

12-30-2002

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Document ID # []
- Correction of PTO Error
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Conveyance Type

- Assignment License
- Security Agreement
- Nunc Pro Tunc Assignment
- Merger Effective Date
Month Day Year
April 25, 2000
- Change of Name
- Other []

Conveying Party

Mark if additional names of receiving parties attached

Name **Evity, Inc.**

Execution Date
Month Day Year
[4/25/00]

Formerly []

- Individual General Partnership Limited Partnership Corporation Association
- Other
- Citizenship

Receiving Party

Mark if additional names of receiving parties attached

Name **BMC Software, Inc.**

DBA/AKA/TA []

Composed of []

Address (line 1) **2101 City West Boulevard**

Address (line 2) **Houston, Texas 77042**

- Individual General Partnership Limited Partnership Corporation Association
- Other []

State of Incorporation **Delaware**

If document to be recorded is an assignment and the receiving party is not domiciled in the United States, an appointment of a domestic representative should be attached. (*Designation must be a separate document from Assignment*).

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Domestic Representative Name and Address

Enter the first Receiving Party Only

Name **Steven R. Sprinkle**

Address (line 1) **Gray Cary Ware & Freidenrich LLP**

Address (line 2) **1221 S. MoPac Expressway, Suite 400**

Address (line 3) **Austin, Texas 78746-7025**

Address (line 4) []

Correspondence Name and Address

Area Code and Telephone Number

Name **Steven R. Sprinkle**

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Address (line 1) **Gray Cary Ware & Freidenrich LLP**

Address (line 2) **1221 S. MoPac Expressway, Suite 400**

Address (line 3) **Austin, Texas 78746-7025**

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Pages

Enter the total number of pages of the attached conveyance document
including any attachments

87

Trademark Application Number(s) or Registration Number(s)

Mark if additional numbers attached

Enter either the Trademark Application Number or the Registration Number (DO NOT ENTER BOTH numbers for the same property).

Trademark Application Number(s)

Registration Number(s)

2500825

2500825, issued October 23, 2001

Number of Properties

Enter the total amount of properties involved.

1

Fee Amount Fee Amount for Properties Listed (37 CFR 3.41): \$40.00

Method of Payment: check Enclosed Deposit Account

Deposit Account

(Enter for payment by deposit account or if additional fees can be charged to the account.)

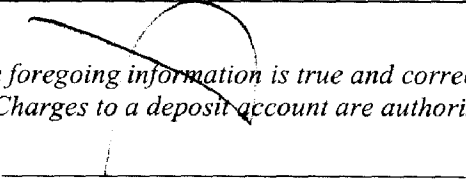
Deposit Account Number: # 50-0456

Authorization to charge additional fees: Yes No

Statement and Signature

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Steven R. Sprinkle

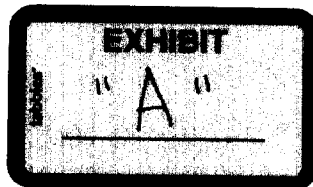


12/18/00

Name of Person Signing

Signature

Date Signed



AGREEMENT AND PLAN OF REORGANIZATION

among

**BMC SOFTWARE, INC.,
BMC ACQUISITION CORP.,
EVITY, INC.
AND CERTAIN
STOCKHOLDERS OF EVITY, INC.**

April 25, 2000

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AGREEMENT AND PLAN OF REORGANIZATION

THIS AGREEMENT AND PLAN OF REORGANIZATION dated as of April 25, 2000 (“Agreement”), is among BMC Software, Inc., a Delaware corporation (“BMC”), BMC Acquisition Corp., a Delaware corporation and wholly-owned subsidiary of BMC (“Sub”), Eivity, Inc., a Delaware corporation (“Eivity”), and the persons whose names are set forth on the signature pages hereto under the heading “Stockholders.”

WITNESSETH:

WHEREAS, the parties hereto desire to effect a combination of Eivity and Sub through a merger (the “Merger”) of Sub with and into Eivity, with Eivity to continue as the surviving corporation, upon the terms and conditions set forth in this Agreement; and

WHEREAS, BMC, Sub, Eivity and the Stockholders desire to set forth certain representations, warranties, covenants and agreements made by each to the other in connection with the transactions described in this Agreement, including certain additional agreements related to the transactions contemplated hereby; and

WHEREAS, for federal income tax purposes, it is intended that the Merger qualify as a reorganization under the provisions of Section 368(a) of the Code; and

NOW, THEREFORE, in consideration of the premises and of the mutual representations, warranties, covenants and agreements herein contained, the parties hereby agree as follows:

ARTICLE I

Definitions

The following terms shall have the following respective meanings for all purposes of this Agreement:

“AAA Rules” shall have the meaning set forth in Section 13.3.

“Affiliate” or “affiliate” shall mean, with respect to any person, any person that, directly or indirectly, controls or is controlled by or is under common control with such person.

“Agreement” shall mean this Agreement and Plan of Reorganization, as it may be from time to time amended.

“BMC” shall mean BMC Software, Inc., a Delaware corporation.

“BMC Common Stock” shall mean the common stock, \$.01 par value per share, of BMC.

“BMC Shares” shall have the meaning set forth in Section 2.2.

“Cause” shall mean any of the following: (i) the employee’s theft, dishonesty, or falsification of any BMC documents or records; (ii) the employee’s improper use or disclosure of BMC’s confidential or proprietary information, (iii) the employee’s failure or inability to perform any reasonable assigned duties after written notice from BMC of, and a reasonable opportunity to cure, such failure or inability; (iv) any material breach by the employee of any employment agreement between the employee and BMC, which breach is not cured pursuant to the terms of such agreement; or (v) the employee’s conviction (including any plea of guilt or nolo contendere) of any criminal act which impairs the employee’s ability to perform his or her duties with BMC.

“Closing” shall have the meaning set forth in Section 2.1(d).

“Closing Date” shall have the meaning set forth in Section 2.1(d).

“Code” shall mean the United States Internal Revenue Code of 1986, as amended.

“Commission” shall mean the United States Securities and Exchange Commission.

“Effective Date” shall have the meaning set forth in Section 2.1(b).

“EPA” shall mean the United States Environmental Protection Agency.

“ERISA” shall mean the Employee Retirement Income Security Act of 1974, as amended.

“Eivity” shall mean Eivity, Inc., a Delaware corporation.

“Eivity Common Stock” shall mean the common stock, par value \$0.0001 per share, of Eivity.

“Eivity Options” shall mean all outstanding options to purchase Eivity Common Stock.

“Eivity Preferred Stock” shall mean the preferred stock, par value \$0.0001 per share, of Eivity.

“Eivity Stock Option Plan” shall have the meaning set forth in Section 2.4(a).

“Financial Statements” shall have the meaning set forth in Section 4.7(a).

“GAAP” shall mean generally accepted accounting principles.

“Governmental Entity” shall mean any court, administrative agency or commission or other governmental authority or instrumentality.

“IRS” shall mean the United States Internal Revenue Service.

“Merger” shall have the meaning set forth in Section 2.1(a).

“Merger Agreement” shall mean the Agreement and Plan of Merger attached hereto as Exhibit A.

"Notice of Claim" shall have the meaning set forth in Section 13.1(b).

"Person" shall mean an individual, a corporation, a company, a partnership, a joint venture, an association, a joint stock company, a trust, an unincorporated organization, a government or any agency or political subdivision thereof.

The terms "plan" or "plans" shall have the meanings set forth in Section 4.16(b).

"Purchase Price" shall have the meaning set forth in Section 2.2.

"Schedules" shall mean all of the Schedules provided for under this Agreement.

"SEC Documents" shall have the meaning set forth in Section 6.7.

"Securities Act" shall mean the Securities Act of 1933, as amended.

"Sub" shall mean BMC Acquisition Corp., a Delaware corporation and a wholly-owned subsidiary of BMC.

"Tax" or "Taxes" shall mean any tax of any kind, including, without limitation, income, profits, gross receipts, net proceeds, alternative or add-on minimum, ad valorem, value added, turnover, sales, use, property, personal property (tangible and intangible), environmental, stamp, leasing, lease, user, excise, duty, franchise, capital stock, transfer, registration, license, withholding, social security (or similar), unemployment, disability, payroll, employment, fuel, excess profits, occupational, premium, windfall profit, severance, estimated, or other taxes and assessments and governmental charges, together with any interest, penalties, additions to tax, fines and other similar amounts, imposed by any federal, state, local or foreign governmental authority.

"Tax Return" or "Tax Returns" shall mean all returns, declarations of estimated tax, tax reports and information returns relating to any Tax, including, any schedule or attachment thereto, and including any amendment thereof.

"Third Party Claim" shall have the meaning set forth in Section 13.1(b).

ARTICLE II

Closing and Post Closing Matters

2.1 *The Merger.*

(a) In reliance upon the representations, warranties, covenants and agreements of the parties set forth herein and upon the terms and subject to the conditions of this Agreement, at the Closing, Sub shall be merged with and into Evity (the "Merger") in accordance with the General Corporation Law of the State of Delaware (the "DGCL"), pursuant to the Agreement and Plan of Merger ("Merger Agreement") attached hereto as

Exhibit A, whereupon the separate existence of Sub shall cease, and Evity shall be the surviving corporation.

(b) As soon as practicable after satisfaction or, to the extent permitted hereunder, waiver of all conditions to the Merger, Sub and Evity shall (i) file a Certificate of Merger with the Secretary of State of the State of Delaware and (ii) make all other filings or recordings required by the DGCL in connection with the Merger. The Merger shall become effective upon the date stamped by the Secretary of State of Delaware upon the Certificate of Merger (such date is referred to as the "Effective Date").

(c) The Merger is intended to be a reorganization within the meaning of Section 368(a) of the Code. Each party agrees that it will not take or assert any position on any tax return, report or otherwise which is inconsistent with the qualification of the Merger as a reorganization within the meaning of Section 368(a) of the Code. The provisions and representations contained or referred to in this Section 2.1(c) shall survive until the expiration of the applicable statute of limitations.

(d) Subject to the closing conditions set forth herein, the closing under this Agreement (the "Closing") will take place as soon as practicable following satisfaction or waiver by the applicable party of all conditions to Closing set forth in Article X of this Agreement (the "Closing Date"), at the offices of Vinson & Elkins L.L.P., 2300 First City Tower, 1001 Fannin Street, Houston, unless a different date or place is agreed to in writing by the parties to this Agreement.

2.2 Merger Consideration. At the Effective Date, subject to the terms and conditions set forth in this Agreement, including without limitation thereto the conditions to Closing set forth in Article X hereof, each issued and outstanding share of (x) Evity Common Stock shall automatically be canceled and extinguished and converted, without any action on the part of the holder thereof, into (i) a fraction of a fully paid nonassessable share of issued and outstanding BMC Common Stock equal to 0.077285 (the "Common Stock Exchange Ratio"), which shall be appropriately adjusted for any recapitalizations, stock combinations, stock dividends, stock splits and the like and (ii) \$1.098901 (the "Per Share Cash Consideration" and together with the Common Stock Exchange Ratio, the "Common Stock Per Share Consideration") and (y) Evity Preferred Stock shall automatically be canceled and extinguished and converted, without any action on the part of the holder thereof, into a fraction of a fully paid nonassessable share of issued and outstanding BMC Common Stock equal to 0.101437 (the "Preferred Stock Exchange Ratio"), which shall be appropriately adjusted for any recapitalizations, stock combinations, stock dividends, stock splits and the like. The calculation of the Common Stock Per Share Consideration and the Preferred Stock Exchange Ratio reflects (i) each Evity stockholder's proportionate interest in Evity (treating all shares of Evity Common Stock issuable upon the exercise of Evity Options as outstanding for such purpose) and (ii) a valuation of Evity of \$100,000,000 ("Purchase Price"). The shares of BMC Common Stock to be issued in connection with the Merger (the "BMC Shares") together with the aggregate Per Share Cash Consideration are hereinafter referred to collectively as the "Merger Consideration." Payment of the purchase consideration to all stockholders of Evity shall be effected through the Merger.

2.3 Documents. On the Closing Date, BMC, Evity and each of the Stockholders shall execute and deliver all appropriate documents and instruments to effectuate the transactions as set forth in this Agreement.

2.4 Evity Options.

(a) At the Effective Date, automatically and without any action on the part of the holder thereof, each Evity Option (whether or not vested) granted under the Evity 1999 Stock Option Plan (the "Evity Stock Option Plan"), which remains as of such time unexercised in whole or in part, shall be assumed by BMC and become an option (an "Assumed Option") to purchase that number of shares of BMC Common Stock obtained by multiplying the number of shares of Evity Common Stock issuable upon the exercise of such Evity Option by the Preferred Stock Exchange Ratio at an exercise price per share equal to the per share exercise price of such Evity Option divided by the Preferred Stock Exchange Ratio. If the foregoing calculation results in an Assumed Option being exercisable for a fraction of a share of BMC Common Stock, the number of shares of BMC Common Stock subject to such Assumed Option shall be rounded down to the nearest whole number of shares, and the total exercise price for such Assumed Option shall be reduced by the exercise price of the fractional share. The Assumed Option (1) shall provide the optionee with the same vesting and other rights that he had under the Evity Option before such assumption and (2) shall not give the optionee additional vesting or other rights which he did not have under the Evity Option before such assumption.

(b) As soon as practicable after the Effective Date, BMC (1) shall deliver to the holders of the Evity Options appropriate agreements evidencing BMC's assumption of such options and (2) shall file a registration statement on Form S-8 (or any successor or other appropriate forms) with respect to the shares of BMC Common Stock issuable in respect of the Assumed Options. BMC shall use all reasonable efforts to maintain the effectiveness of such registration statement (and maintain the current status of the prospectus or prospectuses contained therein) for so long as such Assumed Options remain outstanding.

(c) At the Effective Date, BMC agrees to assume the Evity Stock Option Plan with such amendments thereto as may be required to reflect the Merger, including, without limitation, the substitution of BMC Common Stock for Evity Common Stock thereunder.

(d) The Board of Directors of Evity (or a duly appointed committee thereof responsible for the administration of the Evity Stock Option Plan in accordance with the terms of such plan) shall, prior to or as of the Effective Date, take all necessary actions, pursuant to and in accordance with the terms of the Evity Stock Option Plan and the instruments evidencing the Evity Options, to provide (1) for the conversion of the Evity Options into the Assumed Options in accordance with Subparagraph (a) above and (2) that no consent of the holders of the Evity Options is required in connection with such conversion.

ARTICLE III

Registration Rights

3.1 Registration of BMC Common Stock. BMC shall prepare for filing with the Commission, and cause to be declared effective, a "shelf" registration statement pursuant to Rule 415 under the Securities Act providing for the sale by the Stockholders of the BMC Shares (the "Shelf Registration"). The registration statement for the Shelf Registration shall be prepared and filed as soon as practicable, but in any event not later than 10 days after the Closing Date. BMC shall use commercially reasonable efforts to cause the registration statement to be declared effective as soon as practicable after it has been filed with the Commission. BMC agrees to use commercially reasonable efforts to keep such Shelf Registration continuously effective for a period ending on the earliest to occur of (i) the second anniversary of the effective date of such Shelf Registration, (ii) the date on which all BMC Shares covered thereby have been sold or otherwise transferred or disposed of by the Stockholders, and (iii) the date upon which all of such BMC Shares are vested and transferable pursuant to Rule 144 under the Securities Act.

3.2 Registration Procedures. In connection with BMC's obligations with respect to the Shelf Registration, BMC shall use commercially reasonable efforts to effect the registration in furtherance of the sale of the BMC Shares by the holders thereof in accordance with the intended method or methods of distribution thereof described in the Shelf Registration. In connection therewith, BMC shall, as promptly as may be practicable:

(a) prepare and file with the Commission a registration statement with respect to the BMC Shares on any form for which BMC then qualifies or which counsel for BMC shall deem appropriate and which form shall be available for the disposition of the BMC Shares in accordance with the intended method or methods of disposition thereof, and use commercially reasonable efforts to cause such registration statement to become and remain effective as set forth in Section 3.1 hereof;

(b) prepare and file with the Commission such amendments and supplements to such registration statement and the prospectus used in connection therewith as may be necessary to keep such registration statement effective for the applicable period specified in Section 3.1 hereof;

(c) furnish promptly to each Stockholder a copy of such registration statement, each amendment and supplement thereto (in each case including all exhibits thereto but excluding all documents incorporated by reference therein unless specifically so requested by such Stockholder) and such reasonable number of copies of the prospectus included in such registration statement (including copies of the supplemented or amended prospectus), as such Stockholder may reasonably request in order to facilitate the disposition of the BMC Shares owned by such Stockholder;

(d) promptly notify each Stockholder that is selling BMC Shares at any time when a prospectus relating thereto is required to be delivered under the Securities Act within the period that BMC is required to keep the registration statement effective of the happening of any event as a result of which the prospectus included in such registration statement (as

then in effect) contains an untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, and BMC will prepare and as soon as reasonably practicable file a supplement or amendment to such prospectus so that, as thereafter delivered to the purchasers of such BMC Shares, such prospectus will not contain an untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading;

(e) advise each Stockholder that is selling BMC Shares, promptly after receiving notice thereof, of any stop order issued or threatened by the Commission and to use commercially reasonable efforts to take all actions required to prevent the entry of such stop order, or to remove it if entered;

(f) use commercially reasonable efforts to cause all BMC Shares included in such registration statement to be listed prior to the effectiveness of such registration statement, on each securities exchange or national market system on which the BMC Common Stock is then listed or proposed to be listed; and

(g) otherwise use commercially reasonable efforts to comply with the provisions of the Securities Act with respect to the disposition of all of the BMC Shares covered by such registration statement in accordance with the intended methods of disposition by the Stockholders thereof set forth in such registration statement and to make generally available to its security holders, as soon as reasonably practicable, an earnings statement satisfying the provisions of Section 11(a) of the Securities Act and Rule 158 thereunder.

Each Stockholder agrees that, upon receipt of any notice from BMC of the happening of any event of the kind described in Section 3.2(d) hereof, such Stockholder will forthwith discontinue disposition of BMC Shares pursuant to the registration statement covering such BMC Shares until such Stockholder's receipt of the copies of the supplemented or amended prospectus contemplated by Section 3.2(d) hereof, and, if so directed by BMC, such Stockholder will deliver to BMC all copies of the prospectus covering such BMC Shares current at the time of receipt of such notice.

Each Stockholder hereby covenants that it will not make any sale of BMC Shares that are registered in accordance with Section 3.1 hereof without first effectively causing the prospectus delivery requirements under the Securities Act to be satisfied, and each such holder acknowledges and agrees that if sold in a non-underwritten public offering, such BMC Shares are not transferable on the books of BMC unless the stock certificates submitted to the transfer agent evidencing the shares are accompanied by a certificate to the effect that the BMC Shares have been sold in accordance with an effective registration statement and the requirements of delivering a current prospectus have been satisfied.

BMC may require each Stockholder as to which any registration is being effected to furnish to BMC such information regarding such Stockholder and the distribution of such BMC Shares as BMC may from time to time reasonably request in writing. Each such Stockholder agrees to notify BMC as promptly as practicable of any inaccuracy or change in information previously furnished by such Stockholder to BMC or of the occurrence of any event in either case as a result of which any prospectus relating to such registration contains an untrue statement of a material fact regarding such

Stockholder or the distribution of such BMC Shares or omits to state any material fact regarding such Stockholder or the distribution of such BMC Shares required to be stated therein or necessary to make the statements therein not misleading in light of the circumstances then existing, and promptly to furnish to BMC any additional information required to correct and update any previously furnished information or required so that such prospectus shall not contain, with respect to such Stockholder or the distribution of such BMC Shares, an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

3.3 Expenses. All expenses incident to BMC's performance of or compliance with the provisions of this Article III (including, without limitation, all registration and filing fees, fees and expenses of compliance with securities or blue sky laws, fees and expenses incurred in connection with the listing of the BMC Shares to be registered on each securities exchange or national market system on which similar securities issued by BMC are then listed, printing expenses, and fees and disbursements of counsel for BMC and of all independent certified public accountants and other persons retained by BMC) will be borne by BMC. Notwithstanding the foregoing, the Stockholders shall pay any and all underwriting fees, discounts or commissions attributable to the sale of BMC Shares.

3.4 Indemnification.

(a) Upon the registration of BMC Shares pursuant to Section 3.1 of this Agreement, and in consideration of the agreements of the Stockholders contained herein, BMC shall, and it hereby agrees to, indemnify and hold harmless, to the extent permitted by law, each of the Stockholders which holds BMC Shares to be included in such registration, its officers, partners and directors and each Person who controls such person (within the meaning of the Securities Act) against all losses, claims, damages, liabilities and expenses (including reasonable attorneys' fees and expenses) to which such Stockholder, its officers, partners and directors, or such controlling persons may become subject, insofar as such losses, claims, damages, liabilities and expenses (or actions in respect thereof) arise out of or are based upon any untrue statement or alleged untrue statement of a material fact contained in any such registration statement, any prospectus or preliminary prospectus contained therein or any amendment or supplement thereto, or any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading and will reimburse each such Stockholder and each officer, partner, director and controlling person for any legal or other expenses reasonably incurred by them (as such expenses are incurred) in connection with investigating or defending any such loss, claim, damage, liability or action; except (i) to the extent that the same arise out of or are based upon an untrue statement or omission or alleged omission so made based upon information furnished by such Stockholder or such officer, partner, director or controlling person in writing specifically for use in such registration statement or prospectus or (ii) to the extent that the same are caused by such Stockholder's failure to deliver a copy of such prospectus or any amendments or supplements thereto after BMC has furnished such Stockholder with a sufficient number of copies of the same; and *provided, however*, that the foregoing indemnity and reimbursement obligation shall not be applicable to the extent that any such loss, claim, damage, liability or action arises out of or is based on any untrue statement or omission made in (i) a preliminary prospectus, which untrue

statement or omission is corrected in the final prospectus and such final prospectus is made available to such Stockholder in accordance with the requirements of Rule 424 under the Securities Act or (ii) any prospectus, which untrue statement or omission is corrected in a prospectus supplement or amended prospectus and such prospectus supplement or amended prospectus is made available to such Stockholder prior to the sale of BMC Shares which gave rise to such loss, claim, damage, liability or expense.

(b) In connection with any registration statement under which BMC Shares are registered under the Securities Act and pursuant to which a Stockholder offers and sells BMC Shares, each such Stockholder shall, and it hereby agrees to, severally and not jointly, indemnify and hold harmless, to the extent permitted by law, each of BMC, its officers and directors, and each Person who controls BMC (within the meaning of the Securities Act) against all losses, claims, damages, liabilities and expenses (including reasonable attorneys' fees and expenses) to which BMC, its officers and directors or controlling persons may become subject, insofar as such losses, claims, damages, liabilities and expenses (or actions in respect thereof) arise out of or are based upon any untrue statement or alleged untrue statement of a material fact contained in any such registration statement, any prospectus or preliminary prospectus contained therein or any amendment or supplement thereto, or any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading and will reimburse BMC and each such officer, director and controlling person for any legal or other expenses reasonably incurred by them (as such expenses are incurred) in connection with investigating or defending any such loss, claim, damage, liability or action, to the extent that (i) the same arise out of or are based upon any untrue statement or omission or alleged omission so made based upon information furnished by such Stockholder or controlling person of such Stockholder in writing specifically for use in such registration statement or prospectus or (ii) the same are caused by such Stockholder's failure to deliver a prospectus or any amendments or supplements thereto after BMC has furnished such Stockholder with a sufficient number of copies of the same; and *provided, further*, that the liability of each Stockholder under this Section 3.4(b) shall be limited to the proportion of any such loss, claim, damage, liability or expense which is equal to the proportion that the public offering price of BMC Shares sold by such Stockholder under such registration statement bears to the total public offering price of all securities sold thereunder at the time such loss is incurred, but not to exceed the amount of the proceeds received by such Stockholder from the sale of the BMC Shares covered by such registration statement.

(c) Any person entitled to indemnification hereunder will (i) give prompt notice to the indemnifying party of any claim with respect to which it seeks indemnification (but the failure to give such notice will not affect the right to indemnification hereunder, unless the indemnifying party is materially prejudiced by such failure) and (ii) unless in such indemnified party's reasonable judgment a conflict of interest may exist between such indemnified and indemnifying parties with respect to such claim, permit such indemnifying party to assume the defense of such claim with counsel selected by the indemnifying party and reasonably satisfactory to the indemnified party. If such defense is not assumed by the indemnifying party or if the indemnifying party is not permitted to assume such defense then (x) the indemnified party shall select counsel, which counsel must be reasonably satisfactory to the indemnifying party, and (y) the indemnifying party will not be subject to any liability

for any settlement made without its consent (but consent will not be unreasonably withheld). No indemnifying party will consent to entry of any judgment or enter into any settlement which does not include as an unconditional term thereof the giving by the claimant or plaintiff to such indemnified party of a release from all liability in respect of such claim or litigation. An indemnifying party who is not entitled to, or elects not to, assume the defense of a claim will not be obligated to pay the fees and expenses of more than one counsel for all parties indemnified by such indemnifying party with respect to such claim, unless in the reasonable judgment of any indemnified party a conflict of interest may exist between such indemnified party and any other of such indemnified parties with respect to such claim, in which case the indemnifying party shall be obligated to pay the fees and expenses of one additional counsel, who must be reasonably satisfactory to the indemnifying party.

(d) Each party hereto agrees that, if for any reason the indemnification provisions contemplated by Section 3.4(a) or 3.4(b) are unavailable or are insufficient to hold harmless an indemnified party in respect of any losses, claims, damages, liabilities or expenses (or actions in respect thereof) referred to therein, then each indemnifying party shall contribute to the amount paid or payable by such indemnified party as a result of such losses, claims, damages, liabilities or expenses (or actions in respect thereof) in such proportion as is appropriate to reflect the relative fault of the indemnifying party and the indemnified party as well as any other relevant equitable considerations. The relative fault of such indemnifying party and indemnified party shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or omission or alleged omission to state a material fact relates to information supplied by such indemnifying party or indemnified party, and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission. The parties hereto agree that it would not be just and equitable if contribution pursuant to this Section 3.4(d) were determined by pro rata allocation (even if the Stockholders or all of them were treated as one entity for such purpose) or by any other method of allocation which does not take into account the equitable considerations referred to in this Section 3.4(d). No Stockholder will be required to contribute any amount in excess of the proceeds received by such Stockholder from the sale of BMC Shares pursuant to the registration statement. No Person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation.

(e) The indemnification and contribution obligations and each other provision set forth in this Section 3.4 shall remain in full force and effect regardless of any investigation made by or on behalf of BMC, any Stockholder, any officer or employee of BMC or such Stockholder or any controlling person of any of the foregoing and shall survive the transfer and registration of BMC Shares by such Stockholder.

3.5 Rule 144 Reporting. With a view to making available to Stockholders the benefits of Rule 144 promulgated by the Commission under the Securities Act, BMC agrees to use commercially reasonable efforts to:

(a) make and keep adequate current public information with respect to BMC available, as those terms are used in Rule 144 under the Securities Act, at all times after the Closing Date;

(b) file with the Commission in a timely manner all reports and other documents required of BMC under the Exchange Act; and

(c) furnish to Stockholders promptly upon request a written statement by BMC as to its compliance with the reporting requirements of Rule 144 and the Exchange Act, a copy of the most recent annual or quarterly report of BMC, and such other reports and documents of BMC as any Stockholder may reasonably request in order to permit such Stockholder to avail itself of any rule or regulation of the Commission allowing such Stockholder to sell its BMC Shares without registration.

ARTICLE IV

Certain Representations, Warranties and Covenants of Evity and the Stockholders

Subject to the exceptions contained in the applicable section of the Disclosure Schedule, Evity and each of the Stockholders, severally and jointly, represent, warrant and covenant to BMC and Sub as follows:

4.1 Authority; Title to Evity Stock. Evity has the requisite corporate power and authority to enter into this Agreement and consummate the transactions described herein. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by the Board of Directors and stockholders of Evity. Each Stockholder has full right, power and legal capacity and authority to enter into and perform the Stockholder's obligations under this Agreement and to consummate the transactions contemplated hereby, and has obtained all requisite consents or approvals applicable to the Stockholder to do so. No other corporate act or proceeding on the part of Evity or the Stockholders is necessary for the due and valid authorization of this Agreement or the transactions contemplated hereby. This Agreement and each of the other agreements to be executed pursuant hereto have been duly executed and delivered by Evity and each Stockholder, as applicable, and constitute the valid and binding obligations of Evity and such Stockholders enforceable in accordance with its terms, except as enforcement may be limited by general principles of equity whether applied in a court of law or a court of equity and by bankruptcy, insolvency and similar laws effecting creditor's rights and remedies generally. Each Stockholder has, and at the Closing each Stockholder will have, good and marketable title to the shares of Evity Common Stock set forth in Section 4.1 of the Disclosure Schedule, free and clear of all liens, encumbrances, security interests, equities, preemptive rights, community property rights and adverse claims whatsoever.

4.2 Organization, Etc. Evity is a corporation duly organized, validly existing and in good standing under the laws of Delaware and has full corporate power and authority to conduct its business as it is now being conducted and to own, operate or lease the properties and assets it currently purports to own, operate or holds under lease. Evity is duly qualified or licensed to do business and is in good standing in each jurisdiction where the character of its business or the nature

of its properties makes such qualification or licensing necessary and where the failure to so qualify or be licensed would have a material adverse effect on Evity's business.

4.3 Capitalization. The authorized capitalization of Evity consists of 25,000,000 shares of Evity Common Stock of which 9,100,000 shares are issued and outstanding, and an additional 3,900,000 shares are reserved for issuance in conjunction with the Evity Stock Option Plan and 15,000,000 shares of Evity Preferred Stock of which 8,666,667 are issued and outstanding, designated "Series A Preferred Stock." All of such outstanding shares are validly issued, fully paid and nonassessable, and were not issued in violation of any preemptive rights of any stockholder. Section 4.3 of the Disclosure Schedule sets forth a complete list as of the date of this Agreement of each stockholder of Evity and the number of shares of Evity Common Stock or Evity Preferred Stock owned by such stockholder and (ii) all outstanding options, warrants or obligations of any kind to issue any shares of capital stock of Evity, the owners thereof and the amounts owned. Other than as set forth on Section 4.3 of the Disclosure Schedule, there are no outstanding options, warrants, convertible securities, calls, rights, commitments, preemptive rights or agreements or instruments or understandings of any character, to which Evity is a party or by which Evity is bound, obligating Evity to issue, deliver or sell, or cause to be issued, delivered or sold, shares of capital stock of Evity on behalf of Evity or the stockholders of Evity or any securities or obligations convertible into or exchangeable for such shares or to grant, extend or enter into any such option, warrant, convertible security, call, right, commitment, preemptive right or agreement. There are no outstanding obligations of Evity to purchase or otherwise acquire any capital stock of Evity.

4.4 Subsidiaries. Evity has no subsidiaries.

4.5 No Violation. The execution and delivery of this Agreement by Evity and the Stockholders do not, and the consummation by Evity and the Stockholders of the agreements and transactions contemplated by this Agreement will not, (a) conflict with, or result in any violation of or default or loss of any benefit under, any provision of the incorporation and organizational documents of Evity; (b) violate any permit, concession, grant, franchise, law, rule or regulation, or any judgment, decree or order of any Governmental Entity to which either Evity is a party or to which Evity or any of its property is subject; or (c) conflict with, or result in a breach or violation of, or accelerate the performance required by, the terms of any agreement, contract, indenture or other instrument to which Evity is a party or to which any of its property is subject, or constitute a default or loss of any right thereunder or an event which, with the lapse of time or notice or both, might result in a default or loss of any right thereunder or the creation of any lien, charge or encumbrance upon any of the assets or properties of Evity.

4.6 Approvals. The execution and delivery of this Agreement and the consummation of the agreements and transactions contemplated by this Agreement will not require the consent, approval, order or authorization of any Governmental Entity or regulatory authority or any other person under any permit, license, agreement, indenture or other instrument to which Evity is a party or to which any of its properties are subject, and no declaration, filing or registration with any Governmental Entity or regulatory authority is required by Evity in connection with the execution and delivery of this Agreement and the consummation of such agreements and transactions. Evity is its own "ultimate parent entity" as such term is defined in regulations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"), at 16 C.F.R. 801.1(a)(3) and does not meet the size of person test set forth in the HSR Act at 15 U.S.C. 18a(a).

4.7 Financial Statements; Absence of Certain Changes.

(a) Evity has delivered to BMC true and complete copies of the unaudited balance sheet of the Company as of March 31, 2000 (the "Balance Sheet") and the related statements of operations and cash flows for the three-month period then ended (together with the Balance Sheet, the "Financial Statements").

(b) The Financial Statements have been prepared in accordance with GAAP, applied on a consistent basis, from the books and records and present fairly and accurately the financial condition of Evity. Evity does not have at the date of the Financial Statements any liabilities or obligations of any nature (whether accrued, absolute, fixed, contingent, liquidated or unliquidated or otherwise and whether due or to become due), except as and to the extent of the amounts specifically reflected or reserved against in the Financial Statements or in the notes thereto (which reserves are adequate, appropriate, and reasonable).

(c) Since March 31, 2000, there has not been:

(i) any adverse change or any threatened adverse change in the condition (financial or otherwise) or in the properties, assets or liabilities or business or prospects of Evity which exceed, or which reasonably could be expected to exceed, in the aggregate, \$10,000;

(ii) any change in the accounting methods or practices followed by Evity or change in the depreciation or amortization policies or rates of Evity theretofore adopted;

(iii) any incurrence of any debts, obligations or liabilities, absolute, accrued, contingent or otherwise, whether due or to become due by Evity, other than in the usual and ordinary course of business consistent with past practice;

(iv) any discharge or satisfaction of any liens or payment of any obligation or liability of Evity, other than in the usual and ordinary course of business consistent with past practice;

(v) any mortgage, pledge or lien, on any of the assets, tangible or intangible of Evity;

(vi) any sale, transfer or lease as lessor or sublessor of any assets of Evity;

(vii) any cancellation, compromise or release of any debt or claim of Evity;

(viii) any physical damage, restriction or loss (whether or not covered by insurance) which materially adversely affects the properties, business or prospects of Evity or its subsidiaries;

(ix) any declaration or payment of any dividends or other distributions with respect to its outstanding capital stock;

(x) any issuance by Evity of any shares of its capital stock, or any repurchase or redemption by it of any shares of its capital stock;

(xi) any merger or consolidation of Evity with any other Person or any acquisition by Evity of the stock or business (including by purchase of all or substantially all of the assets) of any other Person;

(xii) the execution of any employment, consulting, severance, indemnification or other compensation agreement between Evity and any of its employees, officers or directors or execution of any collective bargaining agreement or incurrence of any other obligation to any labor organization or employee;

(xiii) any increase in the compensation or benefits of any employee of Evity other than scheduled increases in the ordinary course of business and consistent with past practices;

(xiv) any payment by Evity to any director, officer, shareholder, partner or employee, or any Affiliate of the foregoing (whether as a loan or otherwise) except regular compensation and usual benefits payments consistent with established compensation and incentive plans; or

(xv) any actual, pending, or to the knowledge of Evity or any Stockholder, threatened change that might reasonably be expected to result in a material deterioration in the relationship of Evity with any material customer, supplier, distributor or sales representative thereof.

4.8 Corporate Action; Charter and Bylaws. Evity has heretofore delivered to BMC true and complete copies of the Certificate of Incorporation and Bylaws of Evity as in effect on the date hereof. Evity has heretofore delivered to BMC true and complete copies of the minute books and stock records of Evity. Such minute books and stock records correctly reflect all corporate actions taken at all meetings of, or by written consents of, directors of Evity (including committees thereof) and stockholders, including but not limited to actions taken at such meetings relating to the organization of Evity and the issuance of shares of capital stock and options to purchase capital stock of Evity.

4.9 Litigation. Evity is not subject, and since its inception, Evity has not been subject, to any judicial, governmental or administrative order, judgment, injunction or decree, other than those of general application. Except as set forth on Section 4.9 of the Disclosure Schedule, no suits, actions, audits or proceedings of any character whatsoever are pending, or, to the knowledge of Evity or any Stockholder, threatened against Evity or any of its properties, assets or business, and, to the knowledge of Evity or any Stockholder, there is no basis for any such actions, audits or proceedings.

4.10 Compliance with Laws; Environmental Matters.

(a) The business of Evity is not currently conducted in violation of any law or any ordinance or regulation of any Governmental Entity. Evity has not since its inception conducted its business in violation of any law or any ordinance or regulation of any Governmental Entity. No investigation or review by any Governmental Entity (including without limitation any audit or similar review by any federal, state or local taxing authority) with respect to Evity is pending or, to the knowledge of Evity or any Stockholder, threatened, nor has any Governmental Entity indicated to Evity or any Stockholder or, to the knowledge of Evity or any Stockholder, an intention to conduct the same.

(b) Evity has all licenses, permits and certifications (federal, state, foreign and local) required by law to conduct its business in the cities, states and countries in which it conducts its business, and such licenses, permits and certifications are in full force and effect. Since its date of organization, Evity has not had any such licenses, permits or certifications suspended or revoked. No proceeding is pending or, to the knowledge of Evity or any Stockholder, threatened, seeking the revocation or limitation of any of such licenses, permits and certifications.

(c) Specifically, without limiting the representations contained in Section 4.10(a) hereof, Evity and its properties are in compliance with all applicable published rules and regulations (and applicable standards and requirements) of the EPA and of all similar national, state and local agencies in which Evity owns assets or conducts business. There is no suit, claim, action or proceeding now pending before any court, governmental agency or board or, to the knowledge of Evity or any Stockholder, threatened by any person or entity for noncompliance by Evity (or by any other person with respect to any of its properties) with any environmental law, rule or regulation. Evity does not have, and its properties are not subject to, any liability, contingent or otherwise, arising out of or resulting from the release, discharge, spillage, storage, burying or other disposal, whether on its own premises or through other persons, of any pollutant, toxic or hazardous material or waste of any kind. There are no citations, fines or penalties heretofore assessed against Evity or with respect to any of its properties under any national, state or local law that remain unpaid, nor has Evity received any notices or any other communications expressly addressed to it from the EPA, the Occupational Safety and Health Administration or any other national, state or local agency or other Governmental Entity with respect to any violations or alleged violations of any national, state or local law or regulation.

4.11 Title to Tangible Property. Section 4.11 of the Disclosure Schedule hereto identifies all of the rights and interests in leasehold estates used by Evity as of the date hereof. Evity does not own any real property. Evity has valid leasehold estates identified and reflected in Section 4.11 of the Disclosure Schedule and good and valid title to all tangible personalty of any kind or nature purported to be owned or used by Evity in its business, free and clear of all liens, encumbrances or claims whatsoever except for (a) liens, encumbrances, defects or irregularities of title identified in Section 4.11 of the Disclosure Schedule, (b) liens for non-delinquent ad valorem Taxes and non-delinquent statutory liens arising other than by reason of default and (c) customary rights of way and easements that may affect the properties identified in Section 4.11 of the Disclosure Schedule and that do not detract from or materially interfere with the present use or value of the properties

subject thereto. The tangible property and assets identified in Section 4.11 of the Disclosure Schedule constitute all of the material tangible property and assets (real, personal and fixed) used in or necessary to conduct the business operations of Evity as conducted prior to the date of this Agreement and necessary to enable Evity to carry on such business as presently conducted. Evity does not own or lease any property or asset (x) which is not used in its business and is used by any other person or (y) which is used in its business but use of which is made available to other persons for matters unrelated to the business of Evity.

4.12 Intellectual Property.

(a) *Ownership.* Section 4.12(a) of the Disclosure Schedule accurately identifies all software programs currently being marketed by Evity and all software products or programs under development by Evity but not currently marketed (collectively, the "Software Programs"). Evity owns full and unencumbered right and good and valid title to the Software Programs listed in Section 4.12(a) of the Disclosure Schedule, all patents, trademarks, service marks, trade names, domain names and copyrights (including registrations and applications pertaining thereto and extensions, continuations, renewals or divisions of any such registrations or applications) and all other intellectual property rights, trade secrets, processes, formulas, know-how and other confidential or proprietary information, processes and formulae used in its businesses or otherwise necessary for the conduct of its businesses (the "Intellectual Property"), free and clear of all mortgages, pledges, liens, security interests, conditional sales agreements, encumbrances or charges of any kind. Section 4.12(a) of the Disclosure Schedule contains a complete list of all registered trademarks and service marks, all reserved trade names, all registered copyrights and all filed patent applications and issued patents used in, or otherwise necessary for the conduct of, the business of Evity as heretofore conducted.

(b) *Notices.* Section 4.12(b) of the Disclosure Schedule sets forth the form and placement of the proprietary legends and copyright notices displayed in or on the Software Programs. In no instance has the eligibility of the Software Programs for protection under applicable U.S. federal copyright law been forfeited to the public domain by omission of any required notice or any other action.

(c) *Protection.* Evity's trade secret protection practices are set forth in Section 4.12(c) of the Disclosure Schedule. To the knowledge of Evity and the Stockholders, there has been no violation of such practices by any person or entity that has resulted, or would result, in the loss of protection of any trade secret of Evity. The source code and related technical system documentation for the Software Programs (i) have at all times been maintained in strict confidence and (ii) have been disclosed by Evity only to employees and contractors who have had a "need to know" the contents thereof in connection with the performance of their duties to Evity and who have executed written agreements requiring the recipient to keep the information in strict confidence.

(d) *Personnel.* All personnel who now, or since Evity's inception have been employees, agents, consultants and contractors of Evity, who have contributed to or participated in the conception and development of the Software Programs, technical documentations, or Intellectual Property on behalf of Evity have executed nondisclosure

agreements in form provided by Evity and either (1) have been a party to a "work-for-hire" arrangement or agreements with Evity in accordance with applicable national and state law that has accorded Evity full, effective, exclusive and original ownership of all tangible and intangible property thereby arising, or (2) have executed appropriate instruments of assignment in favor of Evity as assignee that have conveyed to Evity, effective, and exclusive ownership of all tangible and intangible property thereby arising.

(e) *Software Performance.* Section 4.12(e) of the Disclosure Schedule sets forth the warranties set forth in the end-user agreements to which Evity is a party. To the knowledge of Evity and the Stockholders, Evity is not required to perform under, and is not in breach of, any of such warranties.

(f) *No Infringement.*

(i) Neither the existence nor the sale, license, lease, transfer, use, reproduction, distribution, modification or other exploitation by Evity of any Software Program or Intellectual Property, as such Software Program or Intellectual Property, as the case may be, is or was, or is currently contemplated to be, sold, licensed, leased, transferred, used or otherwise exploited by such Persons, does, did or will (1) infringe on any copyright of any Person, (2) to the knowledge of Evity and the Stockholders, infringe on any trademark, patent right or other right of any Person, (3) constitute a misuse or misappropriation of any trade secret, know-how, process, proprietary information or other right of any other Person, or (4) entitle any other Person to any interest therein, or right to compensation from Evity, its successors or assigns.

(ii) Evity has not received any notice of any lawsuit, claim, demand, proceeding, threat or allegation or otherwise has notice of any lawsuit, claim, demand, proceeding or investigation involving matters of the type contemplated by the immediately preceding sentence or is aware of any facts or circumstances that could reasonably be expected to give rise to any lawsuit, claim, demand, proceeding or investigation. There are no restrictions on Evity's ability to sell, license, lease, transfer, use, reproduce, distribute, modify or otherwise exploit any Software Programs or Intellectual Property.

(iii) Evity is not aware of any infringement, misappropriation or other violation of any Software Programs or Intellectual Property, and no lawsuit, claim, demand, proceeding or investigation brought by Evity with respect to the Software Programs and Intellectual Property is pending against any third party.

(g) *Technical Systems.* The electronic data processing, information, communications, telecommunications and computer systems and Intellectual Property that are used by Evity in its business (collectively, the "Technology Systems") operate in accordance with their technical specifications and are adequate for the operation of the business of Evity as currently operated. Evity owns or has the right to use all components of the Technology Systems. There has not been any material malfunction with respect to any

of the Technology Systems since inception that has not been remedied or replaced without disruption to the business of Evity.

(h) *Integrity.* Except with respect to demonstration or trial copies, no portion of the Software Programs contains any "back door," "time bomb," "Trojan horse," "worm," "drop dead device," "virus" or other software routines or hardware components designed to permit unauthorized access; to disable or erase software, hardware, or data; or to perform any other such actions.

(i) *Contract Performance.* Evity has observed all material provisions of, and performed all of their material obligations under, the Licenses, including, but not limited to, the performance of its product maintenance obligations. Evity has not taken any action that could cause, or failed to take any action, the failure of which could cause, (i) any material source code, trade secret or other Intellectual Property relating to the Software Programs to be released from an escrow or otherwise made available to any Person or entity other than those Persons described in Section 4.12(c), dedicated to the public or otherwise placed in the public domain or (ii) any other material adverse affect to the protection of the Software Programs under trade secret, copyright, patent or other intellectual property laws.

(j) *Year 2000.* The Software Programs (i) are year 2000 compliant and compatible, which shall include, but is not limited to, date data century recognition, and calculations that accommodate same century and multi-century formulas and data values; (ii) operate or will operate in accordance with their specifications prior to, during and after the calendar year 2000 A.D.; and (iii) shall not end abnormally or provide invalid or incorrect results as a result of date data, specifically including date data which represents or references different centuries or more than one century.

(k) *Third-Party Rights-In General.* Other than the Licenses and the Marketing Agreements, no person other than Evity has any right or interest of any kind or nature in or with respect to the Software Programs, the Technical Documentation or Intellectual Property.

(l) *No Royalties.* Other than the Licenses and the Marketing Agreements, the sale, license, lease, transfer, use, reproduction, distribution, modification or other exploitation by Evity or any of its successors or assigns of any version or release of any computer program included in the Software Programs does not and will not obligate Evity or its successors or assigns to pay any royalty, fee or other compensation to any other person.

(m) *Third-Party Components in Software Programs.* The Software Programs and Technical Documentation contain no programming or materials in which any third party may claim superior, joint or common ownership, including any right or license. The Software Programs and Technical Documentation do not contain derivative works of any programming or materials not owned in their entirety by Evity.

(n) *Third-Party Tools.* Section 4.12(n) of the Disclosure Schedule contains a complete list of material software libraries, compilers and other third-party software used in the development of the Software Programs. Section 4.12(n) of the Disclosure Schedule lists

all license agreements for the use of all such software and, if any such software is not licensed, the basis of the use of such software by Evity. All use of each of such Software Programs by Evity has been in full compliance with the respective license agreement or other rights of use listed in Section 4.12(n) of the Disclosure Schedule.

4.13 Adequacy of Technical Documentation. The technical documentation of the Software Programs (the "Technical Documentation") includes the source code (with comments) for all Software Programs, as well as any pertinent comments or explanation that may be necessary to render such materials understandable and usable in all material respects by a trained computer programmer. The Technical Documentation also includes any programs (including compilers), "workbenches," tools and higher level (or "proprietary") languages necessary for the development, maintenance and implementation of the Software Programs.

4.14 Software Contracts.

(a) *End-User Agreements.* Section 4.14(a) of the Disclosure Schedule sets forth a complete list of all licenses and sublicenses of the Software Programs and of all customer trial agreements for the Software Programs granted by Evity to other parties (the "Licenses"). All contracts identified in Section 4.14(a) of the Disclosure Schedule constitute only end-user agreements, each of which grants the end user thereunder principally the nonexclusive right and license to use an identified Software Program and related user documentation, for internal purposes only and only in the form of software object code. Section 4.14(a) of the Disclosure Schedule sets forth the general product licensing and pricing policies of Evity by categories of Software Programs.

(b) *Marketing Agreements.* Section 4.14(b) of the Disclosure Schedule sets forth a complete list of all contracts, agreements, licenses, or other commitments or arrangements in effect with respect to the marketing, remarketing, distribution, licensing or promotion of (i) the Software Programs or any other Technical Documentation or the Intellectual Property by any independent salesperson, distributor, sublicensor or other remarketer or sales organization or (ii) any third party's software products by Evity (the "Marketing Agreements").

4.15 Contracts. Section 4.15 of the Disclosure Schedule contains a complete list of all (a) employment contracts of Evity which may not be immediately terminated without penalty (or any augmentation or acceleration of benefits); (b) leases, sales contracts and other agreements with respect to any property, real or personal, of Evity in excess of \$10,000; (c) contracts or commitments for capital expenditures or acquisitions in excess of \$10,000 for one project or set of related projects; (d) agreements, contracts, indentures or other instruments relating to the borrowing of money, or the guarantee of any obligation for the borrowing of money; (e) contracts or agreements providing for any covenant not to compete by or otherwise restricting in any way Evity's engaging in any business activity; (f) contracts or agreements relating to franchisees, consultancies, professional retentions, agency, sales or distributorship arrangements pertaining to Evity or its products or activities; (g) contracts relating to the disposal of any pollutant, toxic or hazardous material or waste generated by or relating to Evity or any of its properties; (h) contracts, agreements, arrangements, understandings or commitments between Evity and any employee, officer, director or stockholder of Evity; (i) contracts between Evity and any of its customers; and (j) contracts, agreements,

arrangements or commitments, other than the foregoing, which are material to the business, assets, earnings, properties, operations or condition, financial or otherwise, of Evity, excluding, in all cases, those contracts listed in Sections 4.14(a) and 4.14(b) of the Disclosure Schedule.

True and complete copies of all the instruments listed in Section 4.15 of the Disclosure Schedule have been furnished to BMC.

All such agreements, arrangements or commitments are valid and subsisting, and Evity has duly performed its obligations thereunder in all material respects to the extent such obligations have accrued, and no breach or default thereunder by Evity or, to the knowledge of Evity or any of the Stockholders, any other party thereto has occurred that impairs the ability of Evity to enforce any material rights thereunder.

To the knowledge of Evity or any of the Stockholders, no customers or suppliers of Evity with which Evity has an ongoing relationship intend to cease purchasing from, selling to, renting from, or dealing with it, and, to such knowledge, no customer or supplier with which Evity has an ongoing relationship intends to alter in any respect the amount of such purchases, sales or the extent of dealings with Evity or to alter in any respect such purchases, sales, rentals or dealings in the event of the consummation of the transactions contemplated hereby.

4.16 Employee and Labor Matters and Plans.

(a) Section 4.16 of the Disclosure Schedule includes a true and complete list or description of all welfare and pension plans as defined in Sections 3(1) and 3(2) of ERISA and all other pension plans, welfare plans, profit-sharing plans, deferred compensation plans, stock option plans, severance pay plans, superannuation plans, and other similar plans, agreements and arrangements that are currently in effect, or have been approved before the date hereof, for the benefit of directors, officers or employees or former employees (or beneficiaries thereof) of Evity. Evity has delivered to BMC, as to each such plan, agreement and arrangement, as applicable, a true and complete copy of (i) such plan, agreement or arrangement, (ii) the most recent annual report (one of the series of Form 5500, including attachments) for each plan that is required to file that form with the IRS, (iii) each trust agreement and group annuity contract relating thereto, (iv) the most recent actuarial report or valuation relating thereto that was delivered to Evity by the actuary for all pension plans, (v) the most current summary plan description for each plan required to have such a description and (vi) the most recent IRS notification, opinion or determination letter, if any, for each plan that is represented to be qualified under Section 401(a) of the Code. All reports and disclosures relating to such plans and agreements required to be filed with or furnished to Governmental Entities, plan participants or plan beneficiaries have been filed or furnished in accordance with applicable law in a timely manner, and each plan and agreement has been administered in accordance with its governing documents and applicable law.

(b) Neither Evity nor any member of a controlled group (with the meaning of Section 414(b), (c), (m) or (o) of the Code) in which Evity is a member has ever maintained, established, sponsored, participated in, contributed to, or is obligated to contribute to, or otherwise incurred any obligation or liability (including, without limitation, any contingent liability) under any "multiemployer plan" (as defined in Section 3(37) of ERISA) or to any

“pension plan” (as defined in Section 3(2) of ERISA) subject to Title IV of ERISA or Section 412 of the Code or to any employee benefit plan described in Section 501(c)(9) of the Code. Neither Evity nor any member of its controlled group has any actual or potential withdrawal liability (including, without limitation, any contingent liability) for any complete or partial withdrawal (as defined in Sections 4203 and 4205 of ERISA) from any multiemployer plan. All plans defined in Section 3(3) of ERISA maintained or contributed to by Evity (hereinafter referred to as “plan” and collectively as the “plans”) intended to be qualified under Section 401(a) of the Code are so qualified and have received or have filed a timely application for a favorable determination letter from the IRS or are not yet required to have filed such a determination letter. With respect to the plans, there has been no “prohibited transaction” (as such term is defined in Section 406 of ERISA and Section 4975(c) of the Code) that will result in any Tax on or liability to Evity and Evity has made all required contributions to its plans or accrued therefor, as completely and accurately set forth in the Financial Statements.

(c) There are no labor disputes or disruptions to which Evity is a party. Evity is not a party to or bound by any contract, agreement or understanding with any labor union. Evity has not received and has no reasonable basis from which to expect to receive notice from any union or employees setting forth demands for representation, elections or for present or future changes in wages, terms of employment or working conditions.

(d) There are no claims, pending or, to Evity's or the Stockholders' knowledge, threatened, involving any pension or welfare plans by a current or former employee (or beneficiary thereof) of Evity.

(e) Evity does not provide employee post-retirement medical or health coverage, except as may be required by the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, (“COBRA”) or other applicable statute.

(f) There are no suits or claims, pending or, to Evity's or any Stockholder's knowledge, threatened, that adversely affect or will adversely affect the assets of any employee benefit plan or the business, prospects, results of operations, financial condition or assets of Evity, including any claims of equity ownership in Evity or of an ownership interest in any Software Program.

(g) The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby will not (A) require Evity to make a larger contribution to, or pay greater benefits or provide other rights under, any plan or arrangement listed in Section 4.16 of the Disclosure Schedule than it otherwise would, whether or not some other subsequent action or event would be required to cause such payment or provision to be triggered, or (B) create or give rise to any additional vested rights or service credits under any such plan or arrangement, unless BMC or Sub causes a partial or full plan termination of any plan subject to Section 401(a) of the Code which was previously sponsored and maintained by Evity.

(h) In connection with the consummation of the transactions contemplated by this Agreement, no payments of money or other property, acceleration of benefits, or provisions

of other rights have or will be made hereunder, under any agreement contemplated herein, or under the plans and arrangements listed in Section 4.16 of the Disclosure Schedule that would be reasonably likely to result in imposition of the sanctions imposed under Sections 280G and 4999 of the Code, whether or not some other subsequent action or event would be required to cause such payment, acceleration, or provision to be triggered.

(i) Each plan and arrangement listed in Section 4.16 of the Disclosure Schedule may be unilaterally amended or terminated in its entirety without liability except as to benefits accrued thereunder prior to such amendment or termination.

(j) No optionee of any stock option granted under any stock option plan maintained by Evity has been exercised on or prior to the Closing Date.

(k) With respect to all employees and other service providers who perform services for Evity under a services agreement with Administaff or other leasing organization ("Joint Employees") and for all periods of Joint Employees employment with Evity, Evity and Administaff (or other leasing organization, if applicable) have agreed in the applicable services agreement that:

(i) Evity has the exclusive right to grant Joint Employees nonqualified deferred compensation or equity based compensation consisting of securities of Evity of any kind including, without limitation, stock options, stock appreciation rights, restricted stock, and phantom stock. Additionally, Evity has the exclusive right to control any legal and accounting matters related to such grants where such matters solely affect Evity.

(ii) Evity has the right to hire, fire, and control the activities of Joint Employees.

(iii) Evity has the exclusive right to determine the economic value of the labor performed by Joint Employees (including compensation levels, accounting treatment, and the number and value of any options or other equity compensation granted), which is solely the basis of any nonqualified deferred compensation or equity-based compensation consisting of securities of Evity provided to Joint Employees by Evity.

(iv) Evity does not provide to any employee of Evity any employee benefits that are not also available to the Joint Employees.

(v) Evity agreed to and has remitted to Administaff, or other leasing organization if applicable, adequate funds to cover the complete remuneration and compensation of the Joint Employees of Evity and to fulfill any and all obligations and responsibilities under its agreement with Administaff or such other leasing organization for all periods prior to April 15, 2000 (the last payroll date).

(l) With respect to all employees and service providers of Evity, including Joint Employees, who have been granted incentive stock options under any Evity stock option

plan, Evity has the right to direct and control each such employee, service provider, and Joint Employee's work, both as to the final results and the details of when, where, and how the work is to be performed

4.17 Insurance Policies. Section 4.17 of the Disclosure Schedule to this Agreement contains a true and complete description of all insurance policies of Evity covering or relating to Evity and its business, properties or assets, any employees or other agents of Evity or any assets of Evity. Each such policy is in full force and effect, and is in an amount, and against such losses and risks, as are generally maintained for comparable business and properties.

4.18 No Undisclosed Liabilities. There are no liabilities of the type appropriately reflected on a balance sheet of Evity other than (a) liabilities disclosed in the Financial Statements and (b) liabilities reflected in Section 4.18 of the Disclosure Schedule. There are no pending claims for indemnification by any person against Evity under any law or agreement or pursuant to its incorporation and organization documents and, no Stockholder has knowledge of any existing facts or circumstances that will give rise to such a claim against Evity thereunder.

4.19 Brokerage Fees. Except as set forth in Section 4.19 of the Disclosure Schedule, none of Evity, any Stockholder or any of their respective Affiliates has retained any financial advisor, broker, agent or finder or paid or agreed to pay any financial advisor, broker, agent or finder on account of this Agreement or any transaction contemplated hereby.

4.20 Miscellaneous Other Information. Section 4.20 of the Disclosure Schedule sets forth the following information:

(a) the name and current annual salary and benefits of each present officer, employee and agent of Evity, and any employment agreement with respect to each such person, and the name and compensation of each person to whom Evity has paid consulting fees; and

(b) the name of each bank in which Evity has an account or safe deposit box, the number of any such accounts, the name in which the account or box is held and the names of all persons authorized to draw thereon or to have access thereto.

4.21 No Illegal or Improper Transactions. Evity has not, nor has any director, officer or employee of Evity, directly or indirectly used funds or other assets of Evity, or made any promise or undertaking in such regards, for (a) illegal contributions, gifts, entertainment or other expenses relating to political activity; (b) illegal payments to or for the benefit of governmental officials or employees, whether domestic or foreign, (c) illegal payments to or for the benefit of any person, firm, corporation or other entity, or any director, officer, employee, agent or representative thereof; (d) gifts, entertainment or other expenses that jeopardize the normal business relations between Evity and any of its customers; (e) the establishment or maintenance of a secret or unrecorded fund; or (f) participated in or co-operated with an international boycott as defined in Section 999 of the Code; and there have been no knowingly false or fictitious entries made in the books or records of Evity.

4.22 Product Liability. Evity has not given or made any warranties to third parties with respect to any products rented or sold by them, except for the warranties imposed by the provisions

of the Licenses and applicable commercial codes. Evity and the Stockholders have no knowledge of any state of facts or the occurrence of any event forming the basis of any present claim against Evity not fully covered by insurance for product liability on account of any express or implied warranty.

4.23 Transactions with Related Parties. All amounts paid (or deemed for accounting purposes to have been paid) by Evity to, or received by Evity from, any Stockholder or Affiliate of any Stockholder since the beginning of its last fiscal year for products or services (including any charge for administrative, purchasing, financial or other services) have been no more favorable to Evity than those available in arm's-length transactions. No products, services or benefits (excluding employment and/or consulting services for which an employee and/or consultant received customary compensation), including the charge therefor, have been received by Evity from any Stockholder or any Affiliate of any Stockholder since the beginning of its last fiscal year without a corresponding charge equal to the fair market value of such products, services or benefits.

4.24 Investment Representations.

(a) Each of the Stockholders, either alone or with his purchaser representative as defined in Rule 501(h) under the Securities Act, if any, has substantial experience in evaluating and investing in private placement transactions so that such Stockholder is capable of evaluating the merits and risks of its investment in the BMC Common Stock. Each of the Stockholders, by reason of such Stockholder's business or financial experience, either alone or with his purchaser representative as defined in Rule 501(h) under the Securities Act, if any, has the capacity to protect such Stockholder's own interests in connection with the acquisition of the BMC Common Stock hereunder. Each of the Stockholders is an "accredited investor" as defined in Rule 501 of Regulation D promulgated pursuant to the Securities Act. Each of the Stockholders has received a copy of each of the SEC Documents that relate to BMC. Each of the Stockholders is familiar with the business and financial condition, properties, operations and prospects of BMC. Each of the Stockholders has had an opportunity to discuss BMC's business and financial condition, properties, operations and prospects with BMC's management. Each of the Stockholders has also had an opportunity to ask questions of officers of BMC, which questions were answered to such Stockholder's satisfaction. Each of the Stockholders understands that such discussion was intended to describe certain aspects of the BMC business and financial condition, properties, operations and prospects, but were not a thorough or exhaustive description.

(b) Each of the Stockholders understands that the shares of BMC Common Stock may be "restricted securities" under the applicable federal securities laws and that the Securities Act and the rules of the Commission provide in substance that such Stockholder may dispose of the shares of BMC Common Stock only pursuant to an effective registration statement under the Securities Act or an exemption therefrom, and it understands that BMC has no obligation or intention to register the BMC Shares (except pursuant to the registration rights granted in connection with this Agreement), or to take action so as to permit sales pursuant to the Securities Act (including Rule 144) thereunder which permits limited resale of shares purchased in a private placement subject to the satisfaction of certain conditions including, among other things, the existence of a public market for the shares, the availability of certain current public information about the issue, the resale occurring not less than one

(1) year after a party has purchased and paid for the security to be sold, the sale being effected through a "broker's transaction" or in transactions with a "market maker" and the number of shares being sold not exceeding specified limitations (except pursuant to the registration rights granted in connection with this Agreement). Accordingly, such Stockholder understands that under the Commission's rules, such Stockholder may dispose of the BMC Common Stock in transactions which are exempt from registration under the Securities Act. As a consequence of all of the foregoing, each Stockholder understands that such Stockholder must bear the economic risk of the investment in the BMC Common Stock for an indefinite period of time.

4.25 Investment Company. Evity is not an "investment company," or an "affiliated person of" or "promoter" or "principal underwriter" of an investment company, as those terms are defined in the Investment Company Act of 1940, as amended (the "Investment Company Act").

4.26 Inapplicability of Certain Statutes. Evity is not subject to any state takeover law that might apply to the Merger or any of the other transactions contemplated by this Agreement.

4.27 No Misleading Statements. This Agreement, the information and schedules referred to herein and the information contained in the Financial Statements that have been furnished to BMC in connection with the transactions contemplated by this Agreement, when taken together, do not include any untrue statement of a material fact and do not and will not omit to state any material fact necessary to make the statements contained herein or therein, in light of the circumstances under which they were made, not misleading.

ARTICLE V

Tax Matters

5.1 Evity and the Stockholders' Representations Regarding Taxes. Except as set forth in Section 5.1 of the Disclosure Schedule, Evity and each of the Stockholders, severally and jointly, represent, warrant and covenant to BMC as of the date hereof and at and as of the Closing, as follows:

(a) (i) all Tax Returns of or with respect to any Tax which is required to be filed on or before the Closing Date by or with respect to Evity have been or will be duly and timely filed, (ii) such Tax Returns are complete and accurate in all material respects and correctly reflect the Tax Liability required to be reported thereon, (iii) all Taxes which have become or will become due have been or will be timely paid in full, (iv) all Tax withholding and deposit requirements imposed on or with respect to Evity have been or will be satisfied in full in all respects, and (v) no penalty, interest or other charge is or will become due with respect to the late filing of any such Tax Return or late payment of any such Tax.

(b) Section 5.1 of the Disclosure Statement lists all foreign, national, state and local income Tax Returns filed with respect to Evity for the six years prior to the date hereof. None of such Tax Returns of Evity are now or have been at any time under audit or examination by any foreign, national, state or local authority and there are no agreements, waivers or other arrangements providing for an extension of time with respect to the

assessment or collection of any Tax or deficiency of any nature against Evity or with respect to any such Tax Return, or any suits or other actions, proceedings, investigations or claims now pending or threatened against Evity with respect to any Tax, or any matters under discussion with any foreign, national, state or local authority relating to any Tax, or any claims for any additional Tax asserted by any such authority.

(c) No claim has ever been made by an authority in a jurisdiction where Evity does not file Tax Returns that it is or may be subject to taxation in that jurisdiction.

(d) The total amounts set up as liabilities for current and deferred Taxes in the Financial Statements are sufficient to cover the payment of all Taxes, whether or not assessed or disputed, which are, or are hereafter found to be, or to have been, due by or with respect to Evity for all periods (or portions thereof) ending on or before the Closing Date.

(e) Notwithstanding anything to the contrary herein, any franchise Tax paid or payable with respect to Evity shall be allocated to the taxable period during which the income, operations, assets or capital comprising the base of such Tax is measured, regardless of whether the right to do business for another taxable period is obtained by the payment of such franchise Tax.

(f) Except for statutory liens for Taxes not yet due or for Taxes that Evity is contesting in good faith through appropriate proceedings and for which appropriate reserves have been established, no liens for Taxes exist upon the assets of Evity.

(g) Evity has not made an election under section 341(f) of the Code.

(h) None of the assets of Evity is held in an arrangement that could be classified as a partnership for Tax purposes, and Evity does not own any interest in any controlled foreign corporation (as defined in section 957 of the Code), foreign personal holding company (as defined in Section 552 of the Code), passive foreign investment company (as defined in section 1297 of the Code) or other entity the income of which is or could be required to be included in the income of Evity.

(i) None of the assets of Evity is subject to a safe-harbor lease (pursuant to section 168(f)(8) of the Internal Revenue Code of 1954 as in effect after the Economic Recovery Tax Act of 1981 and before the Tax Reform Act of 1986) or is "tax-exempt use property" (within the meaning of section 168(h) of the Code) or "tax-exempt bond financed property" (within the meaning of section 168(g)(5) of the Code).

(j) Evity will not be required to include any amount in income for any taxable period beginning after the Closing Date as a result of a change in accounting method for any taxable period ending on or before the Closing Date or pursuant to any agreement with any Tax authority with respect to any such taxable period.

(k) Neither Evity nor any Stockholder has taken or agreed to take any action that would prevent the Merger from constituting a reorganization qualifying under the provisions of Section 368(a) of the Code.

(l) Prior to and in connection with the Merger, (i) none of the Evity Common Stock or Evity Preferred Stock will be redeemed other than the repurchase of the Evity Common Stock pursuant to the Repurchase Agreement between Evity and Christopher Marich, (ii) no extraordinary distribution will be made with respect to the Evity Common Stock or Evity Preferred Stock, and (iii) none of the Evity Common Stock or Evity Preferred Stock will be acquired by any person related (as defined in Treas. Reg. 1.368-1(e)(3)) without regard to Treas. Reg. 1.368-1(e)(3)(i)(A)) to Evity.

(m) Following the Merger, the surviving corporation will hold at least 90 percent of the fair market value of the net assets of Evity, at least 70 percent of the fair market value of the gross assets of Evity, and, to the knowledge of Evity and the Stockholders, at least 90 percent of the net assets of Sub, and at least 70 percent of the fair market value of the net assets of Sub, held immediately prior to the Merger, taking into account amounts used to pay Merger expenses and any distributions other than regular dividends.

(n) Except as set forth in Section 15.8, Evity and each of the Stockholders will each pay their respective expenses, if any, incurred in connection with the Merger.

(o) There is no intercorporate indebtedness existing between Evity and BMC or between Evity and Sub that was issued, acquired, or will be settled at a discount.

(p) Evity is not under the jurisdiction of a court in a title 11 or similar case within the meaning of section 368(a)(3)(A) of the Code.

(q) Evity is not an investment company as defined in Section 368(a)(2)(F)(iii) and (iv) of the Code.

(r) Evity has not made any payments, is obligated to make any payments, or is a party to any agreement that under certain circumstances could obligate it to make any payments that would not be deductible under Section 280G of the Code.

(s) At the time of the Merger, the fair market value of the assets of Evity will exceed the sum of its liabilities to which such assets are subject.

5.2 BMC and Sub Representations Regarding Taxes. BMC and Sub represent and warrant to the Stockholders as follows:

(a) Neither BMC nor Sub has taken or agreed to take any action that would prevent the Merger from constituting a reorganization qualifying under the provisions of Section 368(a) of the Code.

(b) In connection with the Merger, none of the Evity Common Stock will be acquired by BMC or a person related (as defined in Treas. Reg. 1.368-1(e)(3)) to BMC for consideration other than BMC Common Stock except for the Per Share Cash Consideration and any cash received in lieu of fractional share interest in BMC Common Stock.

(c) Following the Merger, the surviving corporation will hold at least 90 percent of the fair market value of the net assets of Evity, at least 70 percent of the fair market value of the gross assets of Evity, at least 90 percent of the net assets of Sub, and at least 70 percent of the fair market value of the net assets of Sub, held immediately prior to the Merger, taking into account amounts used to pay Merger expenses and any distributions other than regular dividends.

(d) BMC has no plan or intention to (i) liquidate the surviving corporation, (ii) merge the surviving corporation with and into another corporation, (iii) sell or otherwise dispose of the stock of the surviving corporation except for transfers or successive transfers to one or more corporations controlled (within the meaning of section 368(c) of the Code) in each case by the transferor corporation, (iv) cause the surviving corporation to issue additional shares of its capital stock that would result in BMC losing control (within the meaning of section 368(c) of the Code) of the surviving corporation, (v) cause or permit the surviving corporation to sell or otherwise dispose of any of its assets or of any of the assets acquired from Sub except for dispositions made in the ordinary course of business or transfers or successive transfers to one or more corporations controlled (within the meaning of section 368(c) of the Code) in each case by the transferor corporation, or (vi) reacquire any of the BMC Common Stock issued to the holders of Evity Common Stock or Evity Preferred Stock pursuant to the Merger, other than as set forth in those certain Share Repurchase Agreements between BMC and the Stockholders.

(e) Sub has no liabilities that will be assumed by the surviving corporation in the Merger and will not transfer to the surviving corporation in the Merger any assets subject to liabilities.

(f) Following the Merger, the surviving corporation will continue the historic business of Evity or use a significant portion of its assets in a business, within the meaning of Treas. Reg. 1.368-1(d).

(g) There is no intercorporate indebtedness existing between Evity and BMC or between Evity and Sub that was issued, acquired, or will be settled at a discount.

(h) BMC does not own, nor has it owned during the past five year, any shares of stock of Evity.

ARTICLE VI

Representations, Warranties and Covenants of BMC and Sub

BMC and Sub represent and warrant to the Stockholders as follows:

6.1 Organization, Etc. BMC is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has full corporate power and authority to conduct its business as it is now being conducted and to own, operate or lease the properties and assets it currently owns, operates or holds under lease. Sub is a corporation duly organized, validly

existing and in good standing under the laws of the State of Delaware and has full corporate power and authority to conduct its business as it is now being conducted and to own, operate or lease the properties and assets it currently owns, operates or holds under lease.

6.2 Authorization. Each of BMC and Sub has the requisite corporate power and authority to enter into this Agreement and to carry out its obligations hereunder. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by the respective Boards of Directors of BMC and Sub and by the sole stockholder of Sub, and no other corporate proceedings on BMC's or Sub's part are necessary to authorize this Agreement and the transactions contemplated hereby, and this Agreement constitutes the valid and binding obligation of BMC and Sub enforceable in accordance with its terms.

6.3 Capitalization. The authorized capitalization of BMC consists of 300,000,000 shares of BMC Common Stock of which, as of March 31, 2000, 244,576,393 shares are issued and outstanding, 60,000,000 shares are reserved for issuance in conjunction with various BMC benefit plans and 1,000,000 shares of preferred stock, par value \$.01 per share of which, as of March 31, 2000 no shares were issued or outstanding. Other than as set forth above there are no outstanding options, warrants, convertible securities, calls, rights, commitments, preemptive rights or agreements or instruments or understandings of any character, to which BMC is a party or by which BMC is bound, obligating BMC to issue, deliver or sell, or cause to be issued, delivered or sold, shares of capital stock of BMC. The authorized capitalization of Sub consists of 1,000 shares of common stock, par value \$.01 per share, all of which are owned by BMC.

6.4 Brokerage Fees. Neither BMC nor Sub has retained any financial advisor, broker, agent or finder or paid or agreed to pay any financial advisor, broker, agent or finder on account of this Agreement or any transaction contemplated hereby.

6.5 No Violation. The execution and delivery of this Agreement by BMC and Sub does not, and the consummation by BMC and Sub of the agreements and transactions contemplated by this Agreement will not, (a) conflict with, or result in any violation of or default or loss of any benefit under, any provision of BMC's or Sub's Certificate of Incorporation or Bylaws; (b) violate any material permit, concession, grant, franchise, law, rule or regulation, or any judgment, decree or order of any Governmental Entity to which BMC or Sub is a party or to which any of either of their property is subject; or (c) conflict with, or result in a breach or violation of, or accelerate the performance required by, the terms of any material agreement, contract, indenture or other instrument to which BMC or Sub is a party or to which any of their property is subject, or constitute a default or loss of any right thereunder or an event which, with the lapse of time or notice or both, might result in a default or loss of any right thereunder or the creation of any material lien, charge or encumbrance upon any of the assets or properties of BMC or Sub.

6.6 Approvals. The execution and delivery of this Agreement and the consummation of the agreements and transactions contemplated by this Agreement will not require the consent, approval, order or authorization of any Governmental Entity or regulatory authority or any other person under any permit, license, agreement, indenture or other instrument to which BMC is a party or to which any of its properties are subject, and no declaration, filing or registration with any Governmental Entity or regulatory authority is required by BMC in connection with the execution and delivery of this Agreement and the consummation of such agreements and transactions, other

than such consents, approvals, orders or authorizations, of which the failure to obtain would not have a material adverse effect on the ability of BMC to consummate the transactions contemplated by this Agreement.

6.7 SEC Documents. BMC has delivered to Evity true, accurate and complete copies of BMC's most recent reports on Forms 10-K, 10-Q and any report on Form 8-K filed since the most recent Form 10-Q (collectively, the "SEC Documents").

6.8 BMC Shares. At Closing, the Stockholders shall acquire good title to the BMC Shares, free and clear of all encumbrances.

ARTICLE VII

Certain Covenants of Evity and the Stockholders

7.1 Access to Records. At all times during normal business hours from and after the date hereof until the Closing or the termination of this Agreement pursuant to Section 11.1 hereof, Evity shall afford BMC, BMC's counsel and other authorized representatives reasonable access to the properties, employees and officers of Evity and to all books, accounts, Tax Returns, financial and other records, including audit work papers, correspondence and contracts of every kind of Evity as BMC may reasonably request. Evity shall also furnish to BMC as promptly as practicable (a) all supplemental financial information regarding Evity prepared hereafter by Evity and (b) all other financial and operating data and other information concerning the business, properties and personnel of Evity as BMC may reasonably request. Before the Closing, Evity shall, as requested by BMC, make available on a reasonable basis the officers and other appropriate employees of Evity to discuss with representatives of BMC the condition, operation, business and prospects of Evity.

7.2 Litigation and Claims. Prior to the Closing, Evity shall promptly inform BMC in writing of any litigation, or of any claim or controversy or contingent liability that may become the subject of litigation, against Evity or affecting any of its business, properties or assets.

7.3 Notice of Material Adverse Changes by the Representatives. Evity and each of the Representatives shall promptly inform BMC in writing upon becoming aware of any change that shall have occurred or shall have been threatened in the financial condition, results of operations, business or assets of Evity that is or will become materially adverse to Evity.

7.4 No Other Bids. Until the termination of this Agreement pursuant to Section 11.1 hereof, neither Evity nor any Stockholder shall, and no Stockholder shall permit Evity to, authorize or permit any officer, director or employee of, or any investment banker, attorney, accountant or other representative retained by, the Stockholders or Evity to, (a) entertain, encourage, solicit or initiate any inquiries or the making of any proposal that may reasonably be expected to lead to any proposal to purchase Evity, or its assets and business, or any shares of capital stock of Evity or (b) participate in any discussions or negotiations, or provide third parties with any information relating to any such inquiry or proposal. The Stockholders shall immediately advise BMC of any such inquiries or proposals.

7.5 Continuing Relationships and Covenants not to Compete.

7.5.1 (a) Each of the Stockholders agrees that the transactions contemplated by this Agreement constitute consideration for the covenant not to compete set forth below.

(b) Michael Lunt, Steve Connor and Walter Bodwell (the "Key Employees"), agree that the transactions contemplated by this Agreement constitute consideration for their covenants not to compete set forth below.

7.5.2 Each of the Stockholders hereby agrees that commencing on the Effective Date and continuing for a period of three years thereafter unless prior written consent is provided by BMC, he shall not directly or indirectly engage in any Competitive Activities (as hereinafter defined) anywhere within the Territory. Each of the Key Employees hereby agrees that commencing on the Effective Date and continuing for a period of two years (provided, that with respect to Walter Bodwell such period shall be three years) thereafter, unless prior written consent is provided by BMC, he/she shall not directly or indirectly engage in any Competitive Activities anywhere within the Territory.

(a) The term "Competitive Activities" as used herein shall mean:

(i) directly or indirectly engaging in, continuing in or carrying on any business in competition with, or functionally equivalent to, the software products, services and business of Evity as of the Closing or as planned by Evity as of the Closing as evidenced by written plans (the "Business"), including owning, controlling, participating in, joining, operating, or managing or being a partner or stockholder of any business which competes with or is engaged in or carries on any aspect of the Business provided, that each of the Stockholders or Key Employees may purchase or otherwise acquire up to (but not more than) one percent (1%) of any class of securities of any enterprise (but without otherwise participating in the activities of such enterprise), if such securities are listed on any national or regional securities exchange or have been registered under Section 12(g) of the Exchange Act;

(ii) consulting with, advising or assisting in any way, whether or not for consideration, any corporation, partnership, firm or other business organization which is now or at the time of such consultation, advice, or assistance is a competitor of the Business or any business which competes with the Business, including, but not limited to, advertising or otherwise endorsing the products or services of any such competitor; soliciting clients or customers of BMC or its subsidiaries (or persons or entities from which BMC or its subsidiaries have solicited orders for the sale of any Business service within the last three years) or otherwise serving as an intermediary for any such competitor; loaning money or rendering any other form of financial assistance to any such competitor;

(iii) offering employment to, or inducing or attempting to induce any director, officer, employee, agent, or customer, supplier or lessor of BMC or its subsidiaries to terminate such position or relationship with BMC or its subsidiaries; and

(iv) directly or indirectly, through a future subsidiary, affiliate or otherwise, hiring, retaining, employing or otherwise providing compensation for or to any employee of Evity who was employed by Evity on the Closing Date without the prior written consent of BMC.

(b) The Stockholders acknowledge that the market for the software products and services of Evity is the entire world and further state that Evity has in fact promoted and marketed Evity's software products and services throughout the U.S.A., Canada, as well as countries throughout Europe, Asia, Australia, and elsewhere. Accordingly, the parties agree that the term "Territory" as used in this Section shall mean the entire world.

(c) The restrictions contained in the second sentence of Section 7.5.2 shall terminate automatically with respect to a Key Employee (provided that such provisions shall survive with respect to all other Key Employees) ten business days after the termination of such Key Employee by Evity or BMC (or the applicable subsidiary of BMC or Evity) without Cause unless, prior to such tenth business day, BMC shall have elected in writing ("BMC Election Notice") delivered to such Key Employee to continue the effectiveness of the restrictions contained in the second sentence of Section 7.5.2 (a "BMC Election").

7.5.3 The Stockholders and Key Employees understand and acknowledge that the foregoing restrictions may limit his or her ability to engage in a business similar to the Business, but acknowledge that he or she is receiving sufficiently high consideration and benefits from BMC under this Agreement to justify and compensate for such restrictions. It is expressly understood and agreed that BMC and each of the Stockholders and Key Employees consider the restrictions contained in Section 7.5.2 above to be reasonable and necessary for the purposes of preserving and protecting the Business and good will purchased by BMC. Nevertheless, if any of the aforesaid restrictions are found by a court having jurisdiction to be unreasonable, or over broad as to geographic area, time, or scope of activity to be restricted, or otherwise unenforceable, the parties intend for and hereby request that the restrictions therein set forth to be modified by such court so as to be reasonable and enforceable and, as so modified by the court, to be fully enforced.

7.5.4 The Stockholders and Key Employees agree and acknowledge that they have had access to and knowledge of the trade secrets and confidential information of Evity and, to the extent of any continuing relationship with BMC from and after the Closing Date, they will have access to and knowledge of BMC's trade secrets and confidential information. In order to protect the trade secrets and confidential information of the Business, both before and after the Closing Date, each of the Stockholders and Key Employees agrees that he or she shall not (except to the extent needed in order to perform his/her employment or other duties to BMC) at any time, either during or after his or her employment by BMC, as appropriate, in any capacity (*e.g.*, officer, employee, consultant, contractor, or the like), disclose to others, use, copy or permit to be copied or used, any secret or confidential information of BMC or relating to the Business. The term "secret or confidential information of BMC or relating to the Business" shall include, without limitation, BMC's and/or Evity's plans, strategies, costs, prices, applications and functionality of products and services, results of studies, tests, investigations, or experiments, computer software in source code, object code, or documentation form, programmer's manuals and notes, algorithms, flow charts, methods of doing business, training manuals and procedures, the status and content of Evity's and BMC's contracts

BMC including, without limitation, copyright registration applications, patent applications and/or recordation documents reasonably necessary for the purposes of protecting BMC's rights in and to the Software Programs.

ARTICLE VIII

Conduct of Business by Evity

The Stockholders, Evity and BMC agree (unless BMC shall otherwise consent in writing) that prior to the Closing:

8.1 Ordinary Course. Except as provided in this Agreement, Evity shall (a) carry on its business in the usual, regular and ordinary course in a manner consistent with its past practices and in compliance with all applicable laws, rules and regulations and (b) preserve its business organization, maintain its rights and franchises, keep available the services of its officers and Stockholders and preserve the goodwill and its relationships with customers, suppliers and others having business dealings with them. Evity shall, and the Stockholders shall use their reasonable efforts to cause Evity to, preserve in full force and effect all material leases, operating agreements, permits, licenses, contracts and other material agreements which relate to the business, properties or assets of Evity (other than those expiring by their terms) and perform or cause to be performed all material obligations of Evity in or under any of such leases, agreements and contracts relating to such assets.

8.2 Dividends; Changes in Stock. Except as provided in Section 8.2 of the Disclosure Schedule, Evity shall not (a) declare or pay any dividend on or make any other distribution in respect of any of its capital stock, (b) split, combine or reclassify any of its capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of, its capital stock, (c) purchase, redeem or otherwise acquire any shares of its capital stock, or (d) take any preliminary action with respect to the foregoing.

8.3 Issuance and Purchase of Securities. Evity shall not (except with respect to the exercise of outstanding stock options) (a) purchase, acquire, issue, deliver, sell or authorize the issuance, delivery or sale of any stock appreciation rights or of any shares of its capital stock of any class or any securities convertible into or exchangeable for, or rights, warrants or options to acquire, any such shares or convertible or exchangeable securities or (b) enter into any agreement or understanding or take any preliminary action with respect to the matters referred to in clause (a) of this Section 8.3.

8.4 Governing Documents; Inconsistent Agreements. Evity shall not amend its Certificate of Incorporation or Bylaws or (b) enter into any agreement or incur any obligation, the terms of which would be violated by the consummation of the transactions contemplated by this Agreement.

8.5 Indebtedness. Except as otherwise agreed to by BMC, Evity shall not incur any indebtedness, including indebtedness for borrowed money, or guarantee any such indebtedness or issue or sell any debt securities of Evity or guarantee any debt securities of others, or, other than in the ordinary course of business, incur any account payable or any liability or obligation for Taxes,

or enter into or modify any contract, agreement, commitment or arrangement with respect to the foregoing.

8.6 Employee Contracts and Benefit Plans. Evity shall not adopt or amend any employee benefit plan or enter into any employment, severance or similar contract with any person (including, without limitation, contracts with management of Evity that might require that payments be made upon the consummation of the transactions contemplated hereby) or amend any such existing contracts to increase any amounts payable thereunder or benefits provided thereunder. Evity shall not grant any increase in compensation to any of its non-executive officer or sales employees, or pay any bonus, which would cause such employee's annual compensation to exceed the compensation range as set forth in Section 8.6 of the Disclosure Schedule, as indicated. Evity shall not (a) grant any increase in compensation to any of its executive officers or (b) make more materially favorable (to the employee) any of its variable compensation plans for its executive officers. Neither Evity nor any plan (including welfare and pension plans defined by Sections 3(1) and 3(2) of ERISA, if applicable), and any trust created thereunder, shall (a) engage in any "prohibited transaction" (as such term is defined in Section 406 of ERISA and Section 4975(c) of the Code), (b) incur any "accumulated funding deficiency" (as such term is defined in Section 302 of ERISA) whether or not waived, (c) terminate any plan in a manner that could result in the imposition of a lien on any property of Evity pursuant to Section 4068 of ERISA, or (d) take any action that could adversely affect the qualification of any plan or its compliance with the applicable requirements of ERISA or that might result in any "reportable event" (as such term is defined in Section 4043(c) of ERISA). Evity shall file, on a timely basis, all reports and forms required by regulations of any Governmental Entity with respect to any employee benefit plan or agreement described in any schedule hereto.

8.7 Prohibited Dispositions. Other than sales and transfers of products in the ordinary course of business and consistent with present practice, and other than those contemplated sales and transfers completely and accurately set forth in an annual budget of Evity which has been approved by BMC or as otherwise agreed to by BMC, Evity shall not (a) sell, lease or otherwise dispose of any of its assets having a book or market value in excess of \$10,000 in the aggregate or that are otherwise material, individually or in the aggregate, to the business, results of operations, financial condition or assets of Evity or (b) enter into, or consent to the entering into, any agreement granting a preferential right to sell, lease or otherwise dispose of any of such assets.

8.8 Lines of Business and Capital Expenditures. Evity shall not (a) enter into any new lines of business, (b) incur or commit to any capital expenditures, obligations or liabilities in connection therewith other than capital expenditures, obligations or liabilities that, on a basis after giving effect to such acquisition or expenditure, individually or in the aggregate taken with all other such expenditures obligations or liabilities, exceeds \$10,000; (c) acquire or agree to acquire by merging or consolidating with, or acquire or agree to acquire by purchasing any assets of, or in any manner, any person in a transaction that would be material to Evity; or (d) otherwise, except as to the acquisition of materials and supplies for its products and activities in the ordinary course of business and consistent with past practices, acquire or agree to acquire any assets for a total consideration that, on a basis after giving effect to such acquisition or expenditure, individually or in the aggregate taken with all other such expenditures, obligations or liabilities, exceeds \$10,000.

8.9 Accounting Methods, Etc. Evity shall not change its methods of accounting or tax elections in effect as of the date of this Agreement, or change materially any of its methods of accounting or tax elections for federal or state income Tax purposes from those employed in the preparation of the federal and state income Tax Returns of Evity for the taxable year ended December 31, 1998, except as required by changes in law.

8.10 Software Programs. Evity and the Stockholders shall use their best efforts to prevent any material adverse effect upon the Software Programs or the Intellectual Property.

8.11 Related Party Transactions. Evity shall not enter into any transaction with any Stockholder or Affiliate of any Stockholder for products or services (including any charge for administrative, purchasing, financial or other services) that are less favorable to Evity than those available in arm's-length transactions.

ARTICLE IX

Mutual Covenants

9.1 Regulatory Filing; Consents; Reasonable Efforts. Subject to the terms and conditions of this Agreement, Evity and BMC shall use their respective reasonable best efforts to (a) obtain all consents, waivers, approvals, authorizations and orders required in connection with the authorization, execution and delivery of this Agreement and the consummation of the Merger; and (b) take, or cause to be taken, all appropriate action, and do, or cause to be done, all things necessary, proper or advisable to consummate and make effective the transactions contemplated by this Agreement as promptly as practicable.

Evity and BMC shall promptly file such materials as are required with respect to the transactions contemplated hereby and shall cooperate with the other party to the extent necessary to assist the other party in the preparation of such filings. Without limiting the generality of the foregoing, Evity and BMC agree to (a) promptly provide all information requested by any governmental entity in connection with the Merger or any of the other transactions contemplated by this Agreement; (b) promptly take, and cause its affiliates to take, all actions and steps necessary to obtain any antitrust clearance or similar clearance required to be obtained from the Federal Trade Commission, the Department of Justice, any state attorney general, any foreign competition authority or any other governmental entity in connection with the transactions contemplated by this Agreement; (c) give the other party prompt notice of the commencement of any investigation, action or legal proceeding by or before any governmental entity with respect to the Merger or any of the other transactions contemplated by this Agreement; (d) keep the other party informed as to the status of any such investigation, action or legal proceeding, and (e) promptly inform the other party of any communication to or from the Federal Trade Commission, the Department of Justice or any other governmental entity regarding the Merger. Evity and BMC will consult and cooperate with the other party and will consider in good faith the views of the other party in connection with any analysis, appearance, presentation, memorandum, brief, argument, opinion or proposal made or submitted in connection with any investigation, action or legal proceeding under or relating to any federal or state or foreign antitrust, competition or fair trade law. In addition, except as may be prohibited by any governmental entity or by any law, rule or regulation, in connection with any investigation, action or legal proceeding under or relating to any federal or state or foreign antitrust, competition or fair

trade law or any other similar investigation, action or legal proceeding, Evity and BMC will permit authorized representatives of the other party to be present at each meeting or conference relating to any such investigation, action or legal proceeding and to have access to and be consulted in connection with any document, opinion or proposal made or submitted to any governmental entity in connection with any such investigation, action or legal proceeding.

9.2 Tax Treatment. All parties intend the Merger to be a tax-free reorganization within the meaning of Section 368(a) of the Code, and agree to use their respective reasonable best efforts to take all action required or appropriate to facilitate such tax treatment.

9.3 Further Assurances. Prior to and following the Closing, each party agrees to cooperate fully with the other parties and to execute such further instruments, documents and agreements and to give such further written assurances, as may be reasonably requested by any other party to better evidence and reflect the transactions described herein and contemplated hereby and to carry into effect the intents and purposes of this Agreement.

9.4 Satisfaction of Conditions Precedent. BMC and Sub will each use its reasonable best efforts to satisfy or cause to be satisfied all of the conditions precedent which are set forth in Section 10.1 or Section 10.3, Evity will use its reasonable best efforts to satisfy or cause to be satisfied all of the conditions precedent which are set forth in Sections 10.1 and 10.2, and BMC, Sub and Evity will each use their reasonable best efforts to cause the transactions contemplated by this Agreement to be consummated, and, without limiting the generality of the foregoing, to obtain all consents and authorizations of third parties and to make all filings with, and give all notices to, third parties which may be necessary or reasonably required on its part, respectively, in order to effect the transactions contemplated hereby.

9.5 Employee Stock Options. BMC shall grant on the Effective Date, pursuant to the BMC Software, Inc. 2000 Stock Option Plan attached hereto as Exhibit 9.5, to the employees of Evity listed on Schedule 9.5 hereto, options to purchase BMC Common Stock in the amounts and with the vesting terms set forth in Schedule 9.5.

ARTICLE X

Conditions of the Closing

10.1 Conditions to All Parties' Obligations. The obligations of all the parties to this Agreement to consummate the transactions described in this Agreement shall be subject to the fulfillment of the following conditions:

(a) As of the Closing, no temporary restraining order, preliminary or permanent injunction or other order or restraint issued by any court of competent jurisdiction, no order, decree, restraint or pronouncement by any Governmental Entity, and no other legal restraint or prohibition that would prevent or have the effect of preventing the consummation of the transactions described in this Agreement shall be in effect.

(b) As of the Closing, the permits, approvals, filings and consents required to be obtained or made prior to the consummation of the transactions described in this Agreement

under applicable federal laws of the United States or applicable laws of any foreign jurisdiction or state having jurisdiction over the transactions described in this Agreement shall have been obtained or made, as the case may be, and all such regulatory approvals shall be in full force and effect.

10.2 Conditions to the Obligations of BMC and Sub to Close. The obligations of BMC and Sub under this Agreement to consummate the transactions described in this Agreement are subject to the fulfillment at or prior to the Closing, or, if an earlier date is expressly provided below, at or prior to such earlier date, of the following conditions, any of which may be waived by BMC and Sub in writing; *provided, however*, BMC's election to proceed with the Closing of the transactions contemplated herein shall not be deemed a waiver of any breach of any representation, warranty or covenant herein, whether or not known to BMC or existing on the Closing Date.

(a) The representations and warranties of Evity and the Stockholders shall be true and correct in all material respects as of the date when made and as of the Closing.

(b) Evity and the Stockholders shall have duly performed and complied in all material respects with the covenants, agreements and conditions required by this Agreement to be performed by or complied with by them prior to or at the Closing.

(c) This Agreement and the Merger Agreement shall have been approved by Evity's stockholders in accordance with applicable laws and regulatory requirements.

(d) BMC shall have received an opinion from Gray Cary Ware & Freidenrich LLP, counsel to Evity, dated as of the Closing, in substantially the form attached as Exhibit 10.2(d).

(e) The Evity Stock Option Plan and Option Agreements shall have been amended to provide for the Assumed Options in a manner satisfactory to BMC.

(f) Clay Davis, Robert Neville and Christopher Marich shall have entered into Share Repurchase Agreements in the form attached hereto as Exhibit 10.2(f).

(g) L & H Leasing Co., Ltd. shall have executed and delivered a Stockholders Agreement in the form attached hereto as Exhibit 10.2(g).

10.3 Conditions to the Obligations of Evity to Close. The obligations of Evity under this Agreement to consummate the transactions described in this Agreement are subject to the fulfillment of the following conditions at or prior to the Closing or, if an earlier date is expressly provided below, at or prior to such earlier date, of the following conditions, any of which may be waived by Evity in writing; *provided, however*, Evity's election to proceed with the Closing of the transactions contemplated herein shall not be deemed a waiver of any breach of any representation, warranty or covenant herein, whether or not known to Evity or any Stockholder or existing on the Closing Date.

(a) The representations and warranties of BMC and Sub herein shall be true and correct in all material respects as of the date when made and as of the Closing.

(b) BMC and Sub shall have duly performed and complied in all material respects with the covenants, agreements and conditions required by this Agreement to be performed or complied with by them prior to or at the Closing.

(c) The Stockholders shall have received an opinion from Vinson & Elkins L.L.P., counsel to BMC and Sub, dated as of the Closing in substantially the form attached as Exhibit 10.3(c).

(d) BMC shall have made effective provision for the assumption effective at the Closing of all stock options outstanding under the Evity Stock Option Plan.

ARTICLE XI

Termination

11.1 Termination. This Agreement may be terminated prior to the Closing by any party if the Closing shall not have occurred on or before April 30, 2000, or such later date as the parties may agree in writing.

11.2 Effect of Termination. In the event of termination of this Agreement as provided in Section 11.1 hereof, this Agreement shall, except as provided herein, forthwith become void and there shall not be any liability or obligation with respect to the terminated provisions of this Agreement on the part of BMC, Sub, Evity or the Stockholders, except and to the extent such termination results from the willful breach by a party of any of its representations, warranties or agreements hereunder.

ARTICLE XII

Survival of Representations, Warranties, Covenants and Agreements

12.1 Limited Representations. Except as provided otherwise in Section 12.2, all of the representations, warranties, covenants and agreements of the parties contained in this Agreement or in any writing delivered pursuant to this Agreement shall not terminate at, but rather shall survive, the Closing Date and shall terminate on the first anniversary of the Closing Date; *provided, however*, that the representations, warranties, covenants and agreements contained in Section 4.12 shall terminate on the third anniversary of the Closing date; *provided further*, that such representations, warranties, covenants and agreements shall survive as to any Notice of Claim if made prior to their termination date with respect to the claims described in such Notice of Claim until such Notice of Claim is fully paid or otherwise resolved by the parties hereto in writing or pursuant to Section 13.3 hereto.

12.2 Surviving Representations. All of the representations, warranties and covenants and agreements of the parties contained in Article III, Sections 4.1, 4.2, 4.3 and 4.8, Section 7.5, and Articles VI, XI, XII, XIII, XIV and XV shall not terminate at, but rather shall survive, the Closing Date and shall terminate at the end of the statutory limitations period applicable to claims relating to such provisions; *provided, however*, that such representations, warranties, covenants and

agreements shall survive as to any Notice of Claim if made prior to their termination date with respect to the claims described in such Notice of Claim until such Notice of Claim is fully paid or otherwise resolved by the parties hereto in writing or pursuant to Section 13.3 hereto. All of the representations, warranties, covenants and agreements in this Agreement or in any writing delivered pursuant to this Agreement, to the extent that a breach or default in any representation, warranty, covenant or agreement is a result of fraud or intentional misrepresentation or fraudulent or intentional breach of covenant or agreement, shall not terminate at, but rather shall survive, the Closing Date and shall terminate at the end of the statutory limitations period applicable to such claims for fraud or intentional misrepresentation.

ARTICLE XIII

Indemnification

13.1 *Indemnification by the Stockholders.*

(a) General.

(i) Each of the Stockholders shall, severally and jointly, indemnify, defend and hold harmless BMC its directors and officers, and each other person, if any, who controls BMC within the meaning of the Securities Act ("Controlling Persons") in respect of any and all claims, losses, damages, liabilities, demands, assessments, judgments, costs and expenses (including, without limitation, settlement costs and any legal or other expenses for investigating, bringing or defending any actions or threatened actions) reasonably incurred by BMC, any of its directors, officers or Controlling Persons in connection with each and all of the following:

(1) any misrepresentation or breach of any warranty made by Evity or the Stockholders in this Agreement or in any schedule, exhibit, certificate or other instrument attached to this Agreement; and

(2) the breach of any covenant, agreement or obligation of Evity or the Stockholders contained in this Agreement or any other instrument attached to this Agreement.

(ii) Except in the case of a breach of a representation, warranty or covenant contained in Sections 4.1, 4.2, 4.3, 4.8 or 4.12, and except in the case of fraud or intentional misrepresentation, the liability under this Article XIII of the Stockholders shall not exceed, in the aggregate, 10% of the Purchase Price.

(iii) Except in the case of fraud or intentional misrepresentation, the liability under this Article XIII of any Stockholder shall not exceed the Purchase Price received by such Stockholder pursuant to the Merger.

(iv) Notwithstanding the foregoing, none of the indemnified parties pursuant to this Section 13.1 will be entitled to make a claim against any indemnifying party hereunder pursuant to Section 13.1, as to the Stockholders'

obligation to indemnify, unless and until the aggregate amount of all indemnifiable losses incurred under Section 13.1 exceeds \$350,000 and in such event only to the extent that the aggregate amount of all such indemnifiable losses incurred under Section 13.1 exceeds \$350,000.

(b) Claims for Indemnification.

(i) Whenever any claim shall arise for indemnification under this Section 13.1, BMC shall describe such claim in a written notice ("Notice of Claim") to the Representatives and, when known, specify the facts constituting the basis for such claim and the amount or an estimate of the amount of such claim. Each Notice of Claim shall (A) be signed by a proper representative of BMC, (B) contain a description of the claim, (C) specify the amount of such claim, and (D) state that, in the opinion of the signer thereof, such Notice of Claim is valid under the terms of Section 13.1 hereof and is being given by BMC in good faith.

(ii) BMC shall give the Representatives prompt written notice of any claim for indemnification hereunder resulting from, or in connection with, any claim or legal proceeding by a person who is not a party to this Agreement ("Third Party Claim") and, with respect to any Third Party Claim, BMC shall undertake the defense thereof by representatives reasonably satisfactory to BMC and the Representatives; *provided, however*, if such Third Party Claim does not assert a claim, which, if successful, would exceed the applicable limitations on the liability of the Stockholders contained in Sections 13.1(a)(ii) or (iii) and is not otherwise material to BMC, the Representatives shall have the right to undertake the defense thereof with representatives reasonably satisfactory to the Representatives and BMC. The party that is entitled to undertake the defense of such Third Party Claim shall be referred to in this Section 13.1(b)(ii) as the "Defending Party." The Defending Party shall not have the right to settle or compromise or enter into any binding agreement to settle or compromise, or consent to entry of any judgment arising from, any such claim or proceeding in their sole discretion without the prior written consent of the other party. The party that is not the Defending Party shall have the right to participate in any such defense of a Third Party Claim with advisory counsel of its own choosing at its own expense. In the event the Defending Party, within a reasonable time after notice of any Third Party Claim, fails to defend, the other party shall have the right to undertake the defense, compromise or settlement of such Third Party Claim. Such party, without the Defending Party's written consent, shall not settle or compromise any such Third Party Claim or consent to entry of any judgment. Notwithstanding any provision in this Section 13 to the contrary, failure of BMC to give any notice of any Third Party Claim required by this Section 13.1 shall not constitute a waiver of BMC's right to indemnification or a defense to any claim by BMC hereunder, except to the extent that the indemnifying party is materially prejudiced in undertaking the defense thereof.

(c) Manner of Indemnification. All indemnification by the Stockholders hereunder shall be effected by (at each of the Stockholders' respective option) the payment of cash or shares of BMC Common Stock valuing such shares of BMC Common Stock at

the fair market value price (based upon a seven-day closing average ending on the date immediately prior to the date of the Notice of Claim) of the BMC Shares.

13.2 Indemnification by BMC.

(a) General. BMC shall indemnify, defend and hold harmless the Stockholders in respect of any and all claims, losses, damages, liabilities, demands, assessments, judgments, costs and expenses (including, without limitation, settlement costs and any legal or other expenses for investigating, bringing or defending any actions or threatened actions) reasonably incurred by the Stockholders in connection with each and all of the following:

(i) any misrepresentation or breach of any warranty made by BMC or Sub in this Agreement or in any schedule, exhibit, certificate or other instrument attached to this Agreement; and

(ii) the breach of any covenant, agreement or obligation of BMC or Sub contained in this Agreement or any other instrument attached to this Agreement.

(b) Claims for Indemnification.

(i) Whenever any claim shall arise for indemnification under this Section 13.2, the Representatives shall describe such claim in a Notice of Claim to BMC and, when known, specify the facts constituting the basis for such claim and the amount or an estimate of the amount of such claim. Each Notice of Claim shall (A) be signed by the Representatives, (B) contain a description of the claim, (C) specify the amount of such claim, and (D) state that, in the opinion of the signer thereof, such Notice of Claim is valid under the terms of Section 13.2 hereof and is being given by the Representatives in good faith.

(ii) The Representatives shall give BMC prompt written notice of any Third Party Claim and, with respect to any Third Party Claim, BMC shall undertake the defense thereof by representatives reasonably satisfactory to BMC and the Representatives. BMC shall not, without the Representatives written consent, settle or compromise or enter into any binding agreement to settle or compromise, or consent to entry of any judgment arising from, any such claim or proceeding that does not include, as an unconditional term thereof, the giving by the claimant or the plaintiff to the Stockholders, as the case may be, an unconditional release from all liability in respect of such Third Party Claim. The Representatives shall have the right to participate in any such defense of a Third Party Claim with advisory counsel of its own choosing at its own expense. In the event BMC, within a reasonable time after notice of any Third Party Claim, fails to defend, the Representatives shall have the right to undertake the defense, compromise or settlement of such Third Party Claim on behalf of, and for the account of, the Stockholders. The Representatives without the BMC's written consent, shall not settle or compromise any such Third Party Claim or consent to entry of any judgment. Notwithstanding any provision in this Section 13 to the contrary, failure of the Representatives to give any notice of any Third Party Claim required by this Section 13.2 shall not constitute a waiver of

the Representatives' right to indemnification or a defense to any claim by the Representatives hereunder, except to the extent that the indemnifying party is materially prejudiced in undertaking the defense thereof.

(c) Manner of Indemnification. All indemnification by BMC hereunder shall be effected upon demand by the Representatives by payment of cash or delivery of a certified or cashier's check in the amount of the indemnification liability.

13.3 Arbitration. If a party makes a good faith determination that a breach (or potential breach) of any of the confidentiality, non-competition, or intellectual property rights provisions of this Agreement by the other party (or the Stockholders) may result in damages or consequences that will be immediate, severe, and incapable of adequate redress after the fact, so that a temporary restraining order or other immediate injunctive relief is necessary for a realistic and adequate remedy, that party may seek immediate injunctive relief without first seeking relief through arbitration. After the court has ruled on the request for injunctive relief, the parties will thereafter proceed with arbitration of the dispute and stay the litigation pending arbitration. Subject to the foregoing, any dispute arising out of this Agreement, or its performance or breach, shall be resolved by binding arbitration under the Commercial Arbitration Rules (the "AAA Rules") of the American Arbitration Association (the "AAA"). This arbitration provision is expressly made pursuant to and shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-14. The parties hereto agree that pursuant to Section 9 of the Federal Arbitration Act, a judgment of the United States District Courts for the Southern District of Texas shall be entered upon the award made pursuant to the arbitration. A single arbitrator, who shall have the authority to allocate the costs of any arbitration initiated under this paragraph, shall be selected according to the AAA Rules within ten (10) days of the submission to the AAA of the response to the statement of claim or the date on which any such response is due, whichever is earlier. The arbitrator shall conduct the arbitration in accordance with the Federal Rules of Evidence. The arbitrator shall decide the amount and extent of pre-hearing discovery which is appropriate. The arbitrator shall have the power to enter any award of monetary and/or injunctive relief (including the power to issue permanent injunctive relief and also the power to reconsider any prior request for immediate injunctive relief by either of the parties and any order as to immediate injunctive relief previously granted or denied by a court in response to a request therefor by either of the parties), including the power to render an award as provided in Rule 43 of the AAA Rules; *provided, however*, that the arbitrator shall not have the power to award punitive damages under any circumstances (whether styled as punitive, exemplary, or treble damages, or any penalty or punitive type of damages) regardless of whether such damages may be available under applicable law, the parties hereby waiving their rights to recover any such damages. The arbitrator shall award costs and reasonable attorney's fees as it deems just and equitable. Any arbitration shall be held in Houston, Texas, for any claim brought by any party under this Agreement. In addition to the above courts, the arbitration award may be enforced in any court having jurisdiction over the parties and the subject matter of the arbitration. Notwithstanding the foregoing, the parties irrevocably submit to the nonexclusive jurisdiction of the state and federal courts situated where the respondent is domiciled or resides as of the Effective Date in any action to enforce an arbitration award. With respect to any request for immediate injunctive relief, the state and federal courts in Houston, Texas, shall have nonexclusive jurisdiction and venue over any such disputes.

13.4 Limitations on Indemnification. Except as otherwise provided in Article III or Section 7.5, if the Merger closes, claims for indemnification pursuant to Section 13.1 shall be the

exclusive remedy of BMC, its subsidiaries and their respective successors and assigns, and each of their respective officers, directors, employees and agents (i) for any breaches or misrepresentations of Evity or the Stockholders under this Agreement and (ii) for any claims against any officer, director, Stockholder or employee of Evity in connection with the Merger.

ARTICLE XIV

The Stockholders Representatives; Power of Attorney

Each Stockholder hereby constitutes and appoints Clay Davis and Robert Neville as his true and lawful attorneys-in-fact, agents and representatives (the "Representatives"), with full power of substitution and resubstitution, for it and in its and his name, place and stead, in any and all capacities, to negotiate and sign all amendments to this Agreement, and all other documents in connection with the transactions contemplated by this Agreement, including without limitation those instruments called for by this Agreement and all waivers, consents, instructions, authorizations and other actions called for, contemplated or that may otherwise be necessary or appropriate in connection with this Agreement or any of the foregoing agreements or instruments, and to prosecute, defend and settle in the Representatives' discretion all indemnification disputes (including hiring counsel and other litigation assistance, the expense of which shall be shared pro rata by the Stockholders), granting unto the Representatives full power and authority to do and perform each and every act and thing requisite and necessary to be done, as fully to all intents and purposes as he might or could do in person, hereby ratifying and confirming all that the Representatives, or their substitute or substitutes, may lawfully do or cause to be done by virtue hereof, including without limitation the power and authority to receive and give receipt for all consideration due him pursuant to this Agreement and to receive all notices, requests and demands that may be made under and pursuant to this Agreement. Should any Representative be unable or unwilling to serve or to appoint his successor to serve in his stead, and unless the Stockholders appoint a successor to serve in his stead, such Stockholders shall be deemed to be represented by the remaining Representative or today's Board of Directors of Evity should the remaining Representative be unable or unwilling to serve in his capacity. All actions by the Representatives shall be by unanimous vote. In no event shall the Representatives be liable to anyone for any action or inaction taken by them in such capacity.

ARTICLE XV

General Provisions

15.1 Taking of Necessary Action. Subject to the terms and conditions of this Agreement, each of the parties hereto agrees, subject to applicable laws, to use reasonable best efforts promptly to take or cause to be taken all action and promptly to do or cause to be done all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement. Without limiting the foregoing, the Stockholders shall use their respective reasonable best efforts to obtain and make all consents, approvals, assurances and filings of or with third parties and Governmental Entities necessary or, in the opinion of the Representatives or BMC, advisable for the consummation of the transactions contemplated by this Agreement.

15.2 Successors and Assigns. This Agreement will inure to the benefit of and be binding upon the parties hereto and their respective successors, permitted assigns, heirs and legal representatives, as the case may be. Neither Evity nor any of the Stockholders may assign this Agreement or any of their rights, interests or obligations hereunder to any other party. Prior to the Closing, BMC may not assign this Agreement or any of its rights, interests or obligations hereunder to any party without the prior written consent of the Representatives which shall not be unreasonably withheld. After the Closing, BMC may assign this Agreement and any of its rights, interests and obligations hereunder to any other party.

15.3 Entire Agreement; Third Party Beneficiaries. This Agreement (including the documents and instruments referred to herein) contains the entire agreement among the parties hereto with respect to the transactions described in this Agreement and neither this nor any document delivered in connection with this Agreement confers upon any person not a party hereto (other than non-signing Stockholders) any rights or remedies hereunder except as provided in Article XIII hereof.

15.4 Announcements. None of the parties shall without the approval of BMC and Evity, make any press release or other public announcement concerning any of the transactions contemplated by this Agreement, except as and to the extent that such party shall be so obligated by law, in which case the other parties shall be advised and the parties shall use their reasonable best efforts to cause a mutually agreeable release or announcement to be issued.

15.5 Notices. All notices or other communications hereunder shall be in writing or sent by facsimile transmission and shall be deemed to have been duly given upon receipt, addressed as follows:

If to BMC, to:

BMC Software, Inc.
2101 City West Boulevard
Houston, Texas 77042
Attention: Robert H. Whilden, Jr.

with copy to:

Vinson & Elkins L.L.P.
1001 Fannin, Suite 2300
Houston, Texas 77002-6760
Attention: John S. Watson

If to Evity, the Stockholders or the Representatives, to:

Evity, Inc.
3925 West Braker Lane
Suite 900
Austin, Texas 78759
Attn: Clay Davis

with copy to:

Gray Cary Ware & Freidenrich LLP
100 Congress Avenue
Suite 1440
Austin, Texas 78701
Attn: Paul E. Hurdlow

Any party may change its address for notice by giving notice thereof under this Section 15.5.

15.6 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

15.7 Governing Law; Interpretation; Section Headings. This Agreement shall be governed by and construed and enforced in accordance with the internal laws of the State of Texas without reference to or application of any conflicts of laws principles. The section headings contained herein are for purposes of convenience only, and shall not be deemed to constitute a part of this Agreement or to affect the meaning or interpretation of this Agreement in any way. The provisions of this Agreement were negotiated by the parties hereto and this Agreement shall be deemed to have been drafted by all the parties hereto.

15.8 Expenses. Except as provided otherwise in this Section 15.8, each party to this Agreement agrees that it shall be liable for all expenses that it has incurred or will incur in connection with the negotiation, preparation and compliance with this Agreement, including, without limitation, all legal and accounting fees and expenses. Upon Closing, BMC shall assume all reasonable expenses of Evity incurred in connection with the Merger; *provided, that* the Stockholders shall assume and be liable for all legal expenses of Evity incurred in connection with the transactions contemplated by this Agreement in excess of \$150,000.

15.9 Waivers; Amendments. The parties may, by mutual written agreement, extend the time for the performance of any of the obligations or other acts of any other party hereto, or waive such other party's performance of any of the obligations set out in this Agreement or amend this Agreement. Any agreement on the part of any party hereto for any such extension, waiver or amendment shall be validly and sufficiently authorized for the purposes of this Agreement if it is signed, if given by BMC, Sub or Evity, by a duly authorized officer or representative of BMC, Sub or Evity, respectively, or, if given by the Stockholders, by the Representatives.

15.10 Severability. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Agreement, but this Agreement shall be construed as if such invalid, illegal or unenforceable provision had been written so as to be enforceable to the greatest extent legally possible.

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the date first above written.

BMC SOFTWARE, INC.

By: M. Brinkley Morse
M. Brinkley Morse
Senior Vice President

BMC ACQUISITION CORP.

By: M. Brinkley Morse
M. Brinkley Morse
President

EVITY, INC.

By: _____
Clay Davis
Co-Chief Executive Officer

TRADEMARK

REEL: 002640 FRAME: 0055

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the date first above written.

BMC SOFTWARE, INC.

By: _____
M. Brinkley Morse
Senior Vice President

BMC ACQUISITION CORP.

By: _____
M. Brinkley Morse
President

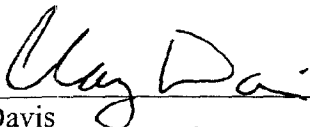
EVITY, INC.

By: Clay Davis
Clay Davis
Co-Chief Executive Officer


TRADEMARK

REEL: 002640 FRAME: 0056

Stockholders:



Clay Davis



Robert Neville

Christopher Marich

**For purposes of Article VII,
Key Employees:**

Michael Lunt

Steve Connor

Walter Bodwell

Stockholders:

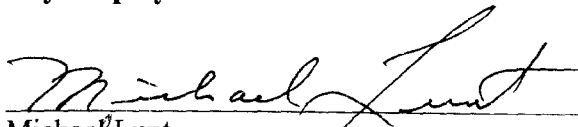
Clay Davis

Robert Neville

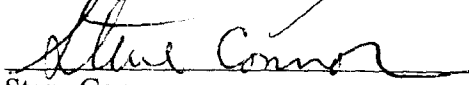


Christopher Marich

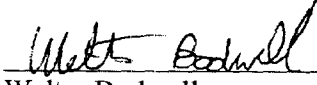
**For purposes of Article VII,
Key Employees:**



Michael Lunt



Steve Connor



Walter Bodwell

TRADEMARK

REEL: 002640 FRAME: 0058

DISCLOSURE SCHEDULE OF EVITY, INC.

PURSUANT TO THE AGREEMENT AND PLAN OF REORGANIZATION

DATED AS OF APRIL 25, 2000

BY AND AMONG

BMC SOFTWARE, INC.,

BMC ACQUISITION CORP.,

EVITY, INC.

AND

THE STOCKHOLDERS OF EVITY, INC.
WHO ARE SIGNATORIES THERETO

The following disclosure schedule is delivered by Evity, Inc., a Delaware corporation (the "Company"), in accordance with the provisions of Article IV of that certain Agreement and Plan of Acquisition, dated as of April 25, 2000, (the "Agreement"). Among other things, this Disclosure Schedule contains lists, descriptions, specific exceptions and other limitations to the representations and warranties contained in the Agreement. Except as otherwise indicated, all capitalized terms used herein shall have the meanings ascribed to such terms in the Agreement.

No reference to or disclosure of any item or other matter in this Disclosure Schedule shall be construed as an admission or indication that such item or other matter is material or that such item or other matter is required to be referred to or disclosed in this Disclosure Schedule. Except insofar as a representation or warranty in the Agreement or a disclosure in this Disclosure Schedule given in response to such a representation or warranty specifically addresses such question, no reference in this Disclosure Schedule to any agreement or document shall be construed as an admission or indication that such agreement or document is enforceable or currently in effect or that there are any obligations remaining to be performed or any rights that may be exercised under such agreement or document. No disclosure in this Disclosure Schedule relating to any possible breach or violation of any agreement, law or regulation shall be construed as an admission or indication that any such breach or violation exists or has actually occurred.

4.1 Authority: Title to Evity Common Stock.

See 4.3

4.2 Organization, Etc.

The Company currently employs Monty Fowler, who is a full-time sales representative based in Chicago, Illinois, and Jan Tompkins, who is a part-time account representative based in Cleveland, Ohio. The Company does not have any offices in such states and has not currently qualified to do business in such states. The Company does not believe such lack of qualification would have a material adverse effect on the Company's business.

TRADEMARK

REEL: 002640 FRAME: 0059

4.3 Capitalization.

Stockholders:

COMMON STOCK			
CERT. No.	NAME OF STOCKHOLDER	NO. OF SHARES ISSUED	DATE OF ISSUANCE
1	Robert Neville	4,000,000	4/21/99
2	Clay Davis	4,000,000	4/21/99
4	Christopher Marich	1,100,000	4/21/99
	TOTAL	9,100,000	

SERIES A CONVERTIBLE STOCK			
CERT. No.	NAME OF STOCKHOLDER	NO. OF SHARES ISSUED	DATE OF ISSUANCE
A-1	L & H Leasing Co., Ltd.	2,166,667	6/15/99
A-2	L & H Leasing Co., Ltd.	6,500,000	6/15/99
	TOTAL	8,666,667	

Option Holders:

EMPLOYEE	GRANT DATE	OPTION TYPE(1)	INITIAL-VESTING DATE	SHARES SUBJECT TO OPTION	EXERCISE PRICE (per share)
Ic ²	4/01/00	NSO		20,000	\$0.20
Aucoin, Ed	11/01/99	ISO		25,000	\$0.03
Aucoin, Ed	4/01/00	ISO		75,000	\$0.20
Bilby, Curt	8/26/99	NSO		10,000	\$0.03
Bilby, Curt	4/01/00	NSO		15,000	\$0.20
Bodwell, Walter	7/06/99	ISO		420,000	\$0.03
Bodwell, Walter	4/01/00	ISO		480,000	\$0.20
Brown, Greg	3/01/00	ISO		20,000	\$0.03
Brown, Greg	4/01/00	ISO		75,000	\$0.20
Connor, Steve	9/20/99	ISO		433,000	\$0.03
Connor, Steve	4/01/00	ISO		867,000	\$0.20
Dean, Alisa	10/04/99	ISO		12,000	\$0.03
Dean, Alisa	4/01/00	ISO		68,000	\$0.20
Fossum, Andrew	4/01/00	ISO		20,000	\$0.20
Fowler, Monty	1/10/00	ISO		35,000	\$0.03
Fowler, Monty	4/01/00	ISO		75,000	\$0.20
Hearn, Sara	3/13/00	ISO		2,000	\$0.03
Hearn, Sara	4/01/00	ISO		13,000	\$0.20
Holden, Chip	8/11/99	ISO		30,000	\$0.03
Holden, Chip	2/28/00	ISO		20,000	\$0.03
Holden, Chip	4/01/00	ISO		150,000	\$0.20
Jenkins, Denise	3/13/00	ISO		2,000	\$0.03
Jenkins, Denise	4/01/00	ISO		13,000	\$0.20
Klobe, Mike	1/03/00	ISO		50,000	\$0.03
Klobe, Mike	4/01/00	ISO		150,000	\$0.20
Lunt, Mike	9/06/99	ISO		40,000	\$0.03

EMPLOYEE	GRANT DATE	OPTION TYPE(1)	INITIAL-VESTING DATE	SHARES SUBJECT TO OPTION	EXERCISE PRICE (per share)
Lunt, Mike	2/28/00	ISO	-	25,000	\$0.03
Lunt, Mike	4/01/00	ISO	-	535,000	\$0.20
Lwali, Munabo	2/28/00	ISO	-	1,000	\$0.03
Lwali, Munabo	4/01/00	ISO	-	4,000	\$0.20
Oskmap, Jason	4/01/00	ISO	-	20,000	\$0.20
Patel, Sushil	4/01/00	ISO	-	10,000	\$0.20
Riley, Brian	2/28/00	NSO	-	2,000	\$0.03
Riley, Brian	4/01/00	NSO	-	8,000	\$0.20
Rowe, Sandra	3/06/00	ISO	-	20,000	\$0.03
Rowe, Sandra	4/01/00	ISO	-	30,000	\$0.20
Tompkins, Jan	4/01/00	ISO	-	5,000	\$0.20
Troxell, George	4/01/00	ISO	-	20,000	\$0.20
Walker, Brian "Doak"	2/02/00	ISO	-	2,500	\$0.03
Walker, Brian "Doak"	4/01/00	ISO	-	22,500	\$0.20
Walker, Michael	4/01/00	ISO	-	15,000	\$0.20
Whichard, Brandon	4/01/00	ISO	-	35,000	\$0.20
Willson, Paul	4/01/00	ISO	-	25,000	\$0.20
TOTAL			-	3,900,000	

4.4 Subsidiaries.

None.

4.5 No Violation.

None.

(c) Section 8.2 of the 1999 Evity, Inc. Stock Option Plan states that if the acquiror of the Company does not assume the options granted under the Plan, then vesting on those options would accelerate. However, BMC in its acquisition of the Company will assume the options granted under the Plan so the acceleration provision will not become effective.

4.6 Approvals.

None.

4.7 Financial Statements; Absence of Certain Changes.

(c)(x) The Company on April 1, 2000 has granted additional options to all of its employees, as disclosed in Section 4.3 above. The Company on April 1, 2000 repurchased 900,000 shares of its Common Stock from Chris Marich for an aggregate purchase price of \$90.

(c)(xi) The Company entered into at-will employment arrangements with four new employees, Paul Wilson, George Troxell, Michael Walker, and Jason Oskamp, who have each entered into the Company's standard form of Employee Innovations Agreement.

(c)(xiii) The Company on April 1, 2000 has granted additional options to all of its employees, as disclosed in Section 4.3 above.

(c)(xv) As of April 18, 2000, the Company and Axiom mutually terminated its consulting contract, which included a sales bonus incentive for the grant of stock option upon meeting certain sales goals, none of which were granted, due to Axiom's nonperformance under the agreement.

4.8 Corporate Action; Charter and Bylaws.

None.

4.9 Litigation.

None.

4.10 Compliance with Laws; Environmental Matters.

(a) None.

(b) None.

(c) None.

4.11 Title to Tangible Property.

- The Company currently is leasing space from the Austin Technology Incubator for property located at 3925 West Braker Lane, Suite 900, Austin, TX 78759 on a month to month lease.
- The Company currently leases computers and related equipment from Dell Financial Services under that Equipment Leases dated September 16, 1999, and an Equipment Lease dated October 16, 1999, by and between the Evity and Dell Financial Services.
- See attached Schedule 4.11

4.12 Intellectual Property.

(a) *Ownership.*

Evity has filed the following patent applications with the United States Patent Office:

- Provisional application for system and method of routing a user through an intermediate web server, serial no. 60/165,102, filed November 12, 1999.
- Provisional application for system and method for software simulation of a user following a path through a web site, serial no. 60/165,103, filed November 12, 1999.

The following are the material developments regarding Evity's trademarks:

- Evity applied for and was refused trademark registration of "Site Angel," serial no. 75/756089, filed on July 20, 1999, due to resemblance to mark no. 2162796 (CyberAngel). Accordingly, Evity makes no representation regarding whether such mark infringes upon mark no. 2162796 (CyberAngel) nor does Evity make the representation that it owns full and unencumbered right to such "Site Angel" trademark.
- Evity applied for trademark registration of "SiteAngel 2000" serial no. 75/847095 filed on November 12, 1999. This application is pending and thus Evity makes no representation

regarding whether it owns full and unencumbered right to the mark "SiteAngel 2000" or whether such mark infringes upon mark no. 2162796 (CyberAngel).

(b) *Notices.*

- See attached Exhibit 4.12(b).

(c) *Protection.*

The Company does not have a trade secret protection program. However, the Company engages in several practices in order to protect its trade secrets which practices include but are not limited to restricting access to the source code and in addition, entering into Employee Innovations and Proprietary Rights Assignment Agreements with the following individuals:

- Edward J. Aucoin
- Walter Bodwell
- Greg Brown
- Steve Connor
- Alisa Dean
- Andrew Fossum
- LaMonte M. Fowler
- Sara Hearn
- Chip Holden
- Denise Jenkins
- Michael Klobe
- Michael Lunt
- Mwabo Lwali
- Jason Oskamp
- Sushil Patel
- Sandra Rowe
- Jan Tompkins
- George Troxell
- Doak Walker
- Michael J. Walker
- Brandon Whichard
- Paul Willson

The Company also has entered into an Independent contractor Services Agreement with Intelligolics Networks, Inc.

(d) *Personnel.*

The Company has Non-Disclosure Agreements with the following third parties and employees who were given knowledge of the software product prior to their employment with the company:

- BEA Systems, Inc. – WebXpress Division
- Cyberplex USA Southwest Inc.
- Raymond Hamilton
- T. Casey Fleming
- Spiraco
- Byron Baird
- BMC Software, Inc.
- Bonnell Technology Pty. Ltd.
- Axiom Consulting, Inc.
- Robert McAdams
- Charles G. Holden, Jr.

- Michael Lunt
- Christian B. Ostertus
- TriActive, Inc.
- Digital Island, Inc.
- Audra Forte

And a Mutual Nondisclosure Agreement with:

- Exodus Communication, Inc.

The Company also has entered into an Independent contractor Services Agreement with Intelligilogics Networks, Inc.

- (e) *Software Performance.*
- Included below are the warranties given by Evity in its standard software license agreements:

“Evity’s Representations and Warranties.

Service Warranty. Evity warrants that the Hosting Services provided hereunder will be performed in a good and workmanlike manner.

Service Levels. Evity will use commercially reasonable efforts to maintain at least ninety-five (95%) availability per month for the Applications and Content hosted for Customer during the term of this Agreement. The following events (“Contingencies”) shall not count against Evity when computing availability of the Applications and Content: (i) any latency or downtime due to Customer’s or Customer’s Users acts or omissions, (ii) acts of unauthorized third parties, (iii) disruptions or outages at the Hosting Center lasting thirty (30) minutes or less, (iv) failures of the Application and/or Content, (v) scheduled maintenance, (vi) Internet latency, failures or outages, (vii) third party acts or omissions over which Evity has no control, and (viii) problems associated with Customer or any User’s hardware or software used to access the Applications and Content. Upon written notice from Customer, if Customer can demonstrate to Evity’s satisfaction that Evity did not meet the availability level stated in this Section 9.2, Evity will credit Customer’s account for every sixty (60) consecutive minutes that Customer is unable to access the Applications or the Content with the prorated fees for one (1) day of services, up to a maximum credit equal to the total fees due to Evity from Customer during such calendar month (“Service Credit”). In no event shall Customer receive a Service Credit if Customer’s inability to access the Applications and Content is due to one or more of the Contingencies. THE FOREGOING SERVICE CREDIT STATES CUSTOMER’S SOLE AND EXCLUSIVE REMEDY AND EVITY’S SOLE OBLIGATION WITH REGARD TO EVITY’S FAILURE TO MEET THE AVAILABILITY LEVEL STATED IN THIS SECTION 9.2.

Authority. Evity warrants and represents that it has full power to enter into and perform this Agreement and that the person signing this Agreement on its behalf is duly authorized to do so.

No Other Warranty. EXCEPT AS EXPRESSLY PROVIDED IN THIS SECTION 9 (“Evity’s Representations and Warranties”), EVITY AND EVITY’S LICENSORS MAKE NO OTHER WARRANTY, EXPRESS, IMPLIED OR STATUTORY, AS TO THE CONDITION, QUALITY, PERFORMANCE, SECURITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT OF RIGHTS OF THIRD PARTIES OF THE APPLICATIONS, UPDATES, UPGRADES AND/OR HOSTING SERVICES. ALL OTHER WARRANTIES ARE HEREBY EXCLUDED.”

- (f)
- (i) Current deployment of Evity’s Software Programs within its data center is dependent on software licenses purchased from BEA WebXpress and require that the Company pay a

"per CPU" license fee to BEA WebXpress. in amount of approximately \$15,000 per CPU.

To the Company's knowledge, there have been discussions between the Company and related to the Company's use of a RSA software license through BEA WebXpress' relationship with RSA. Two representatives of BEA WebXpress have represented via e-mail to the Company that, to the best of their knowledge, BEA WebXpress' license entitles the Company to use the RSA technology in its business. Later, a third representative recommended that the Company contact RSA directly regarding the Company's use of such technology. The Company had intended to contact RSA after funding, but to date has not approached RSA directly regarding its use of such technology. The requirement to pay the license fee expires later this year when the licensed technology becomes part of the public domain.

(ii) See (f)(i) above.

(g) None.

(h) None.

(i) None.

(j) See (f)(i) above.

(k) None.

(l) See attached Schedule 4.12(l)

4.13 Adequacy of Technical Documentation.

None.

4.14 Software.

(a) *End-User Agreements.*

- American Express Financial Advisors, Inc., dated 4/3/00.
- National Instruments, Inc., dated 2/14/00.
- Sematech, Inc., dated 3/31/00.
- uBid, Inc., dated 3/28/00.
- Igogolf.com, dated 2/29/00.
- Dojin Limited, dated 2/22/00
- Sitestuff.com, dated 4/1/00.
- eCity Limits – Letter of intent to enter Strategic Partnership Agreement, dated 1/10/00.
- There are currently over 100 complimentary users of the Software Programs who obtained such software from the internet and have accepted standard terms and conditions for a 30-day trial period.

(b) *Marketing Agreement.*

- eCity Limits – Letter of intent to enter Strategic Partnership Agreement, dated 1/10/00.
- Contract dated 11/1/99 between Evity and Springbok Technologies, Inc., retaining Springbok as Evity's public relations agency and advisor of record where Evity agreed to pay a retainer

of \$10,000 which amount increases by \$1,000 for each of the following months until May 2000 when the retainer shall remain at \$16,000 per month.

- The Springbok agreement was amended on 1/1/00 to reflect that beginning January 1, 2000, until April 30, 2000, the monthly retainer shall be \$21,600 and thereafter \$15,500 per month.

4.15 Contracts.

- (a) None
- (b) The Company on April 7 purchased servers, a computer and software from Dell for \$32,224.85 and on April 18, the Company purchased software from Netforce Technologies for \$30,569.80.
- (c) The Company has a remaining liability under its contract with Ernst & Young for its website certification.
- (d) The Company accepted a loan of \$500,000 from L&H Leasing Co., LTD. evidenced by a Promissory Note between the parties, dated February 11, 2000.
- (e) None
- (f) See 4.14(a)(b).
- (g) None
- (h) See 4.14(a).
- (i) The Company has entered into the agreements listed below:
 - Master Service Agreement between IXC Communications Services, Inc. and Evity, Inc. dated October 29, 1999, for telecommunication, data collection and bandwidth services.
 - Dedicated Transport Service Agreement between Time Warner Telecom and Evity, Inc. dated December 22, 1999, for telecommunication services.
 - Products and Services Agreement between Broadwing Communications, Inc. and Evity, Inc. dated December 28, 1999, for telecommunication services.
 - See Above
- (j) See above.

4.16 Employee and Labor Matters.

- (a) The Company granted additional options to employees as of April 1, 2000.
 - (i) Evity does not maintain or sponsor any employee benefit plans. Instead, all employees of Evity are also employees of Administaff Companies, Inc. ("Administaff") as provided by a client service agreement entered into between Evity and Administaff, and consequently all such employees are eligible to participate in the employee benefit plans sponsored and maintained by Administaff. A copy of the Administaff Agreement has been attached as Schedule 4.16.

4.17 Insurance Policies.

- Directors and Officers Insurance policy with E-Risk Services, L.L.C., for the period 1/7/00 to 1/7/01, for a limit of liability of \$1,000,000.
- Business Liability and Property Insurance policy with CIA Insurance Agency for the period 6/30/99 to 6/30/00.
- Keyman Life Insurance policies with Security-Connecticut Life Insurance Company for:
 - Robert Neville \$1,000,000 10/21/99 – 10/21/60
 - Clay Davis \$1,000,000 10/21/99 – 10/21/64
 - Chris Marich \$1,000,000 10/21/99 – 10/21/62

4.18 No Undisclosed Liabilities.

The Company has retained the services of Broadview International LLC pursuant to that certain letter agreement dated March 27, 2000 and anticipates having to pay a “success fee” payable in cash, upon consummation of a transaction of \$500,000 plus 1.5% of all consideration beyond \$20 million if the total consideration is less than or equal to \$100 million or; \$500,000 plus 2.0% of all consideration beyond \$20 million if the total consideration is greater than \$100 million, under such agreement.

4.19 Brokerage Fees.

The Company has retained the services of Broadview International LLC pursuant to that certain letter agreement dated March 27, 2000 and anticipates having to pay a “success fee” payable in cash, upon consummation of a transaction of \$500,000 plus 1.5% of all consideration beyond \$20 million if the total consideration is less than or equal to \$100 million or; \$500,000 plus 2.0% of all consideration beyond \$20 million if the total consideration is greater than \$100 million, under such agreement.

4.20 Miscellaneous Other Information.

- (a) See attached schedule 4.20(a).
- (b) Chase Manhattan, Account No. 60333528, Authorized Signatories: Clay Davis, Rob Neville, Chris Marich.
- (c) Chase Manhattan, Account No. 099-27845317, Authorized Signatories: Clay Davis, Rob Neville, Chris Marich.

4.21 No Illegal or Improper Transactions.

None.

4.22 Product Liability.

None.

4.23 Transactions with Related Parties.

None.

4.24 Investment Representations.

None.

4.25 **Investment Company.**

None.

4.26 **Inapplicability of Certain Statutes.**

None.

4.27 **No Misleading Statements.**

None.

5.1 **Evity and the Stockholders' Representations Regarding Taxes.**

(r) Pursuant to the Merger Agreement, options under the Evity, Inc. 1999 Stock Option Plan shall vest 25% at the closing of the merger. In addition, the Company on April 1, 2000, granted an aggregate of 2,750,500 options to purchase shares of common stock under the Evity, Inc. 1999 Stock Option Plan. There may be certain employees who due to option accelerations, may require Stockholder approval in connection with the provisions of Section 280G of the Code. The Company is obtaining such approval.

(s) None.

8.6 **Employee Contracts and Benefits Plans.**

There are to be no increases contemplated hereunder.

9.5 **Additional Option Grants**

See Schedule 9.5.

SCHEDULE 4.11
MATERIAL TANGIBLE PROPERTY

Furniture

Date Acquired	Description	Vendor
Jun-99	4 Drawer File	Office Depot
Jun-99	Desk	Office Depot
Jun-99	Keyboard Drawer	Office Depot
Jun-99	Bookcase	Office Depot
Jun-99	Supplies	Office Depot
Aug-99	Chairs	Office Depot
Aug-99	Chairs	Office Depot
Aug-99	Whiteboards	Office Depot
Aug-99	Bookcase	Office Depot
Aug-98	Desk	Office Depot
Sep-99	Chair	Furniture.com
Sep-99	Chairs	Office Depot
Oct-99	Furniture Assembly	RMS WRTA
Oct-99	Refrigerator	Sam's Club
Dec-99	Desk	Office Depot
Dec-99	Chairs	Office Depot
Dec-99	Furniture Assembly	RMS WRTA
Dec-99	Bookcase	Office Depot
Dec-99	Desk	Office Depot
Dec-99	Ball Chair	Relax the Back
Dec-99	Furniture Assembly	RMS WRTA
Jan-00	Furniture Assembly	RMS WRTA
Jan-00	Furniture Assembly	David Jenkins
Jan-00	Bookcase	Office Depot
Jan-00	Desk	Office Depot
Jan-00	Whiteboards	Office Depot
Jan-00	Chairs	Office Depot
Feb-00	Chair	Office Depot
Feb-00	Chair	Office Depot
Mar-00	Table	Office Depot
Mar-00	Folding Table	Office Depot
Mar-00	Furniture Assembly	Rico's Furniture
Mar-00	Chair	Office Depot
Mar-00	Bookcase	Office Depot
Mar-00	Chair – executive	Office Depot
Mar-00	Desk	Office Depot
Mar-00	Safe	Office Depot
Mar-00	Workcenter	Office Depot
Mar-00	Workstation	Office Depot
Mar-00	Hutch	Office Depot
Mar-00	File Cabinet	Office Depot
Mar-00	2 drawer file	Office Depot

SCHEDULE 4.11
MATERIAL TANGIBLE PROPERTY

Computer Equipment

Date Acquired	Description	Vendor
Jun-99	Dell 500MHz computer	Dell
Jun-99	Monitors	DFO
Jun-99	Dell 400MHz computer	DFO
Jul-99	Tape Backup	Buy.com
Aug-99	DAT Tapes	Dell
Aug-99	Dell 500MHz computer	Dell
Aug-99	Dell 500MHz computer	Dell
Aug-99	Monitors	DFO
Aug-99	Dell 500MHz computer	Dell
Aug-99	Modem	Office Depot
Aug-99	UPS/Monitor/Mouse	DFO
Sep-99	Laptop, network card	DFO
Sep-99	Power supply	Radio Shack
Oct-99	Dell 450MHz computer	DFO
Oct-99	Cables - STF	Buy.com
Oct-99	Cables - STF	Buy.com
Oct-99	Dell computer	DFO
Oct-99	HP Laserjet	Buy.com
Nov-99	Dell Power Vault 20XS	Dell
Nov-99	PowerEdge 4350	Dell
Nov-99	PowerEdge 6350	Dell
Nov-99	Microsoft SQL Server	Dell
Nov-99	External Tape Backup	Dell
Nov-99	PowerEdge 6350	Dell
Nov-99	Backup for MS SQL	Dell
Dec-99	Dell 400MHz computer	DFO
Dec-99	Dell 466MHz computer	Dell
Dec-99	PowerEdge 2300	Dell
Dec-99	Dell 500MHz computer	Dell
Dec-99	APC	Dell
Dec-99	Dell Laptop computer	DFO
Dec-99	Cell Phone	AT&T
Jan-00	HP Laserjet	Buy.com
Jan-00	DAT Tapes	Buy.com
Jan-00	Dell Laptop computer	DFO
Feb-00	Dell 466MHz computer	DFO
Feb-00	Dev server	Dell
Feb-00	PowerEdge 2450	Dell
Feb-00	Dell 533 computers	Dell
Feb-00	Domain controller	Dell
Feb-00	Tester PC	Dell
Feb-00	PowerEdge 1300	Dell
Feb-00	Dell Laptop computer	Dell
Mar-00	Control Switch	Buy.com
Mar-00	Dell Laptop computer	Dell
Mar-00	DAT Tapes	Buy.com
Mar-00	Optiplex GX300	Dell

SCHEDULE 4.11
MATERIAL TANGIBLE PROPERTY

<u>Date</u> <u>Acquired</u>	<u>Description</u>	<u>Vendor</u>
Mar-00	Optiplex GX110	Dell
Mar-00	PowerEdge6350	Dell
Mar-00	Hard drive and cables	Comp USA
Apr-00	19" monitors	DFO
Apr-00	Optiplex GX110 desktop	DFO
Apr-00	Latitude laptop, card	DFO

EXHIBIT 4.12(B)

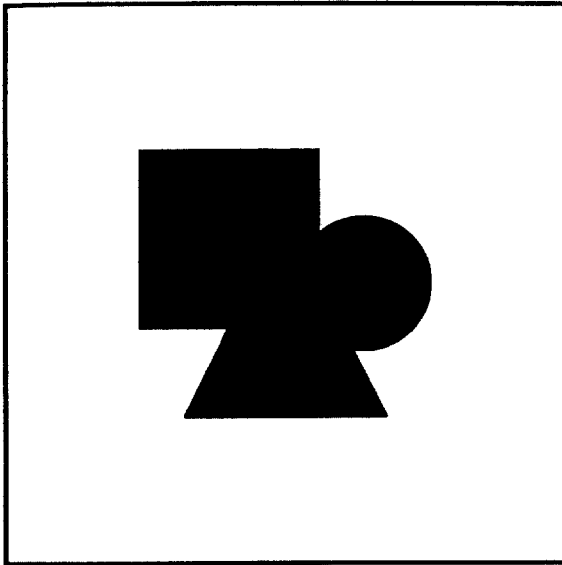
NOTICES

The following are the notices contained on the Evity website:

Privacy Policy

Registration information

Unless expressly told otherwise, all information entered into SiteAngel 2000's Customer Information form (names, email addresses, URLs, etc.) will not be revealed to outside parties. All specific data about your web site (i.e., measurements and statistics) will remain private and not be shared with other parties.

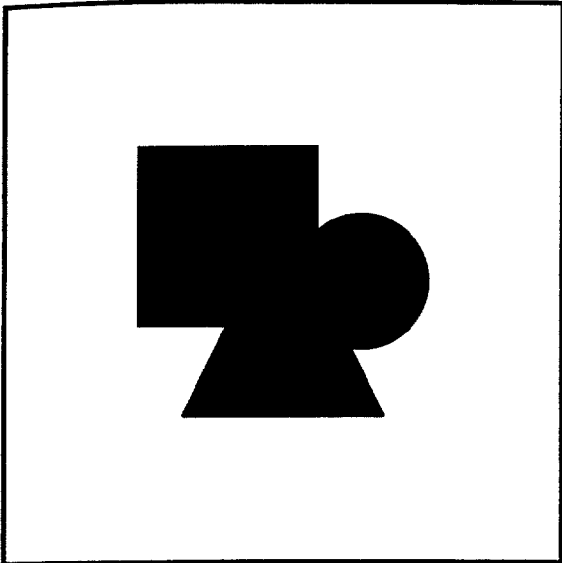


Cookies

SiteAngel 2000 uses cookies to save your user ID and password, at your request only, so you don't have to remember them each time you log in to your account. Also, SiteAngel uses cookies to keep track of session information while you are logged in to the service.

EXHIBIT 4.12(B)

NOTICES



Security

Evity makes every effort possible to ensure secure use of its online service, SiteAngel 2000. Evity uses industry-standard commercially-available methods, such as firewalls and secure connections, to protect against loss, misuse, or alteration of web site information. All SiteAngel accounts require a customer's chosen login ID and password to access customer-specific information.

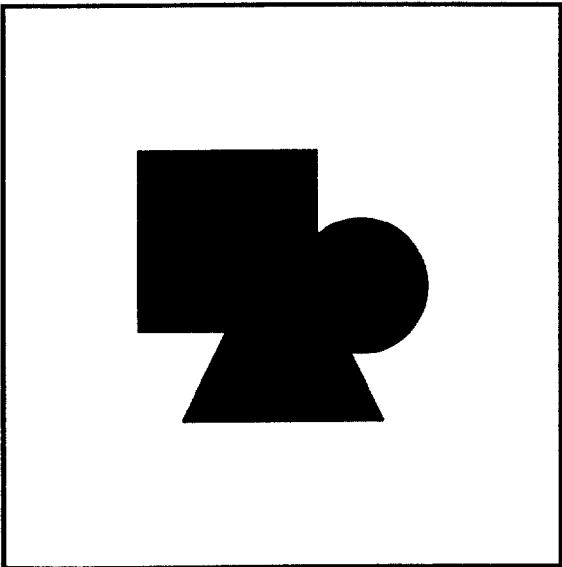
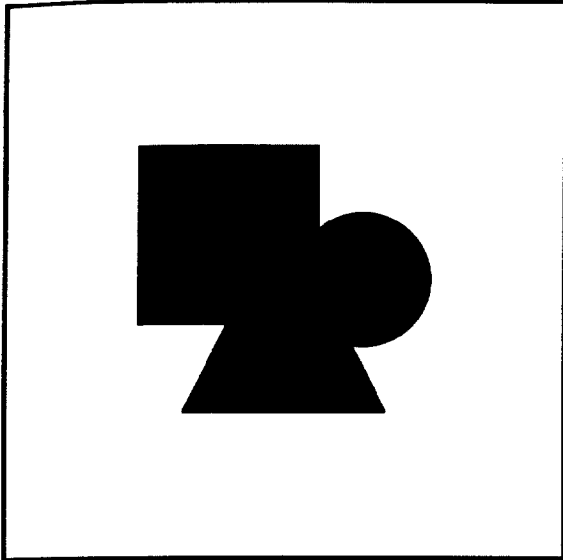


EXHIBIT 4.12(B)

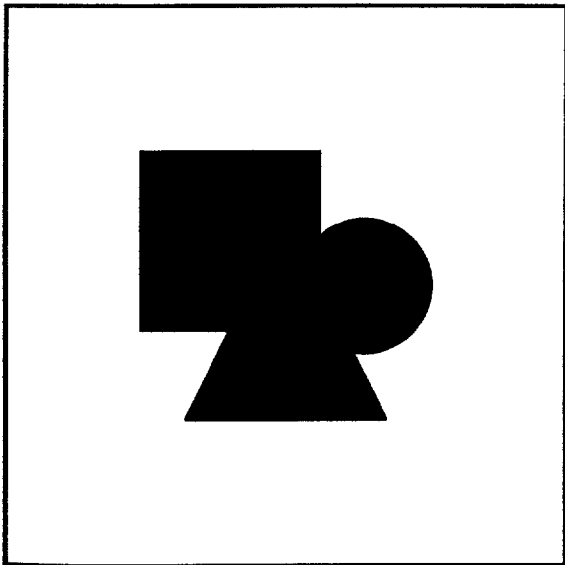
NOTICES



Y2K Statement

Year 2000 Readiness Disclosure

Evity is aware of the Y2K concern, and its online service, SiteAngel 2000 is Y2K compliant. In fact, SiteAngel could be used by companies to help mitigate Y2K risks. However, like other companies, SiteAngel also has risks associated with the Year 2000. The following is Evity's Year 2000 readiness program.

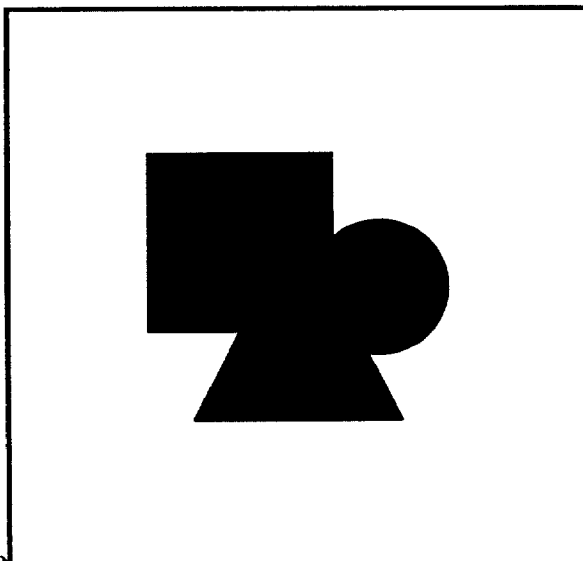


Evity's preparations

EXHIBIT 4.12(B)

NOTICES

All software internally developed by Evity has been written using four digits to define applicable years accurately. In addition, Evity's data centers are equipped with back-up power and communication systems in the event of power disruptions.



Third-party compliance

Evity uses third-party software packages in addition to internally-developed software. All third-party software used by Evity has been certified Y2K compliant. In addition, all hardware used by Evity, and its service SiteAngel 2000, is Y2K compliant.

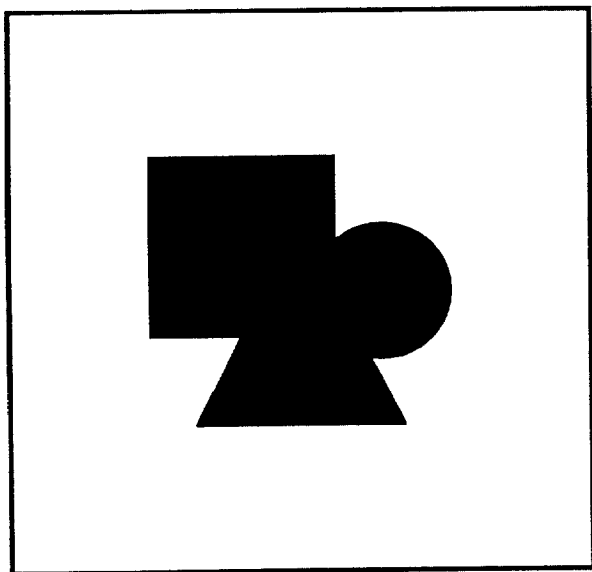
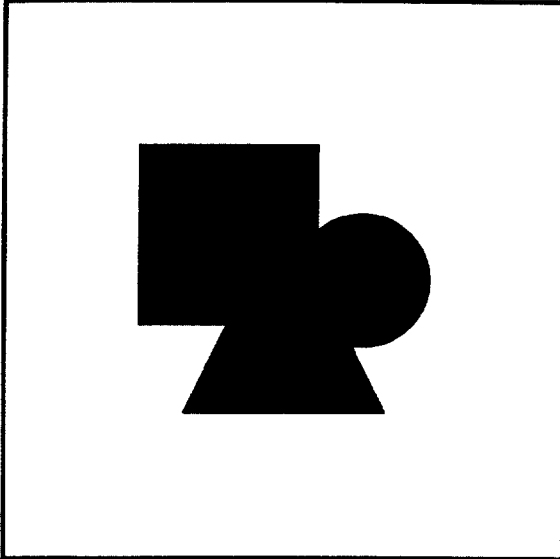


EXHIBIT 4.12(B)

NOTICES

Trademark Information

SiteAngel and SiteAngel 2000 are trademarks of Evity, Inc. No individual or organization is allowed to use these names or logos without express written consent from Evity, Inc. To receive approval to use one of the above-listed names, contact Evity's marketing department at marketing@evity.com.

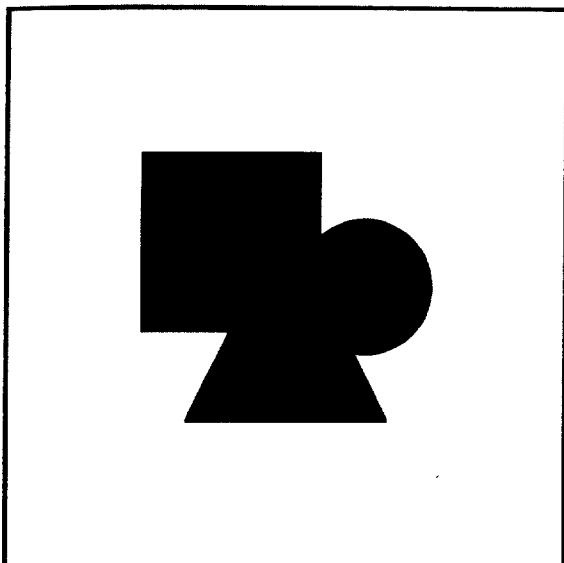


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EXHIBIT 4.12(B)

NOTICES



Contacting Evity

If you have any questions concerning this information:

Evity, Inc.
3925 W. Braker Lane, Suite 900
Austin, TX 78759
512.305.0370
info@evity.com

EXHIBIT 4.12(I)

THIRD-PARTY TOOLS

The following software items are used as components at the Evity Data Center

<u>Date Acquired</u>	<u>Description</u>	<u>Vendor</u>
Oct-99	Espress Chart	Quadbase
Oct-99	WebLogic Server	BEA WebXpress
Nov-99	Digital Certificate	Verisign
Mar-00	Voyager ORB Bundle	Object Space

Software

<u>Date Acquired</u>	<u>Description</u>	<u>Vendor</u>
Jun-99	Quickbooks	Comp USA
Jun-99	Visual Sourcesafe	Beyond.com
Aug-99	WorldMail Server	Qualcomm
Oct-99	MSDN Universal	Prgmmr's Paradise
Oct-99	Windmail	NetSales
Oct-99	pcAnywhere	Buy.com
Oct-99	mySQL	Monty Program
Oct-99	RoboHelp Office	Blue Sky Software
Oct-99	IIS filter-custom built	IntelliLogic Networks
Nov-99	MS Proxy server	Buy.com
Nov-99	Cisco VPN	Computers 4 Sure
Dec-99	Backup Software	Dell
Dec-99	Optimizelt	Intuitive Systems
Dec-99	Backup Software	Dell
Dec-99	Mail Server license	Qualcomm
Dec-99	Digital Certificates	Verisign
Jan-00	Maximizer Enterp 2000	Multiactive Software
Jan-00	Maximizer Sales Team	Multiactive Software
Feb-00	Windows 2000 server	Dell
Feb-00	Wrun test software	Mercury Interactive
Feb-00	MS Exchange server	Netforce
Mar-00	Digital certs (global svr)	Verisign
Mar-00	Maximizer Installation	Keystone Integration
Mar-00	Pervasive SQL Database	Multiactive Software

Networking

<u>Date Acquired</u>	<u>Description</u>	<u>Vendor</u>
Jun-99	Hub	Office Depot
Jun-99	Network Card, Cable	Tinkertronics
Jun-99	Ethernet Hub	Comp USA
Jul-99	5 port hub, cable	Tinkertronics

EXHIBIT 4.12(I)

THIRD-PARTY TOOLS

Aug-99	Firewall	Buy.com
Aug-99	8 port hub	Tinkertronics
Aug-99	cables, surge suppr	Tinkertronics
Sep-99	cables	Tinkertronics
Oct-99	10/100 switches	Buy.com
Oct-99	10/100 switch	Buy.com
Oct-99	Master switches	Buy.com
Oct-99	Cisco Router	Computers 4 Sure
Nov-99	ACEDirector switches	Alteon Websystems
Nov-99	Backup Tapes	Buy.com
Nov-99	Cables	Tinkertronics
Nov-99	Cables	Tinkertronics
Dec-99	Hubs	Comp USA
Jan-00	10/100 switch	Buy.com
Jan-00	Cables	Tinkertronics
Mar-00	Cables	Comp USA

SCHEDULE 4.16

See attached Administaff Agreement.

SCHEDULE 4.20(a)
EMPLOYEE COMPENSATION

Employee	Compensation	Position	Offer Letter	Proprietary Rights
Ed Aucoin	\$75,000 + 3% comm	Sales Rep	10/27/1999	12/28/1999
Walter Bodwell	\$100,000	VP, Software Dev	06/25/1999	06/25/1999
Greg Brown	\$75,000 + 3% comm	Sales Rep	02/28/2000	04/17/2000
Steve Connor	\$138,000 + 2% comm	VP, Sales	08/03/1999	09/21/1999
Clay Davis	\$78,000	Officer - CEO	founder	x
Alisa Dean	\$40,000	Marketing	09/24/1999	10/05/1999
Andrew Fossum	\$10.00 / hour	QA Tester	hourly	12/28/1999
Monty Fowler	\$70,000 + 3% comm	Sales Rep	01/04/2000	04/11/2000
Sara Hearn	\$38,000	Sales Support	ex-temp	04/10/2000
Chip Holden	\$64,000	Developer	08/03/1999	08/05/1999
Denise Jenkins	\$35,000	Office Manager	ex-temp	04/07/2000
Michael Klobe	\$80,000	Snr. Developer	01/03/2000	01/03/2000
Mike Lunt	\$65,000	Director QA	08/03/1999	09/06/1999
Munabo Lwali	\$13.50 / hour	QA Tester	02/23/2000	02/23/2000
Chris Marich	\$78,000	Snr. Developer	founder	x
Rob Neville	\$78,000	Officer - CEO	founder	x
Jason Oskamp	\$55,000	Sales Support	04/06/2000	04/12/2000
Sushil Patel	\$10.00 / hour	QA Tester	hourly	04/18/2000
Sandra Rowe	\$65,000	Dir, Cust. Care	02/14/2000	03/06/2000
Jan Tompkins	\$18,000	Sales Rep	02/01/2000	04/11/2000
George Troxell	\$66,000	Developer	03/10/2000	03/14/2000
Doak Walker	\$57,000	Network Admin	01/26/2000	01/31/2000
Michael Walker	\$38,000	Cust Care Rep	04/03/2000	04/07/2000
Brandon Whichard	\$68,000	Product Manager	03/14/2000	03/28/2000
Paul Willson	\$75,000	Controller	02/29/2000	04/03/2000
Spiraco	fixed consignment	Consultant – web graphics development	n/a	n/a
Sonny Lacey	fixed consignment	Consultant – Logo design	n/a	n/a
Hillon Keats	fixed consignment	Consultant – Programming	n/a	n/a

SCHEDULE 9.5
ADDITIONAL OPTION GRANTS

	BMC Options ¹
Clay Davis	131,250
Rob Neville	131,250
	262,500
Chris Marich	15,000
Steve Connor	5,000
Walter Bodwell	5,000
Mike Lunt	5,000
Chip Holden	5,000
Ed Aucoin	5,000
Mike Klobe	5,000
Monty Fowler	5,000
Paul Willson	5,000
Greg Brown	5,000
Sandra Rowe	10,000
Brandon Whichard	10,000
Jason Oskmap	10,000
Alisa Dean	5,000
Andrew Fossum	5,000
George Troxell	10,000
Doak Walker	2,500
Denise Jenkins	5,000
Sara Hearn	5,000
Michael Walker	2,500
Munabo Lwali	2,500
Sushil Patel	5,000
Jan Tompkins	5,000
	137,500
 Total Options	 400,000

¹ The BMC Options shall have a vesting commencement date and grant date as of the Effective Date (the "Grant Date") and an exercise price equal to the average of the high and low sales price of BMC Common Stock on the Grant Date. The BMC options shall vest in annual installments such that 20% of the BMC Options shall vest upon each annual anniversary of the Grant Date.

BMC SOFTWARE, INC.

2000 STOCK OPTION PLAN

I. Purpose of the Plan

The **BMC SOFTWARE, INC. 2000 STOCK OPTION PLAN** (the "Plan") is intended to provide a means whereby certain employees and consultants of **BMC SOFTWARE, INC.**, a Delaware corporation (the "Company"), and its affiliates may develop a sense of proprietorship and personal involvement in the development and financial success of the Company, and to encourage them to remain with and devote their best efforts to the business of the Company, thereby advancing the interests of the Company and its shareholders. A further purpose of the Plan is to permit the Company to provide incentives to individuals who serve as employees and consultants to entities that are acquired by the Company or one of its affiliates. Accordingly, the Company may grant to certain employees and consultants ("Optionees") the option ("Option") to purchase shares of the common stock of the Company ("Stock"), as hereinafter set forth. Options granted under the Plan shall not be treated as incentive stock options, within the meaning of section 422(b) of the Internal Revenue Code of 1986, as amended (the "Code").

II. Administration

The Plan shall be administered by a committee (the "Committee") appointed by the Board of Directors of the Company (the "Board"), and the Committee shall be comprised solely of one or more members of the Board. The Committee shall have sole authority to select the Optionees from among those individuals eligible hereunder and to establish the number of shares which may be issued under each Option. In selecting the Optionees from among individuals eligible hereunder and in establishing the number of shares that may be issued under each Option, the Committee may take into account the nature of the services rendered by such individuals, their present and potential contributions to the Company's success and such other factors as the Committee in its discretion shall deem relevant. The Committee is authorized to interpret the Plan and may from time to time adopt such rules and regulations, consistent with the provisions of the Plan, as it may deem advisable to carry out the Plan. All decisions made by the Committee in selecting the Optionees, in establishing the number of shares which may be issued under each Option and in construing the provisions of the Plan shall be final.

III. Option Agreements

(a) Each Option shall be evidenced by a written agreement between the Company and the Optionee ("Option Agreement") which shall contain such terms and conditions as may be approved by the Committee. The terms and conditions of the respective Option Agreements need not be identical. Specifically, an Option Agreement may provide for the surrender of the right to purchase shares under the Option in return for a payment in cash or shares of Stock or a combination of cash and shares of Stock equal in value to the excess of the fair market value of the shares with respect to which the right to purchase is surrendered over the option price

therefor ("Stock Appreciation Rights"), on such terms and conditions as the Committee in its sole discretion may prescribe; provided, that, except as provided in Subparagraph VIII(c) hereof, the Committee shall retain final authority (i) to determine whether an Optionee shall be permitted, or (ii) to approve an election by an Optionee, to receive cash in full or partial settlement of Stock Appreciation Rights. Moreover, an Option Agreement may provide for the payment of the option price, in whole or in part, by the delivery of a number of shares of Stock (plus cash if necessary) having a fair market value equal to such option price.

(b) For all purposes under the Plan, the fair market value of a share of Stock on a particular date shall be equal to the mean of the high and low sales prices of the Stock (i) reported by the National Market System of NASDAQ on that date or (ii) if the Stock is listed on a national stock exchange, reported on the stock exchange composite tape on that date; or, in either case, if no prices are reported on that date, on the last preceding date on which such prices of the Stock are so reported. If the Stock is traded over the counter at the time a determination of its fair market value is required to be made hereunder, its fair market value shall be deemed to be equal to the average between the reported high and low or closing bid and asked prices of Stock on the most recent date on which Stock was publicly traded. In the event Stock is not publicly traded at the time a determination of its value is required to be made hereunder, the determination of its fair market value shall be made by the Committee in such manner as it deems appropriate.

(c) Each Option and all rights granted thereunder shall not be transferable other than (i) by will or the laws of descent and distribution, (ii) pursuant to a qualified domestic relations order as defined by the Code or Title I of the Employee Retirement Income Security Act of 1974, as amended, or the rules thereunder, or (iii) with the consent of the Committee. Unless otherwise determined by the Committee, an Option shall be exercisable during the Optionee's lifetime only by the Optionee or the Optionee's guardian or legal representative.

IV. Eligibility of Optionee

Options may be granted only to individuals who are employees or consultants of the Company or any affiliate of the Company at the time the Option is granted; provided, however, that an individual who is an officer and/or a director of the Company shall not be eligible to receive an Option under the Plan even if such individual is also an employee or consultant of the Company or any affiliate of the Company. Options may be granted to the same individual on more than one occasion. For all purposes under the Plan, the term "affiliate" shall mean any corporation, partnership, limited liability company or partnership, association, trust or other organization which, directly or indirectly, controls, is controlled by, or is under common control with, the Company. For purposes of the preceding sentence, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any entity or organization, shall mean the possession, directly or indirectly, of the power (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of the controlled entity or organization, or (ii) to direct or cause the direction of the management and policies of the controlled entity or organization, whether through the ownership of voting securities or by contract or otherwise.

V. Shares Subject to the Plan

The aggregate number of shares which may be issued under Options granted under the Plan shall not exceed 600,000 shares of Stock. Such shares may consist of authorized but unissued shares of Stock or previously issued shares of Stock reacquired by the Company. Any of such shares which remain unissued and which are not subject to outstanding Options at the termination of the Plan shall cease to be subject to the Plan, but, until termination of the Plan, the Company shall at all times make available a sufficient number of shares to meet the requirements of the Plan. Should any Option hereunder expire or terminate prior to its exercise in full, the shares theretofore subject to such Option may again be subject to an Option granted under the Plan. The aggregate number of shares which may be issued under the Plan shall be subject to adjustment in the same manner as provided in Paragraph VIII hereof with respect to shares of Stock subject to Options then outstanding. Exercise of an Option in any manner, including an exercise involving a Stock Appreciation Right, shall result in a decrease in the number of shares of Stock which may thereafter be available, both for purposes of the Plan and for sale to any one individual, by the number of shares as to which the Option is exercised.

VI. Option Price

The purchase price of Stock issued under each Option shall be determined by the Committee, but such purchase price shall not be less than the fair market value of Stock subject to the Option on the date the Option is granted. Notwithstanding the foregoing, Options may be granted with a purchase price that is lower than that specified in the preceding sentence pursuant to a merger or other corporate transaction.

VII. Term of Plan

The Plan shall be effective upon the date of its adoption by the Board. Except with respect to Options then outstanding, if not sooner terminated under the provisions of Paragraph IX, the Plan shall terminate upon and no further Options shall be granted after the expiration of ten years from the date of its adoption by the Board.

VIII. Recapitalization or Reorganization

(a) The existence of the Plan and the Options granted hereunder shall not affect in any way the right or power of the Board or the shareholders of the Company to make or authorize any adjustment, recapitalization, reorganization or other change in the Company's capital structure or its business, any merger or consolidation of the Company, any issue of debt or equity securities, the dissolution or liquidation of the Company or any sale, lease, exchange or other disposition of all or any part of its assets or business or any other corporate act or proceeding.

(b) The shares with respect to which Options may be granted are shares of Stock as presently constituted, but if, and whenever, prior to the expiration of an Option theretofore granted, the Company shall effect a subdivision or consolidation of shares of Stock or the

payment of a stock dividend on Stock without receipt of consideration by the Company, the number of shares of Stock with respect to which such Option may thereafter be exercised (i) in the event of an increase in the number of outstanding shares shall be proportionately increased, and the purchase price per share shall be proportionately reduced, and (ii) in the event of a reduction in the number of outstanding shares shall be proportionately reduced, and the purchase price per share shall be proportionately increased.

(c) If the Company recapitalizes, reclassifies its capital stock, or otherwise changes its capital structure (a "recapitalization"), the number and class of shares of Stock covered by an Option theretofore granted shall be adjusted so that such Option shall thereafter cover the number and class of shares of stock and securities to which the Optionee would have been entitled pursuant to the terms of the recapitalization if, immediately prior to the recapitalization, the Optionee had been the holder of record of the number of shares of Stock then covered by such Option. If (i) the Company shall not be the surviving entity in any merger, consolidation or other reorganization (or survives only as a subsidiary of an entity), (ii) the Company sells, leases or exchanges all or substantially all of its assets to any other person or entity, (iii) the Company is to be dissolved and liquidated, (iv) any person or entity, including a "group" as contemplated by Section 13(d)(3) of the Securities Exchange Act of 1934, as amended, acquires or gains ownership or control (including, without limitation, power to vote) of more than 50% of the outstanding shares of the Company's voting stock (based upon voting power), or (v) as a result of or in connection with a contested election of directors, the persons who were directors of the Company before such election shall cease to constitute a majority of the Board (each such event is referred to herein as a "Corporate Change"), no later than (a) ten days after the approval by the shareholders of the Company of such merger, consolidation, reorganization, sale, lease or exchange of assets or dissolution or such election of directors or (b) thirty days after a change of control of the type described in Clause (iv), the Committee, acting in its sole discretion without the consent or approval of any Optionee, shall act to effect one or more of the following alternatives, which may vary among individual Optionees and which may vary among Options held by any individual Optionee: (1) accelerate the time at which Options then outstanding may be exercised so that such Options may be exercised in full for a limited period of time on or before a specified date (before or after such Corporate Change) fixed by the Committee, after which specified date all unexercised Options and all rights of Optionees thereunder shall terminate, (2) require the mandatory surrender to the Company by selected Optionees of some or all of the outstanding Options held by such Optionees (irrespective of whether such Options are then exercisable under the provisions of the Plan) as of a date, before or after such Corporate Change, specified by the Committee, in which event the Committee shall thereupon cancel such Options and the Company shall pay to each Optionee an amount of cash per share equal to the excess, if any, of the amount calculated in Subparagraph (d) below (the "Change of Control Value") of the shares subject to such Option over the exercise price(s) under such Options for such shares, (3) make such adjustments to Options then outstanding as the Committee deems appropriate to reflect such Corporate Change (provided, however, that the Committee may determine in its sole discretion that no adjustment is necessary to Options then outstanding) or (4) provide that the number and class of shares of Stock covered by an Option theretofore granted shall be adjusted so that such Option shall thereafter cover the number and class of shares of stock or other securities or property (including, without limitation, cash) to which the Optionee would have been entitled pursuant to the terms of the agreement of merger,

consolidation or sale of assets and dissolution if, immediately prior to such merger, consolidation or sale of assets and dissolution, the Optionee had been the holder of record of the number of shares of Stock then covered by such Option.

(d) For the purposes of clause (2) in Subparagraph (c) above, the "Change of Control Value" shall equal the amount determined in clause (i), (ii) or (iii), whichever is applicable, as follows: (i) the per share price offered to shareholders of the Company in any such merger, consolidation, reorganization, sale of assets or dissolution transaction, (ii) the price per share offered to shareholders of the Company in any tender offer or exchange offer whereby a Corporate Change takes place, or (iii) if such Corporate Change occurs other than pursuant to a tender or exchange offer, the fair market value per share of the shares into which such Options being surrendered are exercisable, as determined by the Committee as of the date determined by the Committee to be the date of cancellation and surrender of such Options. In the event that the consideration offered to shareholders of the Company in any transaction described in this Subparagraph (d) or Subparagraph (c) above consists of anything other than cash, the Committee shall determine the fair cash equivalent of the portion of the consideration offered which is other than cash.

(e) Any adjustment provided for in Subparagraphs (b) or (c) above shall be subject to any required shareholder action.

(f) Except as hereinbefore expressly provided, the issuance by the Company of shares of stock of any class or securities convertible into shares of stock of any class, for cash, property, labor or services, upon direct sale, upon the exercise of rights or warrants to subscribe therefor, or upon conversion of shares or obligations of the Company convertible into such shares or other securities, and in any case whether or not for fair value, shall not affect, and no adjustment by reason thereof shall be made with respect to, the number of shares of Stock subject to Options theretofore granted or the purchase price per share.

IX. Amendment or Termination of the Plan

The Board in its discretion may terminate the Plan at any time with respect to any shares for which Options have not theretofore been granted. The Board shall have the right to alter or amend the Plan or any part thereof from time to time; provided, that no change in any Option theretofore granted may be made which would impair the rights of the Optionee without the consent of such Optionee.

X. Securities Laws

The Company shall not be obligated to issue any Stock pursuant to any Option granted under the Plan at any time when the offering of the shares covered by such Option have not been registered under the Securities Act of 1933 and such other state and federal laws, rules or regulations as the Company or the Committee deems applicable and, in the opinion of legal counsel for the Company, there is no exemption from the registration requirements of such laws, rules or regulations available for the offering and sale of such shares.

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4/14/00

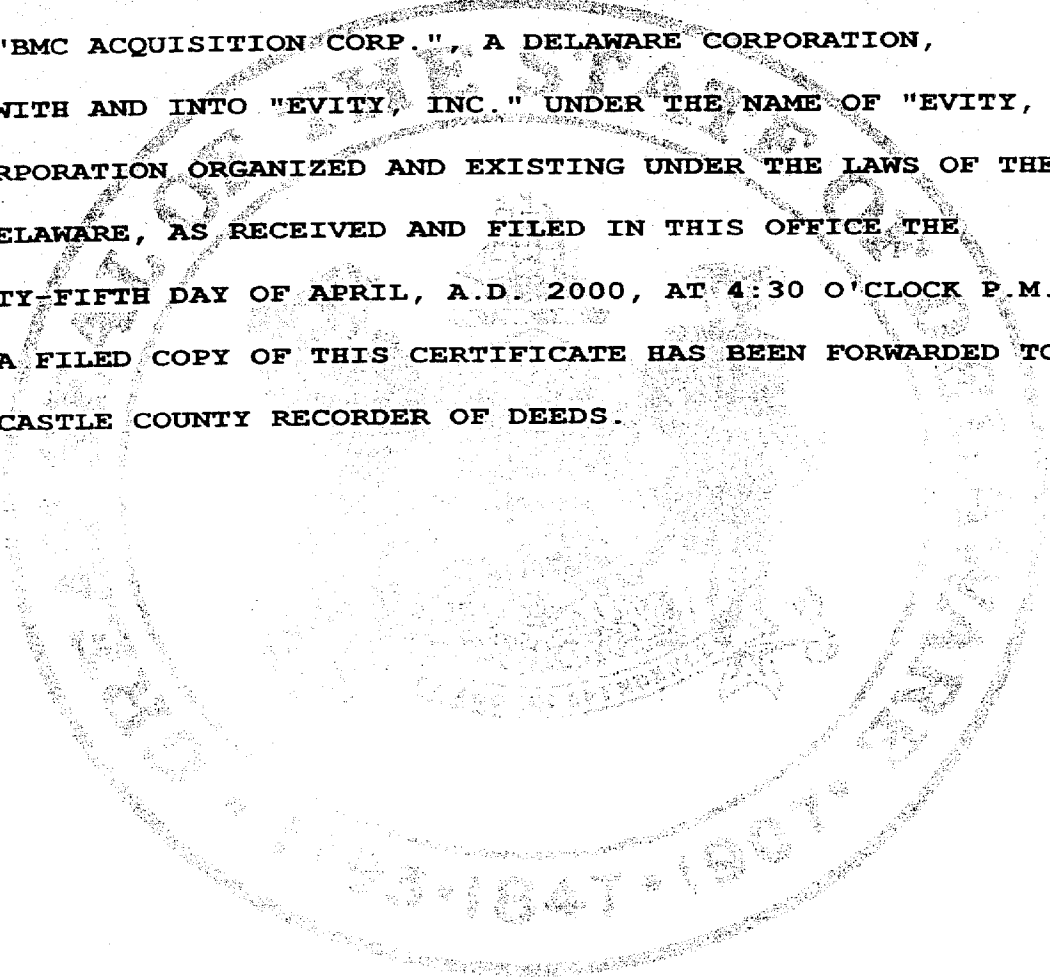
EXHIBIT
"B"

Office of the Secretary of State

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF MERGER, WHICH MERGES:

"BMC ACQUISITION CORP.", A DELAWARE CORPORATION, WITH AND INTO "EVITY, INC." UNDER THE NAME OF "EVITY, INC.", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE TWENTY-FIFTH DAY OF APRIL, A.D. 2000, AT 4:30 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.



Edward J. Freel

Edward J. Freel, Secretary of State

3030961 8100M

001211701

AUTHENTICATION: 0402874

DATE: 04-26-00

CERTIFICATE OF MERGER
OF
BMC ACQUISITION CORP.
WITH AND INTO
EVITY, INC.
(UNDER SECTION 251 OF THE GENERAL
CORPORATION LAW OF THE STATE OF DELAWARE)

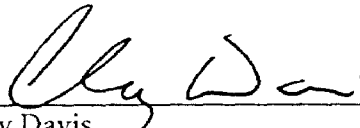
EVITY, INC. hereby certifies that:

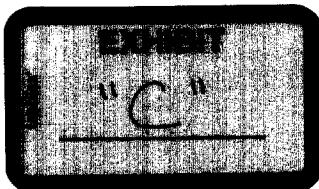
1. The name and state of incorporation of each of the constituent corporations to the merger are:
 - (a) BMC Acquisition Corp., a Delaware corporation ("Merger Sub"); and
 - (b) Eivity, Inc., a Delaware corporation ("Eivity")
2. An Agreement and Plan of Merger among BMC Software, Inc., a Delaware Corporation (and the sole stockholder of Merger Sub), Merger Sub and Eivity has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with the provisions of Section 251 of the General Corporation Law of the State of Delaware.
3. The name of the corporation surviving the merger is Eivity, Inc.
4. The Certificate of Incorporation of Eivity, as in effect immediately prior to the effective time of the merger, shall be the Certificate of Incorporation of the surviving corporation until further amended as provided therein and under Delaware law.
5. An executed copy of the Agreement and Plan of Merger is on file at the principal place of business of Eivity at 3925 W. Braker Lane, Suite 900, Austin, Texas 78759.
6. A copy of the Agreement and Plan of Merger will be furnished by Eivity, on request and without cost, to any stockholder of any constituent corporation.

IN WITNESS WHEREOF, Eivity has caused this certificate to be signed by a duly authorized officer thereof, as of the 25 day of April, 2000.

EVITY, INC.

By: _____


Clay Davis
Co-Chief Executive Officer



The United States of America



CERTIFICATE OF REGISTRATION PRINCIPAL REGISTER

The Mark shown in this certificate has been registered in the United States Patent and Trademark Office to the named registrant.

The records of the United States Patent and Trademark Office show that an application for registration of the Mark shown in this Certificate was filed in the Office; that the application was examined and determined to be in compliance with the requirements of the law and with the regulations prescribed by the Director of the United States Patent and Trademark Office; and that the Applicant is entitled to registration of the Mark under the Trademark Act of 1946, as Amended.

A copy of the Mark and pertinent data from the application are part of this certificate.

This registration shall remain in force for TEN (10) years, unless terminated earlier as provided by law, and subject to compliance with the provisions of Section 8 of the Trademark Act of 1946, as Amended.



Nicholas P. Edici

Acting Director of the United States Patent and Trademark Office

TRADEMARK
REEL: 002640 FRAME: 0091

Requirements for Maintaining a Federal Trademark Registration

SECTION 8: AFFIDAVIT OF CONTINUED USE

The registration shall remain in force for 10 years, except that the registration shall be canceled for failure to file an Affidavit of Continued Use under Section 8 of the Trademark Act, 15 U.S.C. §1058, upon the expiration of the following time periods:

- i) At the end of 6 years following the date of registration.
- ii) At the end of each successive 10-year period following the date of registration.

Failure to file a proper Section 8 Affidavit at the appropriate time will result in the cancellation of the registration.

SECTION 9: APPLICATION FOR RENEWAL

The registration shall remain in force for 10 years, subject to the provisions of Section 8, except that the registration shall expire for failure to file an Application for Renewal under Section 9 of the Trademark Act, 15 U.S.C. §1059, at the end of each successive 10-year period following the date of registration.

Failure to file a proper Application for Renewal at the appropriate time will result in the expiration of the registration.

No further notice or reminder of these requirements will be sent to the Registrant by the Patent and Trademark Office. It is recommended that the Registrant contact the Patent and Trademark Office approximately one year before the expiration of the time periods shown above to determine the requirements and fees for the filings required to maintain the registration.

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

United States Patent and Trademark Office

Reg. No. 2,500,825

Registered Oct. 23, 2001

**SERVICE MARK
PRINCIPAL REGISTER**

SITE ANGEL

EVITY, INC. (TEXAS CORPORATION)
6280 MCNEIL DRIVE, SUITE 801
AUSTIN, TX 78729

FOR: COMPUTER SERVICES, NAMELY, MONITORING, EVALUATING AND PROVIDING DATA REGARDING THE TRAFFIC, ACTIVITY AND/OR RESPONSE TIME OF A WEBSITE, A CUSTOMER'S SATISFACTION WITH WEBSITE OVER TIME, THE PERCENTAGE OF TIME CRITICAL PATHS THROUGH A WEBSITE MEET PREDEFINED TIME GOALS, THE AMOUNT OF TIME REQUIRED TO COMPLETE A CRITICAL PATH THROUGH A WEBSITE, THE AMOUNT OF TIME TO RESOLVE WEB-

SITE PROBLEMS ONCE DETECTED, AND REPORTING A FAILURE OF A WEBSITE TO PROPERLY RESPOND TO A REQUEST, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 1-17-2000; IN COMMERCE 1-17-2000.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SITE", APART FROM THE MARK AS SHOWN.

SN 75-756,089, FILED 7-20-1999.

TERESA M. RUPP, EXAMINING ATTORNEY