordance with Accounting Standards Codification (“ASC”) 805, Business Combinations. The results of businesses acquired in a business combination are included in the Company’s consolidated financial statements from the date of the acquisition. Purchase accounting results in assets and liabilities of an acquired business generally being recorded at their estimated fair values on the acquisition date. Any excess consideration over the fair value of assets acquired and liabilities assumed is recognized as goodwill. Transaction costs associated with business combinations are expensed as incurred and are included in general and administrative related costs in the consolidated statements of operations. The Company performs valuations of assets acquired and liabilities assumed and allocates the purchase price to its respective assets and liabilities. Determining the fair value of assets acquired and liabilities assumed requires management to use significant judgment and estimates.

Upon completion of the business combination with Obalon on June 15, 2021, the transaction was treated as a “reverse acquisition” for financial accounting purposes. As a result of the controlling interest of the former shareholders of ReShape, for financial statement reporting and accounting purposes, ReShape was considered the acquirer under the acquisition method of accounting in accordance with the Financial Accounting Standards Board (“FASB”) Accounting Standards Codification (“ASC”) 805-10-55. The reverse acquisition is deemed a capital transaction in substance whereas the historical assets and liabilities of Obalon before the business combination were replaced with the historical financial statements of ReShape in all future filings with the SEC.

Goodwill and Long-Lived Assets

Goodwill represents the excess of the cost of an acquired business over the fair value of the identifiable tangible and intangible assets acquired and liabilities assumed in a business combination.

Indefinite-lived intangible assets relate to in-process research and development (“IPR&D”) acquired in business combinations. The estimated fair values of IPR&D projects acquired in a business combination which have not reached technological feasibility are capitalized and accounted for as indefinite-lived intangible assets until completion or abandonment of the projects. In accordance with guidance within FASB ASC 350 “Intangibles - Goodwill and Other,” goodwill and identifiable intangible assets with indefinite lives are not subject to amortization but must be evaluated for impairment.

We evaluate long-lived assets, including finite-lived intangible assets, for impairment by comparison of the carrying amounts to future net undiscounted cash flows expected to be generated by such assets when events or changes in circumstances indicate the carrying amount of an asset may not be recoverable. Should an impairment exist, the impairment loss would be measured based on the excess carrying value of the asset over the asset’s fair value or estimates of future discounted cash flows.

For goodwill and indefinite-lived intangible assets, in-process research and development, we review for impairment annually and upon the occurrence of certain events as required by ASC Topic 350, “Intangibles — Goodwill and Other.” Goodwill and indefinite-lived intangible assets are tested at least annually for impairment and more frequently if events or changes in circumstances indicate that the asset might be impaired. We review goodwill for impairment by first assessing qualitative factors to determine whether it is more likely than not that the fair value of a reporting unit is less than its carrying amount as a basis for determining whether it is necessary to perform the two-step goodwill impairment test. If we are able to determine that it is not more likely than not that the fair value of a reporting unit is less than its carrying amount, we would conclude that goodwill is not impaired. If the carrying amount of a reporting unit is zero or negative, the second step of the impairment test is performed to measure the amount of

impairment loss, if any, when it is more likely than not that a goodwill impairment exists. The Company recorded an impairment loss for indefinite-lived intangible assets for the three months and nine months ended September 30, 2022. See Note 4 below for details.

Fair Value of Financial Instruments

The carrying amounts of cash equivalents, accounts receivable, accounts payable and certain accrued and other liabilities approximate fair value due to their short-term maturities. Refer to Note 5 regarding the fair value of debt instruments and Note 9 regarding fair value measurements and inputs of warrants.

Net Loss Per Share

The following table sets forth the potential shares of common stock that are not included in the calculation of diluted net loss per share because to do so would be anti-dilutive as of the end of each period presented:

	<u>September 30,</u>	
	<u>2022</u>	<u>2021</u>
Stock options	1,140,996	592,320
Unvested restricted stock units	288,493	1,807,014
Convertible preferred stock	38	38
Warrants	6,952,328	6,777,333

Recent Accounting Pronouncements

There were no new accounting standards adopted by the Company during the nine months ended September 30, 2022.

New accounting standards not yet adopted are discussed below.

In June 2016, the FASB issued Accounting Standards Update (“ASU”) No. 2016-13, *Financial Instruments – Credit Losses (Topic 326): Measurement of Credit Losses on Financial Instruments*, which is intended to provide financial statement users with more useful information about expected credit losses on financial assets held by a reporting entity at each reporting date. In May 2019, the FASB issued ASU No. 2019-05, which amended the new standard by providing targeted transition relief. The new guidance replaces the existing incurred loss impairment methodology with a methodology that requires consideration of a broader range of reasonable and supportable forward-looking information to estimate all expected credit losses. In November 2019, the FASB issued ASU No. 2019-11, which amended the new standard by providing additional clarification. This guidance is effective for the fiscal years and interim periods within those years beginning after December 15, 2022. The Company is currently evaluating the impact the guidance will have on its consolidated financial statements.

(2) Liquidity and Management’s Plans

The Company currently does not generate revenue sufficient to offset operating costs and anticipates such shortfalls to continue primarily due to the unpredictability of new variants of COVID-19, which may result in a slow-down of elective surgeries and restrictions in some locations. As of September 30, 2022, the Company had net working capital of approximately \$6.1 million, primarily due to cash and cash equivalents and restricted cash of \$6.2 million. The Company’s principal source of liquidity as of September 30, 2022, consisted of approximately \$6.2 million of cash and cash equivalents and restricted cash, and \$2.2 million of accounts receivable. Based on its available cash resources, the Company may not have sufficient cash on hand to fund its current operations for more than twelve months from the date of filing this Quarterly Report on Form 10-Q. This condition raises substantial doubt about the Company’s ability to continue as a going concern. The Company believes in the viability of its business strategy and in its ability to raise additional funds, however, there can be no assurance to that effect.

Given the Company’s projected operating requirements and its existing cash and cash equivalents management’s plans include evaluating different strategies to obtain the required funding of future operations. Our anticipated operations include plans to (i) increase the sales and operations of the Company with the Lap-Band product line in order

to expand sales domestically and internationally (ii) improve operational efficiencies, resulting in a reduction of operational expenses, as well as a reduction to marketing and advertising costs, primarily due to focusing on digital media rather than television and print and (iii) to continue promoting our reshapecare virtual health coaching program as an addition to bariatric surgery or as an alternative to individuals that do not meet the criteria and/or do not want to go through bariatric surgery. If sales do not improve, we will reduce our expenditures for marketing, clinical and product development activities to maintain operational activities until a period of time in which we could obtain additional debt or equity financing to support our operations. However, there can be no assurance that the Company will be able to secure such additional financing. Therefore, the plans cannot be deemed probable of being implemented. As a result, the Company's plans do not alleviate substantial doubt about our ability to continue as a going concern.

The accompanying financial statements have been prepared on a going concern basis, which contemplates the realization of assets and satisfaction of liabilities in the ordinary course of business. The financial statements do not include any adjustments relating to the recoverability and classification of recorded asset amounts or the amounts and classification of liabilities that might result from the outcome of the uncertainties described above.

COVID-19 Risk and Uncertainties and CARES Act

COVID-19 pandemic continues to lead to unprecedented restrictions on, distributions in, and other related impacts on business and personal activities, including a shift in healthcare priorities, which resulted in a significant decline in medical procedures in 2020 in the United States and foreign countries. Concerns remain regarding the pace of economic recovery due to virus resurgences, including new variants, across the globe as well as vaccine distribution and hesitancy. The United States and other foreign governments may reimplement restrictions and other requirements in light of the continuing spread of the COVID-19 pandemic. Due to the continuing uncertainty caused by the COVID-19 pandemic, the full extent to which the pandemic will directly or indirectly impact the Company's business, results of operations and financial condition, including sales, expenses, manufacturing, clinical trials, research and development costs, reserves and allowances, will depend on future developments that are highly uncertain and difficult to predict. These developments include, but are not limited to, the duration and spread of the outbreak (including new and more contagious variants of COVID-19), its severity, the actions to contain the virus or address its impact, the public acceptance and efficacy of vaccines and other treatments, United States and foreign governments actions to respond to the reduction of global activity, and how quickly and to what extent normal economic and operating conditions can resume.

On March 27, 2020, President Trump signed into law the "Coronavirus Aid, Relief, and Economic Security (CARES) Act." The CARES Act, among other things, included provisions relating to refundable payroll tax credits, deferment of employer side social security payments, net operating loss carryback periods, alternative minimum tax credit refunds, modifications to the net interest deduction limitations, increased limitations on qualified charitable contributions, and technical corrections to tax depreciation methods for qualified improvement property. The CARES Act established the Paycheck Protection Program ("PPP") under which the Company received a PPP loan. On February 3, 2021, the Company submitted the application for PPP loan forgiveness according to the terms and conditions of the United States Small Business Administration's ("SBA") Loan Forgiveness Application (Revised June 24, 2020). On March 1, 2021, the Company received confirmation from the SBA that the PPP Loan had been forgiven in full including all interest incurred. This may still be subject to audit by the SBA or relevant authorities, and subject to terms and conditions of the PPP program. The Company was also able to benefit from the employee retention credit. For further details on the PPP loan and the employee retention credit, see Note 5 below.

(3) Supplemental Balance Sheet Information

Components of selected captions in the condensed consolidated balance sheets consisted of the following:

Inventory:

	<u>September 30,</u> 2022	<u>December 31,</u> 2021
Raw materials	\$ 1,109	\$ 829
Sub-assemblies	927	682
Finished goods	2,135	1,492
Total inventory	<u>\$ 4,171</u>	<u>\$ 3,003</u>

Prepaid expenses and other current assets:

	<u>September 30,</u> 2022	<u>December 31,</u> 2021
Prepaid insurance	\$ 721	\$ 736
Prepaid advertising and marketing	48	698
Other current assets	157	188
Total prepaid expenses and other current assets	<u>\$ 926</u>	<u>\$ 1,622</u>

Accrued and other liabilities:

	<u>September 30,</u> 2022	<u>December 31,</u> 2021
Payroll and benefits	\$ 2,535	\$ 1,527
Accrued legal settlements	1,000	—
Customer deposits	644	549
Taxes	120	307
Accrued insurance premium	115	301
Accrued professional	168	300
Other liabilities	266	185
Total accrued and other liabilities	<u>\$ 4,848</u>	<u>\$ 3,169</u>

(4) Goodwill and Intangible Assets

Indefinite-lived intangible assets consist of IPR&D for the ReShape Vest recorded in connection with the Company's 2017 acquisition of BarioSurg, Inc. and developed technology recorded in connection with the Obalon acquisition. The Company's finite-lived intangible assets consists of developed technology, trademarks and tradenames, and covenant not to compete. The estimated useful lives of these finite-lived intangible assets range from 3 to 10 years. The amortization expenses for both the three months ended September 30, 2022 and 2021, was \$0.5 million, and the nine months ended September 30, 2022 and 2021 were \$1.4 million and \$1.3 million, respectively.

Impairment of In-Process Research and Development

During the quarter ended September 30, 2022, the Company determined that it was stopping the clinical trials for the ReShape Vest and was closing out the previous trials that occurred, as significant additional clinical work and cost would be required to achieve regulatory approval for the ReShape Vest. As such, we determined the carrying value of the IPR&D asset was impaired and recognized a non-cash impairment charge of approximately \$6.9 million on the condensed consolidated balance sheet as of September 30, 2022, which reduced the value of this asset to zero.

	September 30, 2022			
	Weighted Average Useful Life (years)	Gross Carrying Amount	Accumulated Amortization	Net Book Value
Finite-lived intangible assets:				
Developed technology	10.8	\$ 17,092	\$ (5,681)	\$ 11,411
Trademarks/Tradenames	10.0	2,045	(943)	1,102
Covenant not to compete	3.0	76	(76)	—
		19,213	(6,700)	12,513
Indefinite-lived intangible assets:				
In-process research and development	indefinite	—	—	—
Total		<u>\$ 19,213</u>	<u>\$ (6,700)</u>	<u>\$ 12,513</u>
	December 31, 2021			
	Weighted Average Useful Life (years)	Gross Carrying Amount	Accumulated Amortization	Net Book Value
Finite-lived intangible assets:				
Developed technology	10.8	\$ 17,092	\$ (4,467)	\$ 12,625
Trademarks/Tradenames	10.0	2,045	(790)	1,255
Covenant not to compete	3.0	76	(76)	—
		19,213	(5,333)	13,880
Indefinite-lived intangible assets:				
In-process research and development	indefinite	6,947	—	6,947
Total		<u>\$ 26,160</u>	<u>\$ (5,333)</u>	<u>\$ 20,827</u>

(5) Debt

CARES Act

On April 24, 2020, the Company entered into a PPP Loan agreement with Silicon Valley Bank ("SVB") under the PPP, which is part of the CARES Act administered by the United States Small Business Administration ("SBA"). As part of the application for these funds, the Company in good faith, certified that the current economic uncertainty made the loan request necessary to support the ongoing operations of the Company. This certification further required the Company to take into account our then-current business activity and our ability to access other sources of liquidity sufficient to support ongoing operations in a manner that is not significantly detrimental to the business. Under this program, the Company received proceeds of \$1.0 million from the PPP Loan. In accordance with the requirements of the

PPP, the Company used proceeds from the PPP Loan primarily for payroll costs, rent and utilities. The PPP Loan carried a 1.00% interest rate per annum, matured on April 24, 2022, and was subject to the terms and conditions applicable to loans administered by the SBA under the PPP.

On February 3, 2021, the Company submitted the application for PPP loan forgiveness, in accordance with the terms and conditions of the SBA's Loan Forgiveness Application (revised June 24, 2020). On March 1, 2021, the Company received confirmation from the SBA that the PPP Loan was forgiven in full including all interest incurred, which resulted in a gain on debt extinguishment of \$1.0 million, during the three months ended March 31, 2021.

On December 27, 2020, the Taxpayer Certainty and Disaster Tax Relief Act of 2020 expanded certain benefits made available under the enhanced CARES Act, including modifying and extending the employee retention credit. As modified, the employee retention credit provides eligible employers with fewer than 500 employees a refundable tax credit against the employer's share of social security taxes. The employee retention credit is equal to 70% of qualified wages paid to employees during calendar year 2021 for a maximum credit of \$7,000 per employee for each calendar quarter through September 30, 2021. The Company recognized a \$0.3 million employee retention credit during the three months ended March 31, 2021, which was offset against payroll tax expense.

Credit Agreement

On January 19, 2021, the Company and the lender thereunder (the "Lender") entered into an amendment to the credit agreement, originally entered into on March 25, 2020, that increased the amount available under delayed draw term loans by \$1.0 million, and issued an additional 1,000,000 Series G Warrants. The Company evaluated the accounting related to the amendment and in conjunction with the warrants issued. Based on this analysis the Company determined the agreements are substantially different and extinguished the original credit agreement and recorded the amended credit agreement as a new debt at a fair value of \$10.0 million. As a result, during the three months ended March 31, 2021, the Company recorded a debt discount of approximately \$0.5 million and a \$3.0 million loss on extinguishment of debt, which is comprised of the fair value of the warrants and unamortized debt issuance cost with the original credit agreement, offset by the debt discount. At March 31, 2021, there was approximately \$0.1 million of unamortized debt discount. Pursuant to the amendment of the credit agreement, the maturity date of the loans are March 31, 2021 and the loans bear interest at LIBOR plus 2.5%.

On March 10, 2021, the Company and the Lender entered into an amendment to the credit agreement that extended the maturity date from March 31, 2021 to March 31, 2022. The Company has accounted for this amendment as a debt modification. The associated unamortized debt discount on the January 19, 2021 amendment of \$0.1 million was amortized as interest expense over the term of the amended credit agreement.

On June 28, 2021, the Company entered into a warrant exercise agreement with existing investors, including the Lender, to exercise certain outstanding warrants. For further details on this transaction see Note 9. The Company used some of the proceeds from this transaction to pay off the \$10.5 million of debt outstanding under the credit agreement.

(6) Leases

The Company has a noncancelable operating lease for office and warehouse space in San Clemente, which was extended by twelve months with an end date of June 30, 2023. The Company also had an operating lease and warehouse space in Carlsbad, California, which expired June 30, 2022. The Company does not have any short-term leases or financing lease arrangements. Lease and non-lease components are accounted for separately.

Operating lease costs were \$0.1 million and \$0.2 million for the three months ended September 30, 2022 and 2021, respectively, and \$0.6 million and \$0.5 million for the nine months ended September 30, 2022 and 2021, respectively. Variable lease costs were not material.

Supplemental information related to operating leases is as follows:

	September 30	December 31,
	2022	2021
Balance Sheet information		
Operating lease ROU assets	\$ 255	\$ 266
Operating lease liabilities, current portion	\$ 255	\$ 279
Total operating lease liabilities	\$ 255	\$ 279
Cash flow information for the nine months ended September 30,	2022	2021
Cash paid for amounts included in the measurement of operating leases liabilities	\$ 473	\$ 365

Maturities of operating lease liabilities were as follows:

Remainder of 2022	\$	87
2023		173
2024		—
Total lease payments		260
Less: imputed interest		5
Total lease liabilities	\$	255
Weighted-average remaining lease term at end of period (in years)		0.7
Weighted-average discount rate at end of period		5.1 %

(7) Acquisition

On June 15, 2021, the Company completed its merger with Obalon, which was treated as a reverse acquisition for accounting purposes, for an aggregate purchase price of \$30.6 million. This includes the issuance of 3,340,035 shares of common stock valued at \$30.6 million at the closing market price on the day of merger and the cancellation of 2,680,301 shares of common stock. As a result of the controlling interest of the former shareholders of ReShape, for financial statement reporting and accounting purposes, ReShape was considered the acquirer under the acquisition method of accounting in accordance with ASC 805-10-55. The reverse acquisition is deemed a capital transaction in substance whereas the historical assets and liabilities of Obalon before the business combination were replaced with the historical financial statements of ReShape in all future filings with the SEC. There were no acquisition related costs recognized for the three months and nine months ended September 30, 2022.

Tangible and intangible assets acquired were recorded based on their estimated fair values at the acquisition date. The excess of the purchase price over the fair value of the net assets acquired was recorded to goodwill. The following table summarizes the fair values of the assets acquired and liabilities assumed, primarily related to inventory, developed technology, goodwill (including the deductibility for tax purposes) and income tax related accruals:

Current assets	\$ 5,887
Property and equipment, net	796
Right-of-use assets	335
Other assets	1,898
Goodwill	21,566
Developed technology	2,730
Liabilities assumed	(2,650)
Total purchase price	30,562
Less: cash acquired	(5,207)
Total purchase price, net of cash acquired	\$ <u>25,355</u>

As part of the warrant agreements there was a provision that would provide the holders, at their election, a cash payment based on a Black-Scholes valuation of the warrants in connection with certain fundamental transactions. This clause could be exercised by the holders for 30 days subsequent to the date of the transaction. The Company performed a preliminary valuation of the warrants and recorded a liability at the time of the merger of \$2.0 million. During the third quarter of 2021, the Company completed its valuation of these warrants which resulted in a liability for the warrants of \$1.3 million, a decrease of \$0.7 million, which had a corresponding decrease to goodwill. The Company had one of the holders exercise the fundamental transaction option, and rather than paying cash both parties agreed on the Company issuing shares of common stock and new warrants to this investor. See Notes 8 and 9 below for additional details. As the 30 day period passed, the Company valued the remaining warrants using a Black-Scholes model with an exercise price ranging from \$13.20 to \$15.00 per share, a risk free rate of 0.44%, a volatility rate of 122.1% and a dividend rate of 0. This resulted in a total fair value of \$0.9 million as of July 15, 2021, with the change in fair value being recognized as a component of warrant expense. The ending liability of \$0.5 million was reclassified from a current liability to additional paid-in capital.

Goodwill includes expected synergies and other benefits the Company believes will result from the acquisition. The developed technology has been capitalized at fair value as an intangible asset with an estimated life of 15 years. The developed technology was determined using the income approach. This approach determines fair value based on cash flow projections which are discounted to present value using a risk-adjusted rate of return, using nonrecurring Level 3 inputs. The discount rate used was 22.0%. For the year ended December 31, 2021, the Company fully impaired goodwill due to the decline in market capitalization.

(8) Equity

Common Stock Issued Related to Restricted Stock Units

During the three months ended September 30, 2022 and 2021, the Company issued 116,040 shares of common stock and 1,755,710 shares of common stock, respectively; and during the nine months ended September 30, 2022 and 2021, the Company issued 1,025,231 shares of common stock and 1,755,710 shares of common stock, respectively, subject to vesting of the restricted stock units. For further details see Note 12.

September 2022 Cancellation of Restricted Stock Units

On September 27, 2022, the Company entered into an agreement with each of its non-employee directors, to rescind and cancel, for no consideration, the issuance of an aggregate of 622,103 restricted stock units that vested on January 1, 2022. In addition, three of the Company's non-employee directors forfeited, for no consideration, an aggregate of 380,145 shares of common stock units that were issued pursuant to restricted stock units that vested on July 22, 2021. Such rescission, cancellation and forfeiture was completed on November 1, 2022.

June 2022 Exercises of Warrants for Common Stock

On June 16, 2022, the Company entered into a warrant exercise agreement with an existing accredited investor to exercise certain outstanding warrants to purchase up to an aggregate of 3.7 million shares of common stock, of which 0.9 million shares were issued in June in accordance with the terms of the warrant exercise agreement, and 2.9 million shares are held in abeyance. In consideration for the immediate exercise of the existing warrants for cash, the exercising holders received new unregistered warrants to purchase up to an aggregate of 3.7 million shares (equal to 100% of the shares of common shares exercised) of the Company's common stock (the "New Warrants") in a private placement pursuant to Section (4)(2) of the Securities Act. In connection with the exercise, the Company also agreed to reduce the exercise price of the existing warrants and 1.6 million remaining unexercised warrants from \$6.00 to \$0.6665 per share, which is equal to the most recent closing price of the Company's common stock on the Nasdaq prior to the execution of the warrant exercise agreement. For further details on the warrants see Note 9 below.

The gross proceeds to the Company from the exercise was approximately \$2.5 million, prior to deducting warrant inducement agent fees and estimated offering expenses. The Company intends to use the remainder of the net proceeds for commercial growth, working capital and general corporate purposes.

August 2021 Issuance of Common Stock for Services

On August 11, 2021, the Company entered into a consulting agreement in which the Company issued to the consultant 37,500 shares of restricted common stock for the consulting services in a private placement in reliance on Section 4(a)(2) under the Securities Act of 1933, as amended (the "Securities Act"). The shares were deemed earned on the day of the agreement and became unrestricted six months after the agreement date which is when the contract term ends.

July 2021 Exchange of Warrants for Common Stock

On July 16, 2021, the Company entered into an exchange agreement (the "Exchange Agreement") with existing institutional investors to exchange certain outstanding warrants (the "Exchange Warrants") for shares of common stock and new warrants to purchase common stock. The investors held common stock purchase warrants issued by the Company prior to the merger of Obalon and ReShape. The merger constituted a fundamental transaction under the Exchange Warrants and, as a result thereof, pursuant to the terms and conditions of the Exchange Warrants, the investors were entitled to a cash payment equal to the Black Scholes value of the Exchange Warrants, calculated in accordance with the terms of the Exchange Warrants (the "Black Scholes Payment").

Subject to the terms and conditions set forth in the Exchange Agreement and, in reliance on Section 3(a)(9) of the Securities Act, in lieu of the Black Scholes Payment, the Company and the Investors agreed to exchange all of the Exchange Warrants for (a) a total of 504,861 shares of common stock, which was calculated by dividing the Black Scholes Payment by \$4.038, which was equal to 95% of the closing market price of the Company's common stock on The Nasdaq Capital Market on July 16, 2021 and (b) new warrants to purchase up to a total of 400,000 shares of common stock at an exercise price of \$4.038 with a term of five years. For further details on the warrants see Note 9 below.

June 2021 Exercises of Warrants for Common Stock

On June 28, 2021, the Company entered into a warrant exercise agreement with existing accredited investors to exercise certain outstanding warrants to purchase up to an aggregate of 7.9 million shares of the Company's common stock, of which 7.1 million shares were issued in July 2021, in accordance with the terms of the warrant exercise agreement. In consideration for the immediate exercise of the existing warrants for cash, the exercising holders received new unregistered warrants to purchase up to an aggregate of 5.9 million shares (equal to 75% of the shares of common stock issued in connection with the exercise) of the Company's common stock (the "New Warrants") in a private placement pursuant to Section 4(a)(2) of the Securities Act. The investors paid a cash purchase price for the New Warrants equal to \$0.09375 per share of common stock underlying the New Warrants. In connection with the exercise, the Company also agreed to reduce the exercise price of certain of the existing warrants to \$6.00, which is equal to the most recent closing price of the Company's common stock on The Nasdaq Capital Market prior to the execution of the warrant exercise agreement. For further details on the warrants see Note 9 below.

The gross proceeds to the Company from the exercise and the sale of the New Warrants was approximately \$45.5 million, prior to deducting placement agent fees and offering expenses. The Company used approximately \$10.8 million to pay off the credit agreement, including \$10.5 million of debt and \$0.3 million of accrued interest under its secured credit agreement dated March 25, 2020, as amended, see Note 5 above for further details. The Company intends to use the remainder of the net proceeds for working capital and general corporate purposes.

On June 18, 2021, the Company issued 100,000 shares of common stock to two healthcare focused institutional investors, totaling 200,000 shares of common stock and on June 21, 2021, the Company issued 130,445 and 57,229 shares of common stock to two healthcare focused institutional investors totaling 187,674 shares of common stock, as an exercise of pre-funded warrants issued in connection with the September 2019 private placement transactions. The Company received approximately \$0.1 million in connection with the exercises.

(9) Warrants

On June 16, 2022, the Company entered into a warrant exercise agreement with an existing accredited investor to exercise certain outstanding warrants. As part of this agreement the Company modified the warrants issued June 28, 2021, from an exercise price of \$6.00 to \$0.6665 per share. The Company issued a total of 3,738,642 shares of common stock in connection with this transaction and issued an additional 3,738,642 new warrants. These new warrants were valued at \$1.7 million using the fair value approach at the time of issuance. The fair value of the new warrants was determined using a Black Scholes option pricing model using a risk free rate of 3.32%, and expected term of 7.5 years, expected dividends of zero and expected volatility of 64.8%.

On July 16, 2021, the Company entered into an exchange agreement with an existing accredited investor to exchange certain outstanding warrants for shares of common stock and issued new warrants to purchase up to total of 400,000 shares of common stock at an exercise price of \$4.038 per share with a term of 5 years. These new warrants were valued at \$1.5 million using the fair value approach at the time of issuance. The fair value of the new warrants was determined using a Black Scholes option pricing model using a risk free rate of 0.79%, an expected term of five years, expected dividends of zero and expected volatility of 157.7%.

On June 28, 2021, the Company entered into a warrant exercise agreement with existing accredited investors to exercise certain outstanding warrants. As part of this agreement the Company modified the Series E warrants issued September 23, 2019 from an exercise price of \$10.64 per share to \$6.00 per share, the Series G warrants issued on March 25, 2020 from an exercise price of \$6.56 per share to \$6.00 per share, the Series G warrants issued on December 17, 2020 from an exercise price of \$6.21 per share to \$6.00 per share and the Series G warrants issued on January 21, 2021 from an exercise price of \$6.21 per share to \$6.00 per share. The Company issued a total of 7,929,384 shares of common stock in connection with this transaction and issued an additional 5,947,039 new warrants. These new warrants were valued at \$18.5 million using the fair value approach at the time of issuance. The fair value the new warrants was determined using a Black Scholes option pricing model using a risk free rate of 0.898%, an expected term of five years, expected dividends of zero and expected volatility of 97.6%.

On January 19, 2021, the Company issued 1,000,000 Series G Warrants, pre-merger, which were adjusted by the exchange ratio in the merger, to an institutional investor in connection with an amendment to the credit agreement. The Series G Warrants were valued at \$3.0 million using the fair value approach at the time of issuance and was recorded as a component of the loss on extinguishment of debt during the three months ended March 31, 2021. See Note 5 above for details. The fair value of the Series G Warrants was determined using a Black Scholes option pricing model using a risk free rate of 0.45%, an expected term of five years; expected dividends of zero and expected volatility of 97.1%.

(10) Revenue Disaggregation and Operating Segments

The Company conducts operations worldwide and has sales in the following regions: United States, Australia, Europe and Rest of World. For the three months and nine months ended September 30, 2022 and 2021, the Company primarily only sold the Lap-Band system. The following table presents the Company's revenue disaggregated by geography:

	Three Months Ended September 30,		Nine Months Ended September 30,	
	2022	2021	2022	2021
United States	\$ 2,412	\$ 2,745	\$ 6,565	\$ 7,897
Australia	164	278	533	849
Europe	206	653	1,009	1,622
Rest of world	16	32	23	90
Total revenue	<u>\$ 2,798</u>	<u>\$ 3,708</u>	<u>\$ 8,130</u>	<u>\$ 10,458</u>

Operating Segments

The Company conducts operations worldwide and is managed in the following geographical regions: United States, Australia, Europe and the Rest of World (primarily in the Middle East). All regions sell the Lap-Band system, which consisted of nearly all our revenue and gross profit for the three and nine months ended September 30, 2022 and 2021. During the three and nine months ended September 30, 2022 and 2021, there was minimal revenue for reshapecare. There was no revenue or gross profit recorded for the ReShape Vest or Diabetes Bloc-Stim Neuromodulation for the three months and nine months ended September 30, 2022 and 2021 as these two products are still in the development stage. There was also no revenue recorded for the recently acquired Obalon line.

(11) Income Taxes

During the three and nine months ended September 30, 2022, the Company recorded \$0.4 million and \$0.5 million, respectively, due to a reduction in the valuation allowance related to impairments of indefinite lived assets partially offset by state and foreign taxes. During the three months and nine months ended September 30, 2021, a \$30 thousand tax benefit and \$23 thousand tax expense, respectively, was recorded, primarily due to adjusted pre-tax income in Australia. The income tax provisions for the nine months ended September 30, 2022, and year ended December 31, 2021, were calculated using the discrete year-to-date method. The effective tax rate differs from the statutory tax rate of 21% primarily due to the existence of valuation allowances against net deferred tax assets and current liabilities resulting from the estimated state income tax liabilities and foreign tax liability.

In assessing the realization of deferred tax assets, the Company considers whether it is more likely than not that some portion or all of the deferred tax assets will not be realized. The ultimate realization of deferred tax assets is dependent upon the generation of future taxable income during periods in which those temporary differences become deductible. Based on the level of historical losses, projections of losses in future periods and potential limitations pursuant to changes in ownership under Internal Revenue Code Section 382, the Company provided a valuation allowance at both September 30, 2022 and December 31, 2021.

(12) Stock-based Compensation

Stock-based compensation expense related to stock options and RSUs issued under the ReShape Lifesciences Inc. Second Amended and Restated 2003 Stock Incentive Plan (the “Plan”) for the three months and nine months ended September 30, 2022 and 2021 were as follows:

	Three Months Ended September 30,		Nine Months Ended September 30,	
	2022	2021	2022	2021
Sales and marketing	\$ 38	\$ 1,085	\$ 294	\$ 1,085
General and administrative	278	8,404	1,397	8,141
Research and development	72	1,231	266	1,231
Total stock-based compensation expense	<u>\$ 388</u>	<u>\$ 10,720</u>	<u>\$ 1,957</u>	<u>\$ 10,457</u>

Stock Options

A summary of the status of the Company’s stock options as of September 30, 2022, and changes during the nine months ended September 30, 2022 are as follows:

	Shares	Weighted Average Exercise Price Per Share	Weighted Average Remaining Contractual Life (years)	Aggregate Intrinsic Value
Outstanding at December 31, 2021	885,039	7.97		\$ —
Options granted	560,154	1.18		
Options exercised	—	—		
Options cancelled	(304,197)	2.97		
Outstanding at September 30, 2022	<u>1,140,996</u>	5.97	8.8	\$ —
Exercisable at September 30, 2022	<u>673,777</u>	8.84	8.4	—
Vested and expected to vest at September 30, 2022	<u>1,140,996</u>	5.97	8.8	—

There was no intrinsic value of the outstanding stock options at September 30, 2022. The unrecognized share-based expense at September 30, 2022 was \$0.8 million, and will be recognized over a weighted average period of 2.7 years.

Stock option awards outstanding under the Company’s incentive plans have been granted at exercise prices that are equal to the market value of its common stock on the date of grant. Such options generally vest over a period of four years and expire at ten years after the grant date. The Company recognized compensation expense ratably over the vesting period. The Company uses a Black-Scholes option-pricing model to estimate the fair value of stock options granted, which requires the input of both subjective and objective assumptions as follows:

Expected Term – The estimate of expected term is based on the historical exercise behavior of grantees, as well as the contractual life of the options granted.

Expected Volatility – The expected volatility factor is based on the volatility of the Company’s common stock for a period equal to the term of the stock options.

Risk-free Interest Rate – The risk-free interest rate is determined using the implied yield for a traded zero-coupon U.S. Treasury bond with a term equal to the expected term of the stock options.

Expected Dividend Yield – The expected dividend yield is based on the Company’s historical practice of paying dividends on its common stock.

Restricted Stock Units

During the nine months ended September 30, 2022, the Company granted 200,417 RSUs and cancelled 582,545 RSUs.

A summary of the Company's unvested RSUs award activity for the nine months ended September 30, 2022, is as follows:

	Shares	Weighted Average Grant Date Fair Value
Unvested RSUs at December 31, 2021	1,711,318	\$ 4.36
Granted	200,417	1.18
Vested ⁽¹⁾	(1,040,697)	4.28
Cancelled/Forfeited	(582,545)	3.76
Non-vested RSUs at September 30, 2022	<u>288,493</u>	<u>3.63</u>

⁽¹⁾ At September 30, 2022, there were 15,466 shares of common stock related to RSU awards that had vested and the shares were not distributed to the participants until October of 2022.

The fair value of each RSU is the closing stock price on the Nasdaq of the Company's common stock on the date of grant. Upon vesting, a portion of the RSU award may be withheld to satisfy the statutory income tax withholding obligation. The remaining RSUs will be settled in shares of the Company's common stock after the vesting period. The unrecognized compensation cost related to the RSUs at September 30, 2022 was \$1.0 million and expected to be recognized over a period of 1.8 years.

(13) Commitment and Contingencies

Litigation

On August 6, 2021, Cowen and Company, LLC ("Cowen") filed a complaint against ReShape, as successor in interest to Obalon Therapeutics, in the Supreme Court of the State of New York based on an alleged breach of contract arising out of Cowen's prior engagement as Obalon's financial advisor. The complaint alleges that Cowen is entitled to be paid a \$1.35 million fee in connection with ReShape's merger with Obalon under the terms of Cowen's engagement agreement with Obalon. The complaint also seeks reimbursement of Cowen's attorneys' fees and interest in connection with its claim. The Company is unable to predict the ultimate outcome of this matter and the Company intends to vigorously defend this matter.

On August 18, 2021, H.C. Wainwright & Co., LLC ("Wainwright") filed a complaint against ReShape in the Supreme Court of the State of New York based on an alleged breach of contract arising out of Wainwright's prior engagement by ReShape in connection with certain capital raising transactions by ReShape. The complaint alleged that Wainwright was entitled to be paid a fee in connection with ReShape's capital raising transaction under the warrant exercise agreement that ReShape entered into on June 28, 2021. Wainwright alleged that its June and September 2019 engagement agreements with ReShape require ReShape to pay Wainwright a cash fee equal to 8.0% of the gross proceeds that ReShape received from the exercise of warrants issued pursuant to those engagement agreements, including warrants that were exercised in the June 2021 transaction. The complaint also sought reimbursement of Wainwright's attorneys' fees and interest in connection with its claim. On July 19, 2022, the Company entered into a definitive settlement and release agreement with Wainwright pursuant to which the Company made a one-time cash payment of \$1.0 million to fully and finally resolve such matter.

The Company is not aware of any pending or threatened litigation against it that could have a material adverse effect on the Company's business, operating results or financial condition, other than what is disclosed above. The medical device industry in which the Company operates is characterized by frequent claims and litigation, including claims regarding patent and other intellectual property rights as well as improper hiring practices. As a result the Company may be involved in various legal proceedings from time to time. As of September 30, 2022, the Company has accrued \$1.0 million for potential legal settlements.

Product Liability Claims

The Company is exposed to product liability claims that are inherent in the testing, production, marketing and sale of medical devices. Management believes any losses that may occur from these matters are adequately covered by insurance, and the ultimate outcome of these matters will not have a material effect on the Company's financial position or results of operations. The Company is not currently a party to any product liability litigation and is not aware of any pending or threatened product liability litigation that is reasonably possible to have a material adverse effect on the Company's business, operating results or financial condition.

(14) Subsequent Events

On November 8, 2022, the Company entered into a Securities Purchase Agreement (the "Purchase Agreement") with a certain institutional investor (the "Investor"), pursuant to which the Company agreed to issue and sell to the Investor in a registered direct offering (i) 2,392,524 shares of the Company's common stock, (ii) 2,500 shares of the Company's Series D Mirroring Preferred Stock, and (iii) pre-funded warrants to purchase 492,091 shares of common stock. Each share of common stock was sold at a price of \$0.26 per share, each share of Series D Mirroring Preferred Stock was sold at a price of \$0.001 per share and each pre-funded warrant was sold at an offering price of \$0.259 per share, for aggregate gross proceeds of \$750,000. Under the Purchase Agreement, the Company also agreed to issue and sell to the Investor in a concurrent private placement warrants to purchase an aggregate of 2,884,615 shares of common stock at an exercise price of \$0.30 per share, which will not be exercisable until six months following the closing date of the offering, and will expire five and one-half years following the closing date of the offering.

In connection with the offering, the Company also entered into a warrant amendment agreement with the Investor. Under the warrant amendment agreement, the Company agreed to amend certain existing warrants to purchase up to 5,348,146 shares of common stock that were previously issued to the Investor, with an exercise price of \$0.665 per share and expiration of June 2026 and December 2029, in consideration for their purchase of the securities in the offering, as follows (i) lower the exercise price of the existing warrants to \$0.30 per share, (ii) provide that the existing warrants, as amended, will not be exercisable until six months following the closing date of the offering, and (iii) extend the expiration date of the existing warrants with an expiration date of June 2026 by five and one-half years following the close of the offering.

The offering closed on November 9, 2022.

ITEM 2. MANAGEMENT’S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

The following discussion should be read in conjunction with the condensed consolidated financial statements and notes thereto appearing elsewhere in this Quarterly Report on Form 10-Q.

Except for the historical information contained herein, the matters discussed in this “Management’s Discussion and Analysis of Financial Condition and Results of Operations,” are forward-looking statements that involve risks and uncertainties. In some cases, these statements may be identified by terminology such as “may,” “will,” “should,” “expects,” “could,” “intends,” “might,” “plans,” “anticipates,” “believes,” “estimates,” “predicts,” “potential,” or “continue,” or the negative of such terms and other comparable terminology. These statements involve known and unknown risks and uncertainties that may cause our results, level of activity, performance or achievements to be materially different from those expressed or implied by the forward-looking statements. Factors that may cause or contribute to such differences include, among others, those discussed in the “Risk Factors” section included in Item 1A of our most recent Annual Report on Form 10-K.

Except as may be required by law, we undertake no obligation to update any forward-looking statement to reflect events after the date of this report.

Overview

We are the premier global weight-loss solutions company, offering an integrated portfolio of proven products and services that manage and treat obesity and associated metabolic disease. Our primary operations are in the following geographical areas: United States, Australia and certain European and Middle Eastern countries. Our current portfolio includes the Lap-Band Adjustable Gastric Banding System, the reshapecare virtual health coaching program, the ReShape Marketplace, the Obalon Balloon System, the ReShape Vest, an investigational device to help treat more patients with obesity, and the Diabetes Bloc-Stim Neuromodulation device, a technology under development as a new treatment for type 2 diabetes mellitus. There has been no revenue recorded for the ReShape Vest or the Diabetes Bloc-Stim Neuromodulation as these products are still in the development stage. We continue to explore the compliance requirements, manufacturing viability and quality system controls necessary for re-introducing the Obalon Balloon System.

Recent Developments

On September 16, 2022, the Company was awarded a \$300 thousand, Small Business Innovation Research grant for the development of ReShape’s Diabetes Bloc-Stim Neuromodulation device. This device utilizes its proprietary vagus nerve block (vBloc) technology platform, combined with vagus nerve stimulation, for the treatment of Type 2 diabetes and metabolic disorders. Specifically, the grant will fund development of the device for the treatment of hypoglycemia.

On July 27, 2022, the Company announced that its Board of Directors has appointed Paul F. Hickey as President and Chief Executive Officer and a member of the Board of Directors, effective August 15, 2022. Mr. Hickey succeeds Bart Bandy, who has separated from the Company to pursue other opportunities. Thomas Stankovich, Chief Financial Officer of the Company, served as Interim President and Chief Executive Officer until Mr. Hickey joined the Company. Dan W. Gladney, current Chair of the Board of Directors, assumed a more active role as Executive Chair, supporting Mr. Hickey and the Company on strategic matters.

On February 16, 2022, the Company renewed the office space lease in San Clemente, California for one year. This lease renewal will commence on July 1, 2022, and end on June 30, 2023.

Results of Operations

The following table sets forth certain data from our unaudited consolidated statements of operations expressed as percentages of revenue (in thousands):

	Three Months Ended September 30,				Nine Months Ended September 30,			
	2022		2021		2022		2021	
Revenue	\$ 2,798	100.0 %	\$ 3,708	100.0 %	\$ 8,130	100.0 %	\$ 10,458	100.0 %
Cost of goods sold	697	24.9 %	1,573	42.4 %	2,928	36.0 %	3,886	37.2 %
Gross profit	2,101	75.1 %	2,135	57.6 %	5,202	64.0 %	6,572	62.8 %
Operating expenses:								
Sales and marketing	2,619	93.6 %	3,496	94.3 %	11,990	147.5 %	6,186	59.2 %
General and administrative	3,872	138.4 %	12,052	325.0 %	13,488	165.9 %	19,085	182.5 %
Research and development	588	21.0 %	1,571	42.4 %	2,096	25.8 %	2,245	21.5 %
Impairment of intangible assets	6,947	248.3 %	—	— %	6,947	85.4 %	—	— %
Loss on disposal of assets, net	1	— %	—	— %	383	4.7 %	—	— %
Total operating expenses	14,027	501.3 %	17,119	461.7 %	34,904	429.3 %	27,516	263.2 %
Operating loss	(11,926)	(426.2)%	(14,984)	(404.1)%	(29,702)	(365.3)%	(20,944)	(200.4)%
Other expense (income), net:								
Interest (income) expense, net	(31)	(1.1)%	33	0.9 %	(47)	(0.6)%	804	7.7 %
Warrant expense	—	— %	2,813	75.9 %	—	— %	2,813	26.9 %
Loss (gain) on extinguishment of debt, net	—	— %	—	— %	—	— %	2,061	19.7 %
Loss (gain) on foreign currency	279	10.0 %	(101)	(2.7)%	467	5.7 %	(170)	(1.6)%
Other, net	—	— %	—	— %	(9)	(0.1)%	—	— %
Loss before income tax provision	(12,174)	(435.1)%	(17,729)	(478.1)%	(30,113)	(370.4)%	(26,452)	(253.0)%
Income tax expense (benefit)	(363)	(13.0)%	(30)	(0.8)%	(511)	(6.3)%	23	0.2 %
Net loss	\$ (11,811)	(422.1)%	\$ (17,699)	(477.3)%	\$ (29,602)	(364.1)%	\$ (26,475)	(253.3)%

Non-GAAP Disclosures

In addition to the financial information prepared in conformity with GAAP, we provide certain historical non-GAAP financial information. Management believes that these non-GAAP financial measures assist investors in making comparisons of period-to-period operating results.

Management believes that the presentation of this non-GAAP financial information provides investors with greater transparency and facilitates comparison of operating results across a broad spectrum of companies with varying capital structures, compensation strategies, and amortization methods, which provides a more complete understanding of our financial performance, competitive position, and prospects for the future. However, the non-GAAP financial measures presented in the Form 10-Q have certain limitations in that they do not reflect all of the costs associated with the operations of our business as determined in accordance with GAAP. Therefore, investors should consider non-GAAP financial measures in addition to, and not a substitute for, or as superior to, measures of financial performance prepared in accordance with GAAP. Further, the non-GAAP financial measures presented by the Company may be different from similarly named non-GAAP financial measures used by other companies.

Adjusted EBITDA

Management uses adjusted EBITDA in its evaluation of the Company's core results of operations and trends between fiscal periods and believes that these measures are important components of its internal performance measurement process. Adjusted EBITDA is defined as net loss before interest, taxes, depreciation and amortization, stock-based compensation, and other one-time costs.

The following table contains a reconciliation of GAAP net loss to non-GAAP net loss attributable to common stockholders for the three and nine months ended September 30, 2022 and 2021 (in thousands):

	Three Months Ended September 30,		Nine Months Ended September 30,	
	2022	2021	2022	2021
GAAP net loss	\$ (11,811)	\$ (17,699)	\$ (29,602)	\$ (26,475)
Adjustments:				
Interest (income) expense, net	(31)	33	(47)	804
Income tax expense (benefit)	(363)	(30)	(511)	23
Depreciation and amortization	543	548	1,638	1,416
Stock-based compensation expense	388	10,720	1,957	10,457
Impairment of intangible assets	6,947	—	6,947	—
Loss on disposal of assets, net	1	—	383	—
Loss on extinguishment of debt, net	—	—	—	2,061
Warrant expense	—	2,813	—	2,813
Professional fees incurred in connection with the Obalon merger	—	—	—	2,277
Non-GAAP loss	\$ (4,326)	\$ (3,615)	\$ (19,235)	\$ (6,624)

Comparison of Results of Operations

Three months ended September 30, 2022 and September 30, 2021

Revenue. The following table summarizes our unaudited revenue by geographic location based on the location of customers for the three months ended September 30, 2022 and 2021, as well as the percentage of each location to total revenue and the amount of change and percentage of change (dollars in thousands):

	Three Months Ended September 30,		Amount Change	Percentage Change		
	2022	2021				
United States	\$ 2,412	86.2 %	\$ 2,745	74.0 %	\$ (333)	(12.1)%
Australia	164	5.9 %	278	7.5 %	(114)	(41.0)%
Europe	206	7.4 %	653	17.6 %	(447)	(68.5)%
Rest of world	16	0.5 %	32	0.9 %	(16)	(50.0)%
Total revenue	\$ 2,798	100.0 %	\$ 3,708	100.0 %	\$ (910)	(24.5)%

Revenue totaled \$2.8 million for the three months ended September 30, 2022, which represents a contraction of 24.5%, or \$0.9 million compared to the same period in 2021. The primary reason for the decrease, is due to a decrease in sales throughout Europe. The Company experienced a decrease in domestic sales during the first quarter of 2022 due to the emergence in late 2021 of the fast-spreading omicron variants of COVID-19 resulting in a significant rise in global cases causing a significant number of bariatric centers to close December 2021 through February 2022. We did see revenue begin to increase, as the omicron variant began to subside. During the three months ended September 30, 2022, the Company placed more focus on domestic sales, resulting in lower international sales. Our expectation is revenue will continue to increase through the remainder of 2022, as we are focusing on a targeted digital media campaign near bariatric surgical centers that sell the Lap-Band system.

Cost of Goods Sold and Gross Profit. The following table summarizes our unaudited cost of revenue and gross profit for the three months ended September 30, 2022 and 2021, as well as the percentage compared to total revenue and amount of change and percentage of change (dollars in thousands):

	Three Months Ended September 30,				Amount	Percentage
	2022		2021		Change	Change
Revenue	\$ 2,798	100.0 %	\$ 3,708	100.0 %	\$ (910)	(24.5)%
Cost of goods sold	697	24.9 %	1,573	42.4 %	(876)	(55.7)%
Gross profit	\$ 2,101	75.1 %	\$ 2,135	57.6 %	\$ (34)	(1.6)%

Gross Profit. Gross profit for the both the three months ended September 30, 2022 and 2021, was \$2.1 million. Gross profit as a percentage of total revenue for the three months ended September 30, 2022, was 75.1% compared to 57.6% for the same period in 2021. The increase in gross profit percentage is due to an increase in domestic sales, which has a higher margin than international sales. Additionally, we had a reduction in payroll related costs during the third quarter of 2022.

Operating Expense. The following table summarizes our unaudited operating expenses for the three months ended September 30, 2022, and 2021, as well as the percentage of total revenue and the amount of change and percentage of change (dollars in thousands):

	Three Months Ended September 30,				Amount	Percentage
	2022		2021		Change	Change
Sales and marketing	\$ 2,619	93.6 %	\$ 3,496	94.3 %	\$ (877)	(25.1)%
General and administrative	3,872	138.4 %	12,052	325.1 %	(8,180)	(67.9)%
Research and development	588	21.0 %	1,571	42.4 %	(983)	(62.6)%
Loss on disposal of assets, net	1	- %	—	— %	1	100.0 %
Total operating expenses	\$ 7,080	253.0 %	\$ 17,119	461.8 %	\$ (10,039)	(58.6)%

Sales and Marketing Expense. Sales and marketing expenses for the three months ended September 30, 2022, decreased by \$0.9 million, or 25.1%, to \$2.6 million, compared to \$3.5 million for the same period in 2021. The decrease is primarily due to a decrease of \$1.0 million in stock-based compensation expense, as during the third quarter of 2021 the Company issued both RSUs and stock options that vested based on employee start dates prior to the grant date, therefore a portion of the RSUs and stock options were vested as of the grant date (which we refer to below as a look back provision), which resulted in a \$0.9 million expense at the time the awards were given. In addition, the Company had a \$0.2 million decrease in commission expense due to reduced sales compared to the third quarter of 2021. This was offset by a \$0.3 million increase in consulting and professional services, as we are working on developing the reshapecare platform.

General and Administrative Expense. General and administrative expenses for the three months ended September 30, 2022, decreased by \$8.2 million, or 67.9%, to \$3.9 million, compared to \$12.1 million for the same period in 2021. The decrease is primarily due to a decrease of \$8.1 million in stock-based compensation expense, as during the third quarter of 2021 the Company issued both RSUs and stock options containing a look back provision that resulted in a \$6.8 million expense at the time the awards were given. Additionally, there was a reduction in payroll related expenses of \$0.3 million.

Research and Development Expense. Research and development expenses for the three months ended September 30, 2022, decreased by \$1.0 million, or 62.6%, to \$0.6 million, compared to \$1.6 million for the same period in 2021. The decrease is primarily due to a decrease of \$1.2 million in stock-based compensation expense, as during the third quarter of 2021 the Company issued both RSUs and stock options containing a look back provision that resulted in a \$1.2 million expense at the time the awards were given. This was offset by a \$0.2 million increase in consulting and professional service expenses related to the ReShape's Diabetes Bloc-Stim Neuromodulation device.

Impairment of Intangible Assets. Impairment of intangible assets was \$6.9 million for the three months ended September 30, 2022, due to the impairment of in-process research and development assets. This is a result of the Company currently not continuing with clinical trials for the ReShape Vest. For further details see Note 4 above.

Loss (Gain) on Foreign Currency. The Company had a loss on foreign currency of \$0.3 million for the three months ended September 30, 2022, compared to a gain of \$0.1 million for the same period in 2021.

Income Tax (Benefit) Expense. The Company had an income tax benefit of \$0.4 million for the three months ended September 30, 2022, due to a reduction in the valuation allowance related to an impairment of indefinite lived assets, offset by income tax expense.

Nine months ended September 30, 2022 and September 30, 2021

Revenue. The following table summarizes our unaudited revenue by geographic location based on the location of customers for the nine months ended September 30, 2022 and 2021, as well as the percentage of each location to total revenue and the amount of change and percentage of change (dollars in thousands):

	Nine Months Ended September 30,				Amount Change	Percentage Change
	2022		2021			
United States	\$ 6,565	80.8 %	\$ 7,897	75.5 %	\$ (1,332)	(16.9)%
Australia	533	6.6 %	849	8.1 %	(316)	(37.2)%
Europe	1,009	12.4 %	1,622	15.5 %	(613)	(37.8)%
Rest of world	23	0.2 %	90	0.9 %	(67)	(74.4)%
Total revenue	<u>\$ 8,130</u>	<u>100.0 %</u>	<u>\$ 10,458</u>	<u>100.0 %</u>	<u>\$ (2,328)</u>	<u>(22.3)%</u>

Revenue totaled \$8.1 million for the nine months ended September 30, 2022, which represents a contraction of 22.3%, or \$2.3 million compared to the same period in 2021. The primary reason for the decrease, is due to the emergence in late 2021 of the fast-spreading omicron variants of COVID-19 resulting in a significant rise in global cases causing a significant number of bariatric centers to close December 2021 through February 2022. We have been experiencing an increase in revenue compared to January and February 2022, as the omicron variant began to subside. Our expectation is revenue will continue to increase through the remainder of 2022, as we are focusing on a targeted digital media campaign near bariatric surgical centers that sell the Lab-Band system.

Cost of Goods Sold and Gross Profit. The following table summarizes our unaudited cost of revenue and gross profit for the nine months ended September 30, 2022 and 2021, as well as the percentage compared to total revenue and amount of change and percentage of change (dollars in thousands):

	Nine Months Ended September 30,				Amount Change	Percentage Change
	2022		2021			
Revenue	\$ 8,130	100.0 %	\$ 10,458	100.0 %	\$ (2,328)	(22.3)%
Cost of goods sold	2,928	36.0 %	3,886	37.2 %	(958)	(24.7)%
Gross profit	<u>\$ 5,202</u>	<u>64.0 %</u>	<u>\$ 6,572</u>	<u>62.8 %</u>	<u>\$ (1,370)</u>	<u>(20.8)%</u>

Gross Profit. Gross profit for the nine months ended September 30, 2022, was \$5.2 million, compared to \$6.6 million for the same period in 2021, a decrease of \$1.4 million. Gross profit as a percentage of total revenue for the nine months ended September 30, 2022, was 64.0% compared to 62.8% for the same period in 2021. The increase in gross profit margin is primarily due to the Company focusing on domestic sales which has a high margin than international sales.

Operating Expenses. The following table summarizes our unaudited operating expenses for the nine months ended September 30, 2022, and 2021, as well as the percentage of total revenue and the amount of change and percentage of change (dollars in thousands):

	Nine Months Ended September 30,				Amount	Percentage
	2022		2021		Change	Change
Sales and marketing	\$ 11,990	147.5 %	\$ 6,186	59.2 %	\$ 5,804	93.8 %
General and administrative	13,488	165.9 %	19,085	182.5 %	(5,597)	(29.3)%
Research and development	2,096	25.8 %	2,245	21.5 %	(149)	(6.6)%
Loss on disposal of assets, net	383	4.7 %	—	— %	383	— %
Total operating expenses	\$ 27,957	343.9 %	\$ 27,516	263.2 %	\$ 441	1.6 %

Sales and Marketing Expense. Sales and marketing expenses for the nine months ended September 30, 2022, increased by \$5.8 million, or 93.8%, to \$12.0 million, compared to \$6.2 million for the same period in 2021. The increase is primarily due to an increase in advertising and marketing costs of \$4.6 million. The Company launched its direct to consumer marketing campaign during the fourth quarter of 2021 and expanded this campaign during the first half of 2022. In addition, we had an increase in payroll related expenses of \$1.0 million, as we continue to strengthen our commercial organization and have hired a senior VP of Commercial Operations, as well as additional sales personnel. There was a \$0.7 million increase in consulting and professional services, as we are working on developing the reshapecare platform. Additionally, there was an increase in travel expenses of \$0.1 million, primarily due to relaxing of COVID-19 restrictions. This was offset by a decrease of \$0.8 million in stock-based compensation expense, as during the third quarter of 2021 the Company issued both RSUs and stock options containing a look back provision that resulted in a \$0.9 million expense at the time the awards were given.

General and Administrative Expense. General and administrative expenses for the nine months ended September 30, 2022, decreased by \$5.6 million, or 29.3%, to \$13.5 million, compared to \$19.1 million for the same period in 2021. The decrease is primarily due to a decrease of \$6.7 million in stock-based compensation expense, as during the third quarter of 2021 the Company issued both RSUs and stock options containing a look back provision that resulted in a \$6.8 million expense at the time the awards were given. In addition, there was a reduction in audit, consulting and professional fees of \$1.9 million, as we had higher costs during 2021 due to the merger with Obalon. This was offset by an increase of legal expenses of \$2.2 million, primarily related to recording litigation losses of \$2.0 million during the second quarter of 2022. There was reduction in payroll related costs of \$0.5 million due to personnel changes. Additionally, there was a decrease of \$0.2 million in rent and \$0.2 million insurance, due to the office and warehouse lease in Carlsbad, CA terminating during June 2022.

Research and Development Expense. Research and development expenses for the nine months ended September 30, 2022, decreased by \$0.1 million, or 6.6%, to \$2.1 million, compared to \$2.2 million for the same period in 2021. The decrease is primarily due to a decrease of \$0.9 million in stock-based compensation expense, as during the third quarter of 2021 the Company issued both RSUs and stock options containing a look back provision that resulted in a \$1.2 million expense at the time the awards were given. This was offset primarily due to an increase of \$0.6 million in consulting and professional service expenses related to the ReShape's Diabetes Bloc-Stim Neuromodulation device. In addition, there was an increase of \$0.1 million in payroll related costs.

Impairment of Intangible Assets. Impairment of intangible assets was \$6.9 million for the nine months ended September 30, 2022, due to the impairment of in-process research and development assets. This is a result of the Company currently not continuing with clinical trials for the ReShape Vest. For further details see Note 4 above.

Loss on Disposal of Assets, net. During the nine months ended September 30, 2022, the Company disposed of \$0.4 million of assets that were acquired from the merger with Obalon.

Net Interest (Income) Expense. Net interest income for the nine months ended September 30, 2022, was minimal, compared to an expense of \$0.8 million in 2021, which related to the debt that was extinguished during the second quarter of 2021.

(Gain) Loss on Foreign Currency. The Company had a foreign currency losses of \$0.5 million for the nine months ended September 30, 2022, compared to a gain of \$0.2 million for the same period in 2021.

Income Tax (Benefit) Expense. The Company had an income tax benefit of \$0.5 million for the nine months ended September 30, 2022, due to a reduction in the valuation allowance related to an impairment of indefinite lived assets, offset by income tax expense related to projected income in the Netherlands and Australia.

Liquidity and Capital Resources

The accompanying condensed consolidated financial statements have been prepared assuming the Company will continue as a going concern. The Company currently does not generate revenue sufficient to offset operating costs and anticipates such shortfalls to continue primarily due to the unpredictability of new variants of COVID-19, which may result in a slow-down of elective surgeries and restrictions in some locations. As of September 30, 2022, the Company had net working capital of approximately \$6.1 million, primarily due to cash and cash equivalents and restricted cash of \$6.2 million. The Company's principal source of liquidity as of September 30, 2022, consisted of approximately \$6.2 million of cash and cash equivalents and restricted cash, and \$2.2 million of accounts receivable. Based on its available cash resources, the Company may not have sufficient cash on hand to fund its current operations for more than twelve months from the date of filing this Quarterly Report on Form 10-Q. This condition raises substantial doubt about the Company's ability to continue as a going concern. The Company believes in the viability of its business strategy and in its ability to raise additional funds, however, there can be no assurance to that effect.

The Company is also evaluating further funding options, including seeking additional equity or debt financing to support the expansion of the Lap-Band system, reshapecare, and the continued development of the ReShape Vest and the ReShape Diabetes Bloc-Stim Neuromodulation; and the re-introduction of the Obalon Balloon System and other strategic market opportunities.

The following table summarizes our change in cash and cash equivalents and restricted cash (in thousands):

	Nine Months Ended	
	September 30,	
	2022	2021
Net cash used in operating activities	\$ (19,072)	\$ (11,949)
Net cash (used in) provided by investing activities	(13)	4,922
Net cash provided by financing activities	2,492	33,299
Effect of exchange rate changes	24	14
Net change in cash and cash equivalents and restricted cash	<u>\$ (16,569)</u>	<u>\$ 26,286</u>

Net Cash Used in Operating Activities

Net cash used in operating activities from operations was \$19.1 million and \$11.9 million for the nine months ended September 30, 2022 and 2021, respectively. For the nine months ended September 30, 2022, net cash used in operating activities was primarily the result of our net loss of \$29.6 million, partially offset by non-cash adjustments for impairment of intangible assets of \$6.9 million, stock-based compensation expense of \$2.0 million, amortization of intangible assets of \$1.4 million, depreciation expense of \$0.3 million, provision for excess and obsolete inventory of \$0.2 million and loss on disposal of assets of \$0.4 million, offset by non-cash reduction of expense for deferred income tax of \$0.6 million and bad debt expense of \$0.1 million. We show a negative cash impact to inventory of \$1.3 million, as the Company is building up its inventory to meet the expected increase in demand due to the marketing strategies, and warranty liability of \$0.3 million. This was offset by a positive cash impact to accounts payable and accrued liabilities of \$0.1 million, accounts and other receivables of \$0.7 million and prepaid expenses of \$0.7 million.

For the nine months ended September 30, 2021, net cash used in operating activities was primarily the result of our net loss of \$26.5 million, partially offset by non-cash adjustments for stock-based compensation expense of \$10.5 million, amortization of intangible assets of \$1.3 million, net loss on extinguishment of debt of \$2.1 million, warrant expense of \$2.8 million and amortization of debt discount of \$0.5 million. We show a negative cash impact to accounts receivable of \$0.9 million, as we had an increase in sales late in the third quarter, a negative impact due to increase prepaids of \$0.4 million and a cash outflow for accounts payable and accruals of \$1.8 million as the Company paid its vendors with the funds received in the equity raise during June of 2021. These decreases were partially offset by a change in other assets of \$0.4 million.

Net Cash Provided (Used in) by Investing Activities

Net cash used in investing activities for the nine months ended September 30, 2022, was minimal.

Net cash provided by investing activities for the nine months ended September 30, 2021 was \$4.9 million, which was comprised of \$5.2 million of cash received in connection with the merger with Obalon, offset by capital expenditures of \$0.3 million, primarily related to the completion of moving manufacturing from Costa Rica to the United States.

Net Cash Provided by Financing Activities

Net cash provided by financing activities was \$2.5 million for the nine months ended September 30, 2022, due to the proceeds received from an exercise of warrants from an institutional investor.

Net cash provided by financing activities was \$33.3 million for the nine months ended September 30, 2021, due to proceeds of \$45.6 million received from exercises of warrants from institutional investors, \$1.0 million received from the credit agreement with an institutional investor, and \$0.4 million in proceeds received from stock option exercises, offset by the early payment of \$10.5 million to pay off the credit agreement and \$3.2 million for financing costs.

Operating Capital and Capital Expenditure Requirements

Given the Company's projected operating requirements and its existing cash and cash equivalents management's plans include evaluating different strategies to obtain the required funding of future operations. Our anticipated operations include plans to (i) integrate the sales and operations of the Company with the Lap-Band product line in order to expand sales domestically and internationally (ii) improve operational efficiencies, resulting in a reduction of operational expenses, as well as a reduction to marketing and advertising costs, primarily due to focusing on digital media rather than television and print and (iii) to continue promoting reshaped care as an addition to bariatric surgery or as an alternative to individuals that do not meet the criteria and/or do not want to go through bariatric surgery. If sales do not improve, we will reduce our expenditures for marketing, clinical and product development activities to maintain operational activities until a period of time in which we could obtain additional debt or equity financing to support our operations. However, there can be no assurance that the Company will be able to secure such additional financing. Therefore, the plans cannot be deemed probable of being implemented. As a result, the Company's plans do not alleviate substantial doubt about our ability to continue as a going concern.

Our forecast of the period of time through which our financial resources will be adequate to support our operations, the costs to complete development of products and the cost to commercialize our products are forward-looking statements and involve risks and uncertainties, and actual results could vary materially and negatively as a result of a number of factors, including the factors discussed in Part I, Item 1A, "Risk Factors", of our Annual Report on Form 10-K. We have based these estimates on assumptions that may prove to be wrong, and we could utilize our available capital resources sooner than we currently expect.

Because of the numerous risks and uncertainties associated with the development of medical devices, such as our ReShape Vest and Diabetes Bloc-Stim Neuromodulation, we are unable to estimate the exact amounts of capital outlays and operating expenditures necessary to complete the development of the ReShape Vest and Diabetes Bloc-Stim Neuromodulation or other additional products and successfully deliver a commercial product to the market. Our future capital requirements will depend on many factors, including, but not limited to, the following:

- the cost and timing of establishing sales, marketing and distribution capabilities;
- the cost of establishing clinical and commercial supplies of our ReShape Vest and Diabetes Bloc-Stim Neuromodulation, and any products that we may develop;
- the rate of market acceptance of our ReShape Vest and Diabetes Bloc-Stim Neuromodulation, and any other product candidates;
- the cost of filing and prosecuting patent applications and defending and enforcing our patent and other intellectual property rights;

- the cost of defending, in litigation or otherwise, any claims that we infringe third-party patent or other intellectual property rights;
- the effect of competing products and market developments;
- the cost of explanting clinical devices;
- the terms and timing of any collaborative, licensing or other arrangements that we may establish;
- any revenue generated by sales of our Lap-Band, reshapecare, ReShape Marketplace, Obalon Balloon System, ReShape Vest, Diabetes Bloc-Stim Neuromodulation or our future products;
- the scope, rate of progress, results and cost of our clinical trials and other research and development activities;
- the cost and timing of obtaining any further required regulatory approvals; and
- the extent to which we invest in products and technologies, although we currently have no commitments or agreements relating to any of these types of transactions.

Critical Accounting Policies and Estimates

The condensed consolidated financial statements have been prepared in accordance with accounting principles generally accepted in the United States which require us to make estimates and assumptions that affect the reported amounts of assets and liabilities at the date of the condensed consolidated financial statements and revenues and expenses during the periods reported. Actual results could differ from those estimates. Information with respect to our critical accounting policies and estimates which we believe could have the most significant effect on our reported results and require subjective or complex judgments by management is contained in Item 7, “*Management's Discussion and Analysis of Financial Condition and Results of Operations*,” of our Annual Report on Form 10-K for the year ended December 31, 2021. There have been no significant changes from the information discussed therein.

During the three and nine months ended September 30, 2022 there were no material changes to our significant accounting policies above, which are fully described in Note 2 to our consolidated financial statements included in our Annual Report on Form 10-K for the year ended December 31, 2021.

Recent Accounting Pronouncements

See Note 1 to our condensed consolidated financial statements for a discussion of recent accounting pronouncements.

ITEM 3. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

As a smaller reporting company, we are not required to provide disclosure pursuant to this item.

ITEM 4. CONTROLS AND PROCEDURES

Evaluation of Disclosure Controls and Procedures

Rule 13a-15(e) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), defines the term “disclosure controls and procedures” as those controls and procedures designed to ensure that information required to be disclosed by a company in the reports that it files or submits under 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 the company’s management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

Our internal control system was designed to provide reasonable assurance to our management and board of directors regarding the preparation and fair presentation of published financial statements. All internal control systems, no matter how well designed, have inherent limitations. Therefore, even those systems determined to be effective can

provide only reasonable assurance with respect to financial statement preparation and presentation. An internal control material weakness is a significant deficiency, or aggregation of deficiencies, that does not reduce to a relatively low level the risk that material misstatements in financial statements will be prevented or detected on a timely basis by employees in the normal course of their work. An internal control significant deficiency, or aggregation of deficiencies, is one that could result in a misstatement of the financial statements that is more than inconsequential. In making its assessment of internal control over financial reporting management used the criteria issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) in Internal Control - Integrated Framework (2013). Our management assessed the effectiveness of our internal control over financial reporting as of September 30, 2022, and determined that our internal control over financial reporting was not effective at a reasonable assurance level due to the following material weaknesses in our internal control over financial reporting:

Control Environment: We had insufficient internal resources with appropriate accounting and finance knowledge and expertise to design, implement, document and operate effective internal controls around our financial reporting process. The insufficient internal resources resulted in a lack of review over our weighted average share calculation spreadsheet which included a formula error resulting in the inaccurate reporting of our earnings per share.

We are currently implementing our remediation plan to address the material weaknesses identified above. Such measures include:

- Hiring additional accounting personnel to ensure timely reporting of significant matters.
- Designing and implementing controls to formalize roles and review responsibilities to align with our team's skills and experience and designing and implementing formalized controls.
- Designing and implementing formal processes, policies and procedures supporting our financial close process.

Changes in Internal Control over Financial Reporting

Other than in connection with executing upon the continued implementation of the remediation measures referenced above, there have been no changes in our internal controls over financial reporting during the quarter ended September 30, 2022, that have materially affected, or are reasonably likely to materially affect, our internal controls over financial reporting.

PART II – OTHER INFORMATION

ITEM 1. LEGAL PROCEEDINGS

On August 6, 2021, Cowen and Company, LLC (“Cowen”) filed a complaint against ReShape, as successor in interest to Obalon Therapeutics, in the Supreme Court of the State of New York based on an alleged breach of contract arising out of Cowen’s prior engagement as Obalon’s financial advisor. The complaint alleges that Cowen is entitled to be paid a \$1.35 million fee in connection with ReShape’s merger with Obalon under the terms of Cowen’s engagement agreement with Obalon. The complaint also seeks reimbursement of Cowen’s attorneys’ fees and interest in connection with its claim. The Company is unable to predict the ultimate outcome of this matter and the Company intends to vigorously defend this matter.

On August 18, 2021, H.C. Wainwright & Co., LLC (“Wainwright”) filed a complaint against ReShape in the Supreme Court of the State of New York based on an alleged breach of contract arising out of Wainwright’s prior engagement by ReShape in connection with certain capital raising transactions by ReShape. The complaint alleged that Wainwright was entitled to be paid a fee in connection with ReShape’s capital raising transaction under the warrant exercise agreement that ReShape entered into on June 28, 2021. Wainwright alleged that its June and September 2019 engagement agreements with ReShape require ReShape to pay Wainwright a cash fee equal to 8.0% of the gross proceeds that ReShape received from the exercise of warrants issued pursuant to those engagement agreements, including warrants that were exercised in the June 2021 transaction. The complaint also sought reimbursement of Wainwright’s attorneys’ fees and interest in connection with its claim. On July 19, 2022, the Company entered into a definitive settlement and release agreement with Wainwright pursuant to which the Company made a one-time cash payment of \$1.0 million to fully and finally resolve such matter.

The Company is not aware of any pending or threatened litigation against it that could have a material adverse effect on the Company's business, operating results or financial condition, other than what is disclosed above. The medical device industry in which the Company operates is characterized by frequent claims and litigation, including claims regarding patent and other intellectual property rights as well as improper hiring practices. As a result the Company may be involved in various legal proceedings from time to time. As of September 30, 2022, the Company has accrued \$1.0 million for potential legal settlements.

ITEM 1A. RISK FACTORS

Except for the additional risk factors set forth below, there have been no material changes to the risk factors set forth in Item 1A. "Risk Factors" of our 2021 Annual Report on Form 10-K filed on April 8, 2022.

We received a bid price deficiency notice from the Nasdaq Capital Market. If we are unable to cure this deficiency and meet the Nasdaq continued listing requirements, we could be delisted from the Nasdaq Capital Market, which would negatively impact the trading of our common stock.

On July 19, 2022, we received a written notice (the "Bid Price Notice") from the Listing Qualifications department (the "Nasdaq Staff") of The Nasdaq Stock Market ("Nasdaq") indicating that the Company is not in compliance with the \$1.00 minimum bid price requirement set forth in Nasdaq Listing Rule 5550(a)(2) for continued listing on The Nasdaq Capital Market. The Nasdaq Listing Rules require listed securities to maintain a minimum bid price of \$1.00 per share and, based upon the closing bid price for the last 30 consecutive business days, the Company no longer meets this requirement. The Bid Price Notice provides that the Company will have a compliance period of 180 calendar days in which to regain compliance. If at any time during this period the closing bid price of the Company's common stock is at least \$1.00 per share for a minimum of 10 consecutive business days, the Nasdaq Staff will provide the Company with a written confirmation of compliance and the matter will be closed.

If the Company fails to regain compliance with Rule 5550(a)(2) prior to the expiration of the 180 calendar day period, but meets the continued listing requirement for market value of publicly held shares and all of the other applicable standards for initial listing on The Nasdaq Capital Market, with the exception of the minimum bid price, and provides written notice of its intention to cure the deficiency during the second compliance period by effecting a reverse stock split, if necessary, then the Company may be granted an additional 180 calendar days to regain compliance with Rule 5550(a)(2).

Our board of directors authorized the submission of a proposal to effect a reverse stock split of the Company's common stock in order to regain compliance with the minimum bid at the Company's 2022 Annual Meeting of Stockholders. However, there can be no assurance that our stockholders will approve the proposal. Even if we are able to effect a reverse stock split, there is also no guarantee that we will be able to maintain the Nasdaq Capital Market listing of our common stock in the future.

If our common stock is delisted by Nasdaq, our common stock may be eligible for quotation on an over-the-counter quotation system or on the pink sheets. Upon any such delisting, our common stock would become subject to the regulations of the SEC relating to the market for penny stocks. A penny stock is any equity security not traded on a national securities exchange that has a market price of less than \$5.00 per share. The regulations applicable to penny stocks may severely affect the market liquidity for our common stock and could limit the ability of stockholders to sell securities in the secondary market. In such a case, an investor may find it more difficult to dispose of or obtain accurate quotations as to the market value of our common stock, and there can be no assurance that our common stock will be eligible for trading or quotation on any alternative exchanges or markets.

Delisting from Nasdaq could adversely affect our ability to raise additional financing through public or private sales of equity securities, would significantly affect the ability of investors to trade our securities and would negatively affect the value and liquidity of our common stock. Delisting could also have other negative results, including the potential loss of confidence by employees, the loss of institutional investor interest and fewer business development opportunities.

We are seeking stockholder approval to effect a reverse stock split of our common stock with a ratio within a range of 1-for-30 and 1-for-100, which if implemented may have adverse effects on our common stock.

We have submitted a proposal to our stockholders to consider at our 2022 annual meeting of stockholders scheduled for December 14, 2022 to authorize our Board to effect a reverse stock split of our issued and outstanding common stock (the “Reverse Stock Split”) with a ratio in the range of 1-for-30 and 1-for-100, such ratio to be determined by our Board in its discretion. The principal purpose of the Reverse Stock Split is to decrease the total number of shares of common stock outstanding and proportionately increase the market price of the common stock above \$1.00 per share in order to meet the continuing listing minimum bid price requirements of the Nasdaq Capital Market. Delisting from Nasdaq would adversely affect our ability to raise additional financing through the public or private sale of equity securities and would significantly affect the ability of investors to trade our securities. Delisting would also negatively affect the value and liquidity of our common stock because alternatives, such as the OTC Bulletin Board and the pink sheets, are generally considered to be less efficient markets. Our Board intends to effect the Reverse Stock Split only if it believes that a decrease in the number of shares outstanding is in the best interests of the Company and our stockholders and is likely to improve the trading price of our common stock and improve the likelihood that we will be allowed to maintain our continued listing on the Nasdaq Capital Market. Accordingly, our Board has approved the Reverse Stock Split in order to help ensure that the share price of our common stock meets the continued listing requirements of the Nasdaq Capital Market.

Although we expect that the Reverse Stock Split will result in an increase in the market price of our common stock, we cannot assure you that the Reverse Stock Split, if effected, will increase the market price of our common stock in proportion to the reduction in the number of shares of our common stock outstanding or result in a permanent increase in the market price. The effect that the Reverse Stock Split may have upon the market price of our common stock cannot be predicted with any certainty, and the history of similar reverse stock splits for companies in similar circumstances to ours is varied. The market price of our common stock is dependent on many factors, including our business and financial performance, general market conditions, prospects for future growth and other factors detailed from time to time in the reports we file with the SEC. Accordingly, the total market capitalization of our common stock after the proposed Reverse Stock Split may be lower than the total market capitalization before the proposed Reverse Stock Split and, in the future, the market price of our common stock following the Reverse Stock Split may not exceed or remain higher than the market price prior to the proposed Reverse Stock Split.

Even if our stockholders approve the Reverse Stock Split and the Reverse Stock Split is effected, there can be no assurance that we will continue to meet the continued listing requirements of the Nasdaq Capital Market. Although the Reverse Stock Split will not, by itself, have any immediate dilutive effect on stockholders, the proportion of shares owned by stockholders relative to the number of shares authorized for issuance will decrease because the number of authorized shares of common stock would remain unchanged. As a result, additional authorized shares of common stock would become available for issuance at such times and for such purposes as the Board may deem advisable without further action by stockholders, except as required by applicable law or stock exchange rules. To the extent that additional authorized shares of common stock are issued in the future, such shares could be dilutive to existing stockholders of the Company by decreasing such stockholders’ percentage of equity ownership in the Company.

Although our Board believes that the decrease in the number of shares of common stock outstanding as a consequence of the Reverse Stock Split and the anticipated increase in the market price of common stock could encourage interest in our common stock and possibly promote greater liquidity for stockholders, such liquidity could also be adversely affected by the reduced number of shares outstanding after the Reverse Stock Split.

ITEM 2. UNREGISTERED SALES OF EQUITY SECURITIES AND USE OF PROCEEDS

Unregistered Sales of Equity Securities

None, except as described above in this Form 10-Q.

Uses of Proceeds from Sale of Registered Securities

None.

Purchases of Equity Securities

None.

ITEM 3. DEFAULTS UPON SENIOR SECURITIES

None.

ITEM 4. MINE SAFETY DISCLOSURES

Not applicable.

ITEM 5. OTHER INFORMATION

Not applicable.

ITEM 6. EXHIBITS

Exhibit No.	Description
10.1**	Employment Agreement, dated November 1, 2022, between the Company and Paul F. Hickey.
10.2	Retention Bonus Agreement, dated August 2, 2022, between the Company and Thomas Stankovich (incorporated by reference to Exhibit 10.2 to the Company's Current Report on Form 8-K filed with the Securities and Exchange Commission on August 2, 2022.
31.1**	Certification of Chief Executive Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.
31.2**	Certification of Chief Financial Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.
32.1**	Certification of Chief Executive Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.
32.2**	Certification of Chief Financial Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.
101**	Financial statements from the Quarterly Report on Form 10-Q of the Company for the quarter ended September 30, 2022, formatted in Inline XBRL: (i) the Condensed Consolidated Balance Sheets, (ii) the Condensed Consolidated Statements of Operations, (iii) the Condensed Consolidated Statements of Stockholders' Equity, (iv) the Condensed Consolidated Statements of Cash Flows and (v) the Notes to Condensed Consolidated Financial Statements.
104	Cover Page Interactive Data File (formatted as Inline XBRL and contained in Exhibit 101)

** Filed herewith.

EMPLOYMENT AGREEMENT

This Employment Agreement ("Agreement") is by and between Paul F. Hickey ("Employee") and ReShape Lifesciences Inc., a Delaware corporation ("Employer") (collectively referred to herein as the "Parties"), effective as November 1, 2022.

RECITALS

WHEREAS, the Employer and Employee wish to have an employment relationship for their mutual benefit;

WHEREAS, the Employer and the Employee wish to enter into this Agreement setting forth the terms and conditions upon which Employee will be employed by Employer;

NOW THEREFORE, in consideration of the mutual covenants and promises set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged Employer and the Employee, the Parties hereby covenant and agree as follows:

ARTICLE 1 - DEFINITIONS

1.1 Definitions. For the purposes of this Agreement, the following words and phrases shall have the following meanings:

- (a) "Affiliate" of a person or entity means any person that directly or indirectly controls, is controlled by, or is under common control with, that person or entity.
 - (b) "Agreement" means this agreement, including any schedules hereto, as amended, supplemented, or modified in writing from time to time.
 - (c) "Board" means the Board of Directors of the Employer.
 - (d) "Cause" means: (a) willful breach of Employee's duties to Employer or willful breach of this Agreement; (b) Employee's conviction of any felony or any crime involving fraud, dishonesty or moral turpitude; (c) Employee's willful participation in any fraud against or affecting Employer or any subsidiary, affiliate, customer, supplier, client, agent, or employee thereof; or (d) any other act that Employer reasonably determines constitutes gross or willful misconduct materially detrimental to Employer, including unethical practices, dishonesty, disloyalty, violation of Employer's harassment policy or any other acts harmful to Employer; *provided, however* that a for Cause termination pursuant to clause (a), if susceptible of cure, shall not become effective unless Employee fails to cure such failure to perform or breach within 60 days after receipt of written notice from Employer, such notice to describe such failure to perform or breach and identify what reasonable actions shall be required to cure such failure to perform or breach. For purposes of the definition of "Cause," no act, or failure to act, on Employee's part shall be considered "dishonest" or "willful" unless done, or omitted to be done, by Employee in bad faith and without reasonable belief that Employee's action or omission was in, or not opposed to, the best interest of Employer. Any act, or failure to act, based upon authority given pursuant to a resolution duly adopted by the Board or based upon the advice of counsel for Employer shall be conclusively presumed to be done, or omitted to be done, by Employee in good faith and in the best interests of Employer. Furthermore, the term "Cause" shall not include ordinary negligence or failure to act, whether due to an error in judgment or
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otherwise, if Employee has exercised substantial efforts in good faith to perform the duties reasonably assigned or appropriate to Employee's position.

- (e) "**Good Reason**" means, at any time: (a) the assignment by Employer to Employee of employment duties, functions or responsibilities that are significantly different from, and result in a material diminution of, Employee's duties, functions or responsibilities, including any requirement that Employee report to another officer of Employer, rather than directly to the Board; (b) a material reduction in Employee's base salary or the minimum target amount provided above for Employee's cash incentive compensation for any calendar year; (c) Employer's requirement that Employee be based at any office or location more than 35 miles from Employer's principal office; or (d) any other action or inaction that constitutes a material breach of this Agreement by Employer.

ARTICLE 2 - AT-WILL EMPLOYMENT

2.1 **At-Will Employment.** Employee will be employed on an "at-will" basis, meaning that either Employee or the Employer may terminate Employee's employment relationship at any time with or without cause, and with or without advanced notice, subject to the payment of the Accrued Amounts and Separation Benefits as provided in Sections 6.2, 6.3, and 6.4. Although Employee's compensation and benefits may change from time to time, the at-will nature of Employee's employment may only be changed by an express written agreement signed by an authorized representative of Employer.

ARTICLE 3 - EMPLOYMENT AND POSITION

3.1 **Position.** Subject to the terms and conditions set out in this Agreement, Employer hereby agrees to employ Employee, and Employee hereby agrees to serve Employer, in the position of President and Chief Executive Officer effective August 15, 2022 ("**Start Date**"). Employee shall be based at Employer's principal office in San Clemente, California or another mutually agreed upon location, subject to reasonable travel requirements on behalf of Employer as determined by the Board.

3.2 **Prior Agreements.** Employee represents and warrants to Employer that Employee is not currently subject to a non-competition, confidentiality or other such agreement with a former employer that prohibits or restricts Employee from working for Employer or performing the services that Employee's position requires Employee to perform. Further, Employee represents and warrants to Employer that Employee has not brought any proprietary information, customer lists, trade secrets, confidential information, or any other property with Employee that belongs to any of Employee's former employers. Employee agrees and understands that Employer does not want Employee to utilize any such confidential or proprietary information, trade secrets, or property on Employer's behalf.

ARTICLE 4 - DUTIES

4.1 **Outside Activities.** Employee's position with Employer is full-time. Therefore, throughout the duration of Employee's employment, except for periods of illness or vacation, Employee shall devote Employee's full working time and attention to the business and affairs of Employer, acting in the best interests of Employer at all times. Employee will not engage in any other business, profession or occupation for compensation or otherwise which would conflict or unreasonably interfere with the rendition of Employee's services to Employer either directly or indirectly, without the prior written consent of Employer; provided that nothing herein shall preclude Employee from managing Employee's personal and/or family investments and/or engaging in charitable and civic activities, including accepting appointment to serve on any board of directors or trustees of any charitable organization; provided, that in

the aggregate, such activities do not conflict or interfere in more than a de minimis way with the performance of Employee's duties hereunder.

4.2 Duties; Reporting. Employee shall have duties and responsibilities consistent with Employee's position and such other duties and responsibilities as may be assigned to Employee from time to time by the Board, consistent with Employee's position. Subject to Employee's right to terminate Employee's employment for Good Reason (as defined below), Employer retains full authority to change Employee's duties and responsibilities and reporting relationships and to assign new duties and responsibilities as may be necessary from time to time providing that they are consistent with Employee's position. Employee's position is classified as "exempt" for purposes of applicable wage and hour law and therefore, Employee will not be eligible for overtime pay.

4.3 Board Appointment. Employee will be appointed to the Board of Employer effective as of the Start Date.

4.4 Travel. Employee acknowledges that the duties of Employee's position may require some travel within and outside the United States. Employee's travel expenses incurred in connection with the performance of Employee's job duties for Employer will be reimbursed in accordance with Employer's expense reimbursement policies and procedures in effect from time to time and Section 5.6 below.

4.5 Compliance. Employee shall perform all duties in accordance with the charter documents and by-laws of Employer, the instructions of the Board, and all of Employer's policies and codes of conduct, rules and regulations in effect from time to time. Employee acknowledges having received a copy of, and having taken cognizance of, all of the provisions of Employer's policies and codes of conduct, and undertakes to keep up-to-date with additions, modifications and updates thereto. The terms and conditions of Employee's employment, including those set forth in this Agreement, are subject to change to the extent required to comply with applicable law, rule or regulation, including the rules and regulations of the Securities Exchange Commission and the Nasdaq Stock Market.

4.6 Corporate Opportunities. Any business opportunities related in any way to the business and affairs of the Employer or any of its Affiliates which become known to Employee during Employee's employment hereunder shall be fully disclosed and made available to Employer and shall not be appropriated by Employee under any circumstance without the prior written consent of Employer.

4.7 Good Faith Concerns. Recognizing Employer's commitment to achieving the highest standards of openness and accountability, Employee shall raise, in a prompt manner, any good faith concerns Employee has regarding the conduct of Employer's business or compliance with Employer's financial, legal or reporting obligations. Such good faith concerns should be brought to the attention of the Board.

ARTICLE 5 - COMPENSATION AND BENEFITS

5.1 Base Salary. During Employee's employment, Employee will be compensated at an annual base salary rate of \$400,000 ("Base Salary") less withholdings and deductions required by law or authorized by Employee, subject to Employer's payroll practices in place from time to time. Upon the achievement of certain performance measures, and subject to review and approval by the Compensation Committee of the Board, the Base Salary shall increase. In addition, the Base Salary will be reviewed by the Board annually for potential additional adjustment on the basis of performance; and Employee shall be eligible, at the Board's sole discretion, for annual merit and incentive-based salary increases consistent with Employer's procedures, policies and practices. If the Base Salary is increased from time to time during the term of Employee's employment, the increased amount shall become the "Base Salary."

5.2 Signing Bonus. Employer agrees to pay a one-time signing bonus to Employee in the total gross amount of \$25,000, less applicable withholdings and deductions (“Signing Bonus”). The Signing Bonus will be distributed to Employee in accordance with Employer’s regular payroll practices within thirty (30) days of Employee’s Start Date.

5.3 Cash Incentive Compensation. In addition to Base Salary, Employee is eligible for cash incentive compensation pursuant to Employer’s management incentive compensation plan. Payment of cash incentive compensation will be subject to certain targets and goals set annually by the Compensation Committee or the Board, with the target amount of any cash incentive compensation for any calendar year to be approved by the Compensation Committee of the Board, which target in no event shall be more than 50% (subject to performance of the specified objectives) of Employee’s Base Salary in effect from time to time (such bonus to be pro-rated for Employee’s first year of employment based on the portion of the year for which Employee is employed by Employer). Employer shall pay any such cash incentive compensation earned by Employee for a calendar year on or before March 15 of the following year provided that Employee is employed on such date. Except as expressly set forth in Section 6.3 and Section 6.4 below, Employee will not be entitled to receive cash incentive compensation for any calendar year in which Employee’s employment is terminated for any reason by Employer or Employee.

5.4 Equity Compensation. As soon as reasonably practicable after the Start Date, Employee will be granted an option to purchase a number of shares of common stock equal to 4% of Company’s outstanding common stock as of the date hereof pursuant to Employer’s equity incentive plan (the “Equity Plan”). The exercise price of such option will be equal to the fair market value of a share of Employer’s common stock as of the grant date, as determined by the Board in accordance with the terms of the Equity Plan. Such option will be an incentive stock option, will have a 10-year term and will be subject to vesting as follows: 25% will vest as of one year from the Start Date, and the remaining 75% of the shares will then vest in equal installments each month thereafter over the following 36 months. As soon as reasonably practicable following the first offering of common stock or securities convertible into common stock for purposes of financing Employer after the Start Date, Employee will be granted an additional stock option or other equity award in an amount that maintains Employee’s fully diluted ownership percentage at 4%. Employee will also be eligible for future stock options or other equity awards based upon the recommendation of the Compensation Committee. If Employee meets or exceeds the targets and goals as set by the Board or Compensation Committee, then the Board will recommend that the Compensation Committee consider granting Employee equity awards in an amount that maintains Employee’s fully diluted ownership percentage at 4%. However, the grant of any such awards will be solely in the discretion of the Compensation Committee.

5.5 Benefits. Employee shall be eligible for participation in the following benefits, perquisites and allowances:

- (a) Group Benefits. Subject to the terms and conditions of applicable plans and policies, Employee shall be eligible to participate in all group insured benefit plans and policies provided by Employer to other executives of Employer employed in the United States, as such plans and policies may be amended from time to time, without notice.
- (b) Paid Time Off. Employee shall be entitled to twenty five (25) paid vacation per calendar year, in addition to Employer recognized holidays and paid sick time, if any, in accordance with the Employer’s practices and policies in place from time to time and applicable law. Any such vacation must be taken for periods and at intervals that are appropriate and consistent with the proper performance of Employee’s duties. To the extent permitted by applicable law, accumulated vacation time or pay may not be carried forward except with

the prior approval of the Board. Employer will pay out accrued but unused vacation time at the time of Employee's separation of employment for any reason.

5.6 Reimbursement of Expenses. Upon presentation of proper receipts or other proof of expenditure and subject to such reasonable guidelines or limitations provided by Employer from time to time, Employer shall reimburse Employee for all reasonable and necessary business and travel expenses actually incurred by Employee directly in connection with the business affairs of Employer and the performance of Employee's duties hereunder, including reimbursement for reasonable travel and lodging expenses related to Employee's travel to and from Employer's principal office in the performance of his job duties ("Commuting Expenses"). Employee shall comply with such reasonable limitations and reporting requirements with respect to such expenses, including provision of receipts and related documentation, as Employer may establish from time to time.

5.7 Relocation Reimbursement. If, during Employee's employment, Employee relocates permanently to the area where Employer's principal office is located ("Permanent Relocation"), the Employer will make a fully taxable lump sum payment to Employee to cover Reasonable Moving Expenses as defined herein ("Relocation Reimbursement"). The Relocation Reimbursement will be paid within thirty (30) days after Employee has submitted to the Employer acceptable documentation supporting such expenses in accordance with the Employer's expense reimbursement policy in place at the time. However, if Employee is terminated for Cause as defined herein, or resigns other than for Good Reason, as defined herein, within six (6) months of such Relocation Reimbursement, Employee agrees to repay to the Employer such Relocation Reimbursement within three (3) months of Employee's separation date from Employer. For purposes of this Section, "Reasonable Moving Expenses" means Employee's actual out of pocket expenses (but not any loss on the sale of your current residence, the purchase price of Employee's new residence, or real estate-related taxes or attorneys' fees) related to (a) the disposition of Employee's then current principal residence, (b) relocation of Employee's principal residence to a location within 50 miles of the principal office of Employer, and (c) other moving expenses incurred to relocate household goods, furnishings, and personal belongings from Employee's then current residence to Employee's new residence. Following any permanent relocation, Employee will no longer be eligible for reimbursement of any Commuting Expenses as defined in Section 5.6.

5.8 No Other Benefits. Employee is not entitled to any other payment, benefit, perquisite, allowance or entitlement other than as specifically set out in this Agreement or as otherwise agreed to in writing and signed by the Employer and the Employee.

ARTICLE 6 - SEPARATION OF EMPLOYMENT

6.1 Termination. Notwithstanding any other provision in this Agreement, Employee's employment may be terminated at any time as follows:

- (a) Cause. Employer may terminate this Agreement and the Employee's employment at any time for Cause, as defined above, with or without advance notice.
- (b) Without Cause. Employer may terminate this Agreement and Employee's employment at any time without Cause and for any reason or no reason whatsoever, with or without advance notice.
- (c) Resignation. Employee may terminate this Agreement and Employee's employment at any time by providing written notice to the Board specifying the date of resignation (such date being not less than fourteen (14) days after the date of the Employee's written notice). Employer shall have the right to determine, in its sole discretion, whether Employee will

continue to actively work during such notice period, providing that Employee will continue to receive his compensation and benefits through the notice period.

- (d) Death. Employee's employment will automatically terminate upon Employee's death.

6.2 Termination by Resignation Without Good Reason, for Cause, or by Death. If this Agreement and the Executive's employment is terminated as a result of Employee's resignation (without Good Reason), for Cause, as defined herein, or by Employee's death, Employee (or Employee's estate) will be paid (a) any unpaid salary as may be due and owing through the Employee's termination date; (b) reimbursement for any unreimbursed expenses incurred through the termination date; and (c) all other benefits earned, vested, and accrued through the termination date (collectively, "Accrued Amounts"). Employee's participation in all bonus plans or other equity or profit participation plans terminates immediately upon the Employee's termination and the Employee shall not be entitled to any additional bonus or incentive award, pro rata or otherwise.

6.3 Termination Without Cause or For Good Reason.

- (a) If Employee's employment is terminated by Employer without Cause, as defined herein, or by Employee for Good Reason, as defined herein, then Employee will receive the Accrued Amounts as defined in Section 6.2 and (i) Employer will pay Employee severance in an amount equal to 12 months of Employee's current Base Salary in effect at the time of the termination, which will be paid on a regular payroll basis over 12 months, (ii) 100% of any unvested shares under any options to purchase shares of Employer common stock Employee holds ("Options") shall immediately vest, and Employee shall be permitted to exercise all shares under Employee's Options immediately or at any time during the five-year period (but not after the end of each Option's original term) following Employee's termination date, (iii) Employer will also pay Employee a pro rata portion of any unpaid cash incentive compensation for the calendar year in which Employee's termination occurs (that pro-rated cash incentive compensation shall be based on whether Employee's objectives were achieved (also pro-rated to the extent possible) during the portion of the year before Employee's termination date, and the pro-rated amount shall be based on the number of days in that portion, as compared with the entire year), and (iv) if Employee timely and effectively elects continuation coverage under Employer's group health plans pursuant to section 4980B of the Code, as amended ("COBRA") or similar state law, Employer will pay or reimburse the premiums for such coverage of Employee (and Employee's dependents, if applicable) at the same rate it pays for active employees for a period of 12 months from Employee's termination date; *provided, however*, that Employer's obligation to make such payments shall immediately expire if Employee ceases to be eligible for continuation coverage under COBRA or similar state law or otherwise terminates such coverage or the date you become eligible for group health plan coverage with a new employer, whichever is earlier (the benefits referred to in (i) through (iv) above are collectively referred to herein as the "Separation Benefits").
- (b) As a condition precedent to the payment of the Separation Benefits, Employee agrees to execute and deliver a full and final release in substantially the form of Exhibit A, from all actions or claims of any kind, known and unknown, in connection with the Employee's employment with Employer or the termination thereof against Employer, its Affiliates, and all of their respective officers, directors, trustees, shareholders, employees, attorneys, insurers and agents ("Release"). No Separation Benefits shall be provided to Employee until the Release has been executed and returned by the Employee and any applicable

rescission periods as set forth in the Release have expired without any rescission or attempted rescission by Employee.

6.4 Change in Control. Upon the occurrence of a Change in Control (as defined in the Employer's Second Amended and Restated 2003 Stock Incentive Plan), Employer agrees that (a) 100% of any unvested shares under Employer's Options shall immediately vest, and (b) if at any time after the Change in Control Employee's employment is terminated by Employer without Cause, as defined herein, or by Employee for Good Reason, as defined herein, Employee will also receive the Separation Benefits defined in Section 6.3(a) of this Agreement.

6.5 Resignation as Director and Officer. Employee covenants and agrees that, upon termination of Employee's employment, however caused, Employee shall immediately tender Employee's resignation from all officer and director positions then held by Employee at Employer or any of the Affiliates, such resignation to be effective upon the date of Employee's termination, unless the Board determines otherwise in its sole discretion. If Employee fails to resign as set out above, Employee will be deemed to have resigned from all such officer and director positions, and Employer is hereby authorized by Employee to appoint any person in Employee's name and on Employee's behalf to sign any documents or do anything necessary or required to give effect to such resignation.

6.6 Return of Property. All equipment, mobile devices, computers, keys, pass cards, credit cards, software, material, data, written correspondence, memoranda, communication, reports, or other documents or property pertaining to the business of the Employer used or produced by Employee in connection with Employee's employment, or in Employee's possession or under Employee's control, shall at all times remain the property of Employer. Employee shall return all property of Employer in Employee's possession or control in good condition forthwith upon any request by Employer or upon any termination of this Agreement and of the Employee's employment (regardless of the reason for such termination).

ARTICLE 7 - GENERAL CONTRACT TERMS

7.1 Recitals. The Employer and the Employee represent and warrant to each other that the Recitals set out above are true.

7.2 Currency. All amounts payable pursuant to this Agreement are expressed in and shall be paid in U.S. currency.

7.3 Withholding. All amounts paid or payable and all benefits, perquisites, allowances or entitlements provided to Employee under this Agreement are subject to applicable taxes and withholdings. Accordingly, Employer shall be entitled to deduct and withhold from any amount payable to Employee hereunder such sums that Employer is required to withhold pursuant to any federal, state, local or foreign withholding or other applicable taxes or levies. Notwithstanding the foregoing, Employee acknowledges and agrees that Employee is solely responsible for all non-employer tax liability arising from Employee's receipt of any payments, benefits, perquisites, allowances or entitlements as set out in this Agreement.

7.4 Rights and Waivers. All rights and remedies of the parties are separate and cumulative, and none of them, whether exercised or not, shall be deemed to be to the exclusion of any other rights or remedies or shall be deemed to limit or prejudice any other legal or equitable rights or remedies which either of the parties may have. Any purported waiver of any default, breach or non-compliance under this Agreement is not effective unless in writing and signed by the party to be bound by the waiver. No waiver shall be inferred from or implied by any failure to act or delay in acting by a party in respect of any default, breach or non-observance or by anything done or omitted to be done by the other party. The waiver by a party of any default, breach or non-compliance under this Agreement shall not operate as a waiver of that party's rights

under this Agreement in respect of any continuing or subsequent default, breach or non-observance (whether of the same or any other nature).

7.5 Severability. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to that jurisdiction, be ineffective to the extent of the prohibition or unenforceability and shall be severed from the balance of this Agreement, all without affecting the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction. If any portion is deemed unenforceable by virtue of its scope or limitation, Employer and Employee agree that a court of competent jurisdiction shall modify such provision to make it enforceable to the fullest extent permitted by law.

7.6 Notices. Any notice required or permitted to be given under this Agreement shall be in writing and shall be properly given if personally delivered, delivered by e-mail transmission (with confirmation of receipt) or mailed by prepaid registered mail addressed as follows:

to the Employer at:

ReShape Lifesciences Inc.
1001 Calle Amanecer
San Clemente, CA 92673
Attention: Dan W. Gladney, Executive Chair of the Board
E-mail: [●]

to the Employee at:

Paul F. Hickey
[●]
E-mail: [●]

or to such other address as the parties may from time to time specify by notice given in accordance herewith. Any notice so given shall be conclusively deemed to have been given or made on the day of delivery, if personally delivered, or if delivered by facsimile transmission or mailed as aforesaid, upon the date shown on the facsimile confirmation of receipt or on the postal return receipt as the date upon which the envelope containing such notice was actually received by the addressee.

7.7 Successors and Assigns. This Agreement shall inure to the benefit of, and be binding on, the parties and their respective heirs, administrators, executors, successors (whether direct or indirect, by purchase, acquisition, merger, consolidation or otherwise) and permitted assigns. Employer shall have the right to assign this Agreement, or the benefit thereof, to any of its Affiliates or to any successor (whether direct or indirect, by purchase, acquisition, merger, consolidation or otherwise) to all or substantially all of the business and/or assets of Employer. Employee, by Employee's signature hereto, expressly consents to such assignment and, provided that such successor agrees to assume and be bound by the terms and conditions of this Agreement, all references to "Employer" hereunder shall include its successor. Employee shall not assign or transfer, whether absolutely, by way of security or otherwise, all or any part of Employee's rights or obligations under this Agreement without the prior consent of Employer.

7.8 Amendment. No amendment of this Agreement will be effective unless made in writing and signed by the parties.

7.9 Section 409A. To the extent applicable, this Agreement shall be interpreted and administered in accordance with, and incorporate the terms and conditions required by, Section 409A of the Internal

Revenue Code of 1986, as amended, and the Department of Treasury regulations and other interpretive guidelines issued thereunder (collectively, "Section 409A"). Notwithstanding any provision to the contrary in this Agreement: (i) no amount payable in connection with Employee's termination of employment shall be paid to Employee unless the termination of Employee's employment constitutes a "separation from service" within the meaning of Section 409A, and if Employee incurs a termination of employment that does not constitute a separation from service, as so defined, Employee's right to such payments shall vest but payment shall be deferred until the date on which Employee incurs a separation from service, or die; (ii) if, on the date on which Employee incurs a separation from service, Employee is a "specified employee" as defined in Section 409A, any amount that constitutes deferred compensation and that becomes payable by reason of such separation from service (including any amount described in clause (i)) shall be deferred until the earlier of the first (1st) day of the seventh (7th) month following the month that includes the separation from service or Employee's death; (iii) for purposes of Section 409A, Employee's right to receive installment payments pursuant to this Agreement shall be treated as a right to receive a series of separate and distinct payments; and (iv) to the extent that any reimbursement of expenses or in-kind benefits constitutes "deferred compensation" under Section 409A, such reimbursement or benefit shall be provided no later than December 31 of the year following the year in which the expense was incurred, the amount of expenses reimbursed in one year shall not affect the amount eligible for reimbursement in any subsequent year, and the amount of any in-kind benefits provided in one year shall not affect the amount of in-kind benefits provided in any other year.

7.10 Entire Agreement. This Agreement, together with the Employee's Employee Proprietary Information Agreement and Dispute Resolution Procedure & Voluntary Mutual Binding Arbitration Agreement, constitute the entire agreement between the parties pertaining to the subject matter of this Agreement and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, including the offer letter, dated July 22, 2022, between Employee and Employer. There are no conditions, warranties, representations or other agreements between the parties in connection with the subject matter of this Agreement (whether oral or written, express or implied, statutory or otherwise) except as specifically set out in this Agreement.

7.11 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California (without regard to the conflict of laws principles of any jurisdiction).

7.12 Headings. The division of this Agreement into Sections and the insertion of headings are for convenience or reference only and shall not affect the construction or interpretation of this Agreement.

7.13 Independent Legal Advice. The parties acknowledge that, prior to executing this Agreement, they have each had the opportunity to obtain independent legal advice and that they fully understand the nature of this Agreement and that they are entering into this Agreement voluntarily.

7.14 Reimbursement of Attorneys' Fees. Upon receipt by Company of a statement for legal services from the attorneys representing Employee, Company shall reimburse Employee or pay on behalf of Employee the reasonable and necessary attorneys' fees and associated expenses incurred by Employee in connection with the negotiation of the July 22, 2022 offer letter and this Agreement, provided, however, that such fees and expenses shall not exceed \$5,000.00.

7.15 Ambiguities. As each party and its legal counsel have participated in the review and revision of this Agreement, any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement.

7.16 Counterparts. This Agreement may be executed in several counterparts, each of which will be deemed to be an original, but all of which together will constitute one and the same instrument. Signature

pages may be detached from the counterparts and attached to a single copy of this Agreement to physically form one document. Facsimile execution and delivery of this Agreement will be legal, valid and binding execution and delivery for all purposes.

[Signature page follows]

IN WITNESS WHEREOF this Agreement has been signed by the parties hereto with effect on the date set out above.

Date: November 1, 2022

RESHAPE LIFESCIENCES INC.
(“EMPLOYER”)

By: /s/ Dan W. Gladney

Name: Dan W. Gladney

Title: Executive Chair of the Board

Date: November 1, 2022

PAUL F. HICKEY (“EMPLOYEE”)

 /s/ Paul F. Hickey

Exhibit A

Form of Confidential Separation Agreement and General Release

See attached.

CONFIDENTIAL SEPARATION AGREEMENT AND GENERAL RELEASE

This Confidential Separation Agreement and General Release (this “Agreement”) is entered into by and between Paul F. Hickey (“you”) and ReShape Lifesciences Inc. (“ReShape”).

WHEREAS, you and ReShape entered into an Employment Agreement dated November 1, 2022 (“Employment Agreement”) which terminates effective [●], 20[●], except as to certain provisions outlined below;

WHEREAS, ReShape wishes to provide you with the separation benefits described in Section 2 below; and

WHEREAS, you and ReShape want to fully and finally settle all issues, differences, and claims, whether potential or actual, between you and ReShape, including, but not limited to, any claim that might arise out of your employment with ReShape or the termination of your employment with ReShape;

NOW, THEREFORE, in consideration of the provisions and of the mutual covenants contained herein, you and ReShape agree as follows:

1. **Separation from Employment.** Effective [●], 20[●] (your “date of separation”), your employment with ReShape terminates and you resign from the Board of Directors of ReShape. Except as provided in this Agreement, all benefits and privileges of employment end as of your date of separation.
2. **Accrued Salary and Unpaid Vacation and Expenses.** ReShape has or will pay your salary through the date of separation plus unused vacation days based on the pro-rata number of annual vacation days you are entitled less vacation days used as of the date of separation, and reimburse you for all business expenses incurred through the date of separation.
3. **Separation Benefits.** As consideration for your promises and obligations under this Agreement, and subject to the terms and conditions of this Agreement, including the release of claims set forth below, ReShape agrees to pay you (a) the gross amount of \$[●], which amount represents 12 months of your base salary as of your date of separation (“Separation Pay”) plus (b) the gross amount of \$[●], which represents a pro rata portion of any unpaid cash incentive compensation for calendar year 20[●] (“Incentive Compensation”) in accordance with Section 6.3(a)(iii) of your Employment Agreement, in each case less applicable deductions and withholdings for state and federal taxes. The Separation Pay will be divided and paid to you in substantially equal periodic payments at the usual and customary pay intervals of ReShape, less deductions and withholdings. The Incentive Compensation shall be paid to you by March 15 of the year after the calendar year for which the Incentive Compensation was earned. You agree that you are not entitled to the separation benefits provided to you in this Agreement if you do not sign this Agreement or if you rescind or attempt to rescind your release of claims under this Agreement.
4. **COBRA Premium Payments/Reimbursement.** In accordance with Section 6.3(a)(iv) of your Employment Agreement, ReShape agrees to reimburse you for COBRA premiums paid by you or on your behalf for continuation coverage for twelve (12) months following your termination. Any reimbursement made to you for COBRA premiums will be treated as taxable by ReShape. Except as otherwise provided in this Section 3, the benefits to which you (or, as applicable, your spouse and eligible dependents) may be entitled upon termination of your employment shall be determined and paid in accordance with such plans, policies and applicable laws.
5. **Stock Options.** All options to purchase shares of common stock of ReShape held by you (the “Options”) are subject to the terms of one or more stock option agreements between you and the

Company (each, an “Option Agreement”) and were granted pursuant to the ReShape Inc. Amended and Restated 2003 Stock Incentive Plan, as amended, or its successor plan (the “Plan”). Pursuant to the terms and conditions set forth in the Option Agreements, ReShape agrees that, notwithstanding anything to the contrary set forth in such Option Agreements or the Plan, 100% of any unvested shares under any Options shall immediately vest and you shall be permitted to exercise any Option immediately or at any time during the five-year period following your date of separation (but not after the end of each Option’s original term). The parties agree and acknowledge that, with respect to any Options that were intended by the parties to be treated as “incentive stock options” within the meaning of Section 422 of the Internal Revenue Code of 1986, as amended, such Options, to the extent they may be exercised by you more than 90 days following your date of separation, shall be treated as non-qualified options, notwithstanding any provision in the Option Agreements to the contrary.

6. Survival of Terms of Employment and Related Agreements. All provisions of the Employment Agreement, Indemnification Agreement, Employee Proprietary Information Agreement, and Dispute Resolution Procedure & Voluntary Mutual Binding Arbitration Agreement that, by their terms, survive the termination of your employment will continue in full force and effect and are not released, negated or otherwise affected by this Agreement.

7. Return of ReShape Property. You acknowledge that, on or before the date you sign this Agreement, you have returned all ReShape property in your possession, including, but not limited to, all files, memoranda, documents, records, copies of the foregoing, any ReShape credit card, computer, fax machine, printer, copier, keys, access cards, and any other property of ReShape in your possession. You also acknowledge that, on or before the date you sign this Agreement, you have provided ReShape with any and all pass codes and/or personal identification numbers used by you to access the ReShape computer system, e-mail system, and/or the Internet, and/or documents or files contained on and saved in the ReShape computer system.

8. Duty to Cooperate. You agree that, beginning on the date you are presented with this Agreement, you will cooperate with ReShape with respect to the transition of your duties, the preservation of effective operations and customer service, and ReShape’s strategic and commercial initiatives. As part of your agreement to cooperate, you will provide a list identifying the status of major projects under way, pending customer interactions, the status of sale cycles with customers, the names and contact information of key contacts at customers, and any other information reasonably requested by ReShape regarding your duties and responsibilities. You further agree that, in the 30 day period following your acceptance of this Agreement you will periodically make yourself accessible and available during normal business hours for consultation with ReShape representatives in connection with the transition of your duties and responsibilities. You agree that such consultation may include appearing from time to time at the office of ReShape for conferences.

9. Confidentiality. You agree that the existence and terms and conditions of this Agreement shall remain confidential and that you will not disclose any information concerning the provisions of this Agreement to any person or entity, including, but not limited to, any present or former employee of ReShape. These confidentiality provisions are subject to the following exceptions: you may disclose the provisions of this Agreement to your attorneys, accountants, tax and financial advisors, and immediate family, or in the course of legal proceedings involving ReShape, or in response to a subpoena, court order, or inquiry by a government agency. You further agree that, if any information concerning the provisions of this Agreement is revealed as permitted by this section, you shall inform the recipient of the information that it is confidential, and the recipient shall agree to keep the information confidential.

10. Release. By this Agreement, you intend to settle any and all claims that you have or may have against ReShape as a result of ReShape hiring you, your employment with ReShape, and the

decision to terminate your employment with ReShape. You agree that, in exchange for ReShape's promises in this Agreement, and in exchange for the consideration provided to you by ReShape, described above in Section 2, you, on behalf of your heirs, successors and assigns, hereby release and discharge ReShape, its predecessors, successors, assigns, parents, affiliates, subsidiaries, and related companies, and their officers, directors, shareholders, agents, servants, employees, and insurers (collectively "the Released Parties") from all liability for damages and from all claims that you may have against the Released Parties occurring up through the date you sign this Agreement. You understand and agree that your release of claims in this Agreement includes, but is not limited to, any claims you may have under: Title VII of the Federal Civil Rights Act of 1964, as amended; the Americans with Disabilities Act; the Equal Pay Act; the Employee Retirement Income Security Act; the Age Discrimination in Employment Act of 1967, as amended; the Older Workers Benefit Protection Act; the Family and Medical Leave Act; the Worker Adjustment and Retraining Notification Act of 1988; the False Claims Act; the California Constitution; the California Labor Code (including but not limited to Sections 132a and 4553); the California Fair Employment & Housing Act; the California Government Code; the California Civil Code; the California Penal Code; or any other federal, state, or local statute, ordinance, or law.

You also agree and understand that you are giving up all other claims, whether grounded in contract or tort theories, including but not limited to: wrongful discharge; breach of contract; any claim for unpaid compensation (including, but not limited to, any claims for vacation, PTO or severance except as set forth in this Agreement, or for incentive compensation); tortious interference with contractual relations; promissory estoppel; detrimental reliance; breach of the implied covenant of good faith and fair dealing; breach of express or implied promise; breach of manuals or other policies; breach of fiduciary duty; assault; battery; fraud; false imprisonment; invasion of privacy; intentional or negligent misrepresentation; defamation, including libel, slander, discharge defamation and self-publication defamation; discharge in violation of public policy; whistleblower; qui tam actions; intentional or negligent infliction of emotional distress; or any other theory, whether legal or equitable.

You understand that nothing contained in this Agreement, including but not limited to this Section 9, will be interpreted to prevent you from filing a charge with the Equal Employment Opportunity Commission ("EEOC"), or any other governmental agency such as the California Department of Fair Employment and Housing ("DFEH"), or from participating in or cooperating with an EEOC or other governmental agency investigation or proceeding. However, you agree that you are waiving the right to monetary damages or other individual legal or equitable relief awarded as a result of any such proceeding.

You are not aware of any other facts, evidence, allegations, claims, liabilities, or demands relating to alleged or potential violations of law that may give rise to any claim or liability on the part of any Released Party under the Securities Exchange Act of 1934, the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the False Claims Act, the Anti-kickback Statute. You understand that nothing in this Agreement interferes with your right to file a complaint, charge or report with any law enforcement agency, with the Securities and Exchange Commission ("SEC") or other regulatory body, or to participate in any manner in an SEC or other governmental investigation or proceeding under any such law, statute or regulation, or to require notification or prior approval by ReShape of any such a complaint, charge or report. You understand and agree, however, that you waive your right to recover any whistleblower award under the Securities Exchange Act of 1934, the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act, or other individual relief in any administrative or legal action whether brought by the SEC or other governmental or law enforcement agency, you, or any other party, unless and to the extent that such waiver is contrary to law. You agree that the Released Parties reserve any and all defenses which they might have against any such allegations or claims brought by you or on your behalf. You understand that ReShape is relying on your representations in this Agreement.

You understand and have been advised that the above release of your claims is subject to the terms of the Older Workers Benefit Protection Act ("OWBPA"). The OWBPA provides that an individual cannot waive a right or claim under the Age Discrimination in Employment Act ("ADEA") unless the waiver is knowing and voluntary. You agree that you have been advised of the OWBPA and agree that you are signing this Agreement voluntarily, and with full knowledge of its consequences. You understand that ReShape is giving you at least 21 days from the date you received a copy of this Agreement to decide whether you want to sign it. You acknowledge that you have been advised to use this time to consult with an attorney about the effect of this Agreement. If you sign this Agreement before the end of the 21 day period it will be your personal, voluntary decision to do so, and will be done with full knowledge of your legal rights. You agree that material and/or immaterial changes to this Agreement will not restart the running of this consideration period.

You understand and for valuable consideration hereby expressly waive all of the rights and benefits of Section 1542 of the California Civil Code, which section reads as follows:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

11. Time to Accept. You are hereby informed that the terms of this Agreement shall be open for acceptance and execution by you through and including the date that is 21 days after the date you received a copy of this Agreement, during which time you may consult with an attorney and consider whether to accept this Agreement. Changes to this Agreement, whether material or immaterial, will not restart the running of this acceptance period. You hereby are advised to consult with an attorney prior to signing this Agreement.

12. Right to Revoke and Rescind. You are hereby informed of your right to revoke your release of claims, insofar as it extends to potential claims under the ADEA, by informing ReShape of your intent to revoke your release of claims within 7 calendar days following your signing of this Agreement. You understand that any such revocation or rescission must be made in writing and delivered by hand or by certified mail, return receipt requested, postmarked on or before the last day within the applicable revocation period to: Chief Financial Officer, ReShape Lifesciences Inc. 1001 Calle Amanecer, San Clemente, CA 92673.

If you exercise your right to revoke or rescind this Agreement, ReShape may, at its option, either nullify this Agreement in its entirety, or keep it in effect in all respects other than as to that portion of your release of claims that you have revoked or rescinded. You agree and understand that if ReShape chooses to nullify the Agreement in its entirety, ReShape will have no obligations under this Agreement to you or to others whose rights derive from you.

13. Entire Agreement. This Agreement, as well as the exhibits hereto and any agreements referenced herein, is the final, complete and exclusive agreement of the parties and sets forth the entire agreement between ReShape and you with respect to your employment by ReShape, and there are no undertakings, covenants or commitments other than as set forth herein. The Agreement may not be altered or amended, except by a writing executed by you and a member of the Board. Except as otherwise indicated, this Agreement supersedes, terminates, replaces and supplants any and all prior understandings or agreements between the parties relating in any way to your hiring or employment by ReShape.

14. Governing Law. The laws of the State of California will govern the validity, construction and performance of this Agreement, without regard to the conflict of law provisions of any other jurisdictions. If any part of this Agreement is construed to be in violation of any law, such part shall be modified to achieve the objective of the parties to the fullest extent permitted and the balance of this Agreement shall remain in full force and effect. If such modification is not possible, said provision will be deemed severable from the remaining provisions of this Agreement and the balance of this Agreement shall remain in full force and effect.

15. Remedies. Any dispute between ReShape and you under this Agreement or the Employment Agreement will be resolved in accordance with the terms and conditions of the Arbitration Agreement.

16. No Admission. Nothing in this Agreement is intended to be, and nothing will be deemed to be, an admission of liability by ReShape or you that either party has violated any state or federal statute, local ordinance or principle of common law, or that either party has engaged in any wrongdoing.

17. Waiver. No waiver of any provision of this Agreement shall be binding unless executed in writing by the party making the waiver. The waiver by either party of a breach by the other party of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach.

[Signature page follows]

IN WITNESS WHEREOF, the parties have duly executed this Agreement on the dates set forth below to be effective as of the date shown below.

I acknowledge and agree that I have read this Agreement in its entirety and that I agree to the conditions and obligations set forth herein. Further, I agree that I have had adequate time to consider the terms of this Agreement and that I am voluntarily entering into this Agreement with a full understanding of its meaning. I understand that I am hereby advised to consult with an attorney before signing this Agreement.

Dated: _____
_____ Paul F. Hickey

RESHAPE LIFESCIENCES INC.

Dated: _____ By _____
Name:
Its:

CERTIFICATION

I, Paul F. Hickey, certify that:

1. I have reviewed this Quarterly Report on Form 10-Q of ReShape Lifesciences Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the consolidated financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/ PAUL F. HICKEY

Paul F. Hickey
President and Chief Executive Officer

Date: November 14, 2022

CERTIFICATION

I, Thomas Stankovich certify that:

1. I have reviewed this Quarterly Report on Form 10-Q of ReShape Lifesciences Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the consolidated financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/ THOMAS STANKOVICH

Thomas Stankovich
Chief Financial Officer, Senior Vice
President, Finance

Date: November 14, 2022

CERTIFICATION

Pursuant to the requirement set forth in Rule 13a-14(b) of the Securities Exchange Act of 1934, as amended (the Exchange Act), and Section 1350 of Chapter 63 of Title 18 of the United States Code (18 U.S.C. §1350), Thomas Stankovich, in his capacity as Chief Financial Officer of ReShape Lifesciences Inc., hereby certifies that, to the best of his knowledge:

1. The Company's Quarterly Report on Form 10-Q for the quarter ended September 30, 2022 to which this Certification is attached as Exhibit 32.2 (the Report) fully complies with the requirements of Section 13(a) or 15(d) of the Exchange Act; and
2. The information contained in the Report fairly presents, in all material respects, the financial condition and the results of operations of ReShape Lifesciences Inc. as of, and for, the periods covered by the Report.

By: /s/ THOMAS STANKOVICH

Thomas Stankovich
Chief Financial Officer, Senior Vice
President, Finance

Date: November 14, 2022
