TRADEMARK ASSIGNMENT

Electronic Version v1.1
Stylesheet Version v1.1

SUBMISSION TYPE:	NEW ASSIGNMENT
NATURE OF CONVEYANCE:	MERGER
EFFECTIVE DATE:	03/09/2006

CONVEYING PARTY DATA

Name	Formerly	Execution Date	Entity Type
@Last Software Corporation		03/09/2006	CORPORATION:

RECEIVING PARTY DATA

Name:	Google Inc.
Street Address:	1600 Amphitheatre Parkway
Internal Address:	Building 41
City:	Mountain View
State/Country:	CALIFORNIA
Postal Code:	94043
Entity Type:	CORPORATION:

PROPERTY NUMBERS Total: 1

Property Type	Number	Word Mark
Registration Number:	2717773	SKETCHUP

CH $40.00 2717773

CORRESPONDENCE DATA

Fax Number: (650)618-8571
Correspondence will be sent via US Mail when the fax attempt is unsuccessful.
Phone: 650-253-0000
Email: trademarks@google.com
Correspondent Name: Google Inc.
Address Line 1: 1600 Amphitheatre Parkway
Address Line 2: Building 41
Address Line 4: Mountain View, CALIFORNIA 94043

NAME OF SUBMITTER:	Karen Robertson
Signature:	/Karen Robertson/

Date:	08/24/2006

Total Attachments: 66
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AGREEMENT AND PLAN OF MERGER

BY AND AMONG

GOOGLE INC.,

STEELCURTAIN INC.,

@LAST SOFTWARE, INC.,

MARK SAWYER, J.K. HULLETT, BRAD SCHELL AND JOSEPH ESCH,

AND WITH RESPECT TO THE FIRST PARAGRAPH OF ARTICLE II AND SECTION 2.15 ONLY,

SCOTT GREEN,

AND WITH RESPECT TO ARTICLES VII AND IX ONLY,

PHILIP L. REED, III

AS STOCKHOLDER REPRESENTATIVE

AND

U.S. BANK, NATIONAL ASSOCIATION

AS ESCROW AGENT

Dated as of March 9, 2006

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THIS AGREEMENT AND PLAN OF MERGER (the "**Agreement**") is made and entered into as of March 9, 2006 by and among Google Inc., a Delaware corporation ("**Parent**"), SteelCurtain Inc., a Delaware corporation and a wholly-owned subsidiary of Parent ("**Sub**"), @Last Software, Inc., a Delaware corporation (the "**Company**"), Mark Sawyer, J.K. Hullett, Brad Schell and Joseph Esch and with respect to the first paragraph of **Article II** and **Section 2.15** hereof only, Scott Green (each, a "**Principal Stockholder,**" and collectively, the "**Principal Stockholders**"), and with respect to **Article VII** and **Article IX** hereof only, Philip L. Reed, III as stockholder representative (the "**Stockholder Representative**"), and U.S. Bank, National Association as Escrow Agent.

RECITALS

A. The Boards of Directors of each of Parent, Sub and the Company believe it is advisable and in the best interests of each corporation and its respective stockholders that Parent acquire the Company through the statutory merger of Sub with and into the Company (the "**Merger**") and, in furtherance thereof, have approved this Agreement and the Merger.

B. Pursuant to the Merger, among other things, and subject to the terms and conditions of this Agreement, (i) all of the issued and outstanding Company Capital Stock shall be converted into the right to receive the consideration set forth herein, (ii) all of the issued and outstanding Company Warrants shall be converted into the right to receive the consideration set forth herein and (iii) all of the issued and outstanding Company Options shall be terminated (unless exercised prior thereto).

C. A portion of the consideration otherwise payable by Parent in connection with the Merger shall be placed in escrow by Parent as partial security for the indemnification obligations set forth in this Agreement.

D. The Company and the Principal Stockholders, on the one hand, and Parent and Sub, on the other hand, desire to make certain representations, warranties, covenants and other agreements in connection with the Merger.

E. Immediately following the execution and delivery of this Agreement, as a material inducement to Parent and Sub to enter into this Agreement, the Company shall have obtained and shall deliver to Parent (i) a true, correct and complete copy of an Action by Written Consent, evidencing the approval of the Merger, this Agreement and the transactions contemplated hereby, in the form attached hereto as **Exhibit A** (the "**Written Consent**"), signed by the Principal Stockholders and certain other stockholders of the Company and (ii) securityholder agreements, in substantially the form attached hereto as **Exhibit B** (the "**Securityholder Agreements**"), with Parent.

NOW, THEREFORE, in consideration of the mutual agreements, covenants and other premises set forth herein, the mutual benefits to be gained by the performance thereof, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted, the parties hereby agree as follows:

ARTICLE I

THE MERGER

1.1 The Merger. At the Effective Time and subject to and upon the terms and conditions of this Agreement and the applicable provisions of the General Corporation Law of the State of Delaware ("**Delaware Law**"), Sub shall be merged with and into the Company, the separate corporate existence of Sub

shall cease, and the Company shall continue as the surviving corporation and as a wholly-owned subsidiary of Parent. The surviving corporation after the Merger is sometimes referred to hereinafter as the "**Surviving Corporation.**"

1.2 Effective Time. The closing of the Merger (the "**Closing**") will take place on a Business Day as promptly as practicable after the execution and delivery hereof by the parties hereto, and following the satisfaction or waiver of the conditions set forth in **Article VI** hereof, at the offices of Wilson Sonsini Goodrich & Rosati, Professional Corporation, 650 Page Mill Road, Palo Alto, California, unless another time or place is mutually agreed upon in writing by Parent and the Company. The date upon which the Closing actually occurs shall be referred to herein as the "**Closing Date.**" On the Closing Date, the Parent shall submit a Certificate of Merger in substantially the form attached hereto as **Exhibit C** for filing with the Secretary of State of the State of Delaware (the "**Certificate of Merger**"), in accordance with the applicable provisions of Delaware Law (the time of such filing shall be referred to herein as the "**Effective Time**").

1.3 Effect of the Merger. At the Effective Time, the effect of the Merger shall be as provided in the applicable provisions of Delaware Law. Without limiting the generality of the foregoing, and subject thereto, at the Effective Time, all of the property, rights, privileges, powers and franchises of the Company and Sub shall vest in the Surviving Corporation, and all debts, liabilities and duties of the Company and Sub shall become the debts, liabilities and duties of the Surviving Corporation.

1.4 Certificate of Incorporation and Bylaws.

(a) Unless otherwise determined by Parent prior to the Effective Time, the certificate of incorporation of the Surviving Corporation shall be amended and restated as of the Effective Time to be identical to the certificate of incorporation of Sub as in effect immediately prior to the Effective Time, until thereafter amended in accordance with Delaware Law and as provided in such certificate of incorporation; *provided, however,* that at the Effective Time, Article I of the certificate of incorporation of the Surviving Corporation shall be amended and restated in its entirety to read as follows: "The name of the corporation is @Last Software, Inc."

(b) Unless otherwise determined by Parent prior to the Effective Time, the bylaws of Sub, as in effect immediately prior to the Effective Time, shall be the bylaws of the Surviving Corporation at the Effective Time until thereafter amended in accordance with Delaware Law and as provided in the certificate of incorporation of the Surviving Corporation and such bylaws.

1.5 Directors and Officers.

(a) Directors of Surviving Corporation. Unless otherwise determined by Parent prior to the Effective Time, the directors of Sub immediately prior to the Effective Time shall be the directors of the Surviving Corporation immediately after the Effective Time, each to hold the office of a director of the Surviving Corporation in accordance with the provisions of Delaware Law and the certificate of incorporation and bylaws of the Surviving Corporation until their successors are duly elected and qualified.

(b) Officers of Surviving Corporation. Unless otherwise determined by Parent prior to the Effective Time, the officers of Sub immediately prior to the Effective Time shall be the officers of the Surviving Corporation immediately after the Effective Time, each to hold office in accordance with the provisions of the bylaws of the Surviving Corporation.

(c) Directors of Subsidiaries of Surviving Corporation. Unless otherwise determined by Parent prior to the Effective Time, Parent, the Company and the Surviving Corporation shall cause the directors of Sub immediately prior to the Effective Time to be the directors of any Subsidiaries immediately

after the Effective Time, each to hold office as a director of each such Subsidiary in accordance with the provisions of the laws of the respective jurisdiction of organization and the respective bylaws or equivalent organizational documents of each such Subsidiary.

(d) Officers of Subsidiaries of Surviving Corporation. Unless otherwise determined by Parent prior to the Effective Time, Parent, the Company and the Surviving Corporation shall cause the officers of Sub immediately prior to the Effective Time to be the officers of any Subsidiaries immediately after the Effective Time, each to hold office as an officer of each such Subsidiary in accordance with the provisions of the laws of the respective jurisdiction of organization and the bylaws or equivalent organizational documents of each such Subsidiary.

1.6 Effect of Merger on the Capital Stock of the Constituent Corporations.

(a) Definitions. For all purposes of this Agreement, the following terms shall have the following respective meanings:

"**Business Day(s)**" shall mean each day that is not a Saturday, Sunday or other day on which Parent is closed for business or banking institutions located in San Francisco, California are authorized or obligated by law or executive order to close.

"**Closing Stockholder Consent**" shall mean the approval by written consent of the holders of 75% of the outstanding shares of Company Capital Stock.

"**Code**" shall mean the Internal Revenue Code of 1986, as amended.

"**Company Capital Stock**" shall mean the Company Common Stock, the Company Preferred Stock and any other shares of capital stock, if any, of the Company, collectively, but excluding, for the avoidance of doubt, the Company Options and Company Warrants.

"**Company Common Stock**" shall mean the Common Stock, par value $0.001 per share, of the Company.

"**Company Options**" shall mean all issued and outstanding options (including commitments to grant options, but excluding Company Warrants) to purchase or otherwise acquire Company Capital Stock (whether or not vested) held by any Person.

"**Company Preferred Stock**" shall mean the Company Series A Preferred Stock, Company Series B Preferred Stock and Company Series C Preferred Stock, collectively.

"**Company Series A Preferred Stock**" shall mean the Series A Preferred Stock, par value $0.001 per share, of the Company.

"**Company Series B Preferred Stock**" shall mean the Series B Preferred Stock, par value $0.001 per share, of the Company.

"**Company Series C Preferred Stock**" shall mean the Series C Preferred Stock, par value $0.001 per share, of the Company.

"**Company Warrants**" shall mean any issued and outstanding warrant to purchase Company Capital Stock.

"**Continuing Employee**" shall mean each employee of the Company who (i) receives and accepts an offer of at-will employment from Parent or any of its subsidiaries prior to the Effective Time and (ii) is an employee of Parent or any of its subsidiaries immediately following the Effective Time.

"**Contract**" shall mean any mortgage, indenture, lease, contract, covenant, plan, insurance policy or other agreement, instrument, arrangement, obligation, understanding or commitment, permit, concession, franchise or license, whether oral or written (collectively, "**Contracts**").

"**Dollars**" or "**$**" shall mean United States Dollars.

"**Escrow Agent**" shall mean U.S. Bank, National Association, or another institution acceptable to Parent and the Stockholder Representative.

"**Escrow Amount**" shall mean a dollar amount equal to $13,000,000.

"**GAAP**" shall mean United States generally accepted accounting principles consistently applied.

"**Knowledge of the Company**" or "**Known to the Company**" shall mean the actual knowledge of the executive officers and directors of the Company and any Subsidiaries, provided that such persons shall have made due and diligent inquiry of all relevant employees of the Company and any Subsidiaries whom such executive officers and directors should reasonably believe would have actual knowledge of the matters represented.

"**Knowledge of the Principal Stockholders**" or "**Known to the Principal Stockholders**" shall mean with respect to any Principal Stockholder, the actual knowledge of such Principal Stockholder.

"**Lien**" shall mean any lien, pledge, charge, claim, mortgage, security interest or other encumbrance of any sort.

"**Material Adverse Effect**" with respect to any Person shall mean any state of facts, condition, change, development, event or effect that, either alone or in combination with any other change, event or effect, is, or is reasonably likely to be, materially adverse to the business, assets (whether tangible or intangible), condition (financial or otherwise), operations, prospects or capitalization of such entity and its subsidiaries (if any), taken as a whole; *provided, however,* that none of the following shall, by itself, be deemed to constitute a Material Adverse Effect on any Person: (i) any loss of employees, any cancellation of or delay in customer orders, any litigation or any disruption in supplier, partner or similar relationships) resulting from the execution, announcement, pendency or consummation of this Agreement and the transactions contemplated hereby, (ii) any changes in general economic conditions, provided that such changes do not affect such Person in a materially disproportionate manner, (iii) any changes generally affecting the industry in which such Person operates provided that such changes do not affect such Person in a materially disproportionate manner, (iv) any action or failure to act contemplated or permitted by this Agreement; (v) any changes in GAAP.

"**Merger Consideration**" shall mean an amount equal to $65,000,000 less the sum of (i) the Series A Consideration and (ii) the Third Party Expense Adjustment Amount.

"**Permitted Liens**" shall mean (i) statutory liens for Taxes that are not yet due and payable or liens for Taxes being contested in good faith by appropriate proceedings for which adequate reserves have been established, (ii) deposits or pledges made in connection with, or to secure payment of, workers' compensation, unemployment insurance or similar programs mandated by applicable law, (iii) statutory liens

in favor of carriers, warehousemen, mechanics and materialmen, to secure claims for labor, materials or suppliers and other like liens for work not yet completed and (iv) liens in favor of customs and revenue authorities arising as a matter of applicable law to secure payments of customs duties in connection with the importation of goods (each, individually, a "**Permitted Lien**").

"**Per Share Amount**" shall mean the quotient obtained by dividing (i) the Merger Consideration by (ii) the Total Outstanding Shares, rounded to the nearest cent ($0.01) (with amounts greater than or equal to $0.005 rounded up).

"**Person**" shall mean an individual or entity, including a partnership, a limited liability company, a corporation, an association, a joint stock company, a trust, a joint venture, an unincorporated organization, or a Governmental Entity (or any department, agency, or political subdivision thereof).

"**Plans**" shall mean the Company's Amended and Restated Stock Plan and the 2004 Equity Incentive Plan.

"**Pro Rata Portion**" shall mean, with respect to each Securityholder, the quotient obtained by dividing (i) the aggregate amount of cash receivable by such Securityholder pursuant to **Sections 1.6(b)** and **1.6(c)(i)** hereof by (ii) the aggregate amount of cash receivable by all Securityholders pursuant to **Sections 1.6(b)** and **1.6(c)(i)** hereof.

"**Related Agreements**" shall mean the Securityholder Agreements, Warrantholder Agreements, Certificate of Merger and Written Consents.

"**Securityholder**" shall mean (i) any holder of any Company Capital Stock or (ii) Company Warrants immediately prior to the Effective Time, but excluding, for the avoidance of doubt, any holder of Company Options.

"**Series A Consideration**" shall mean the product obtained by multiplying (i) the Series A Per Share Amount by (ii) the Total Outstanding Series A Shares, rounded to the nearest cent ($0.01) (with amounts greater than or equal to $0.005 rounded up).

"**Series A Per Share Amount**" shall mean $100 (as appropriately adjusted for any stock dividend, stock split, combination of shares, recapitalization or similar event with respect to the Company Series A Preferred Stock).

"**Stockholder**" shall mean any holder of any Company Capital Stock immediately prior to the Effective Time.

"**Terminating Employee(s)**" shall mean the employee(s) of the Company and any Subsidiaries who are not offered or who do not accept employment by Parent or any of its subsidiaries prior to the Effective Time.

"**Third Party Expense Adjustment Amount**" shall mean the difference between (i) the amount of the Third Party Expenses reflected on the Statement of Expenses and (ii) $50,000.

"**Total Outstanding Series A Shares**" shall mean the aggregate number of shares of Company Series A Preferred Stock including, for the avoidance of doubt, the maximum aggregate number of shares of Company Series A Preferred Stock issuable upon full exercise, exchange or conversion of all Company Warrants and any other rights whether vested or unvested convertible into, exercisable for or exchangeable for, shares of Company Series A Preferred Stock issued and outstanding immediately prior to

the Effective Time. Notwithstanding the foregoing, Total Outstanding Series A Shares shall not include any shares of Company Series A Preferred Stock issuable upon the exercise of Company Options that expire or are canceled or terminated concurrently with or immediately prior to the Effective Time to the extent not exercised or converted into the right to receive the consideration described in **Section 1.6(b)**.

"**Total Outstanding Shares**" shall mean the aggregate number of shares of Company Capital Stock (excluding any and all shares of Company Series A Preferred Stock) on an as-converted to Common Stock basis, including, for the avoidance of doubt, the maximum aggregate number of shares of Company Capital Stock issuable upon full exercise, exchange or conversion of all Company Options, Company Warrants and any other rights whether vested or unvested convertible into, exercisable for or exchangeable for, shares of Company Capital Stock issued and outstanding immediately prior to the Effective Time. Notwithstanding the foregoing, Total Outstanding Shares shall not include any shares of Company Capital Stock issuable upon the exercise of Company Options that expire or are canceled or terminated concurrently with or immediately prior to the Effective Time to the extent not exercised or converted into the right to receive the consideration described in **Section 1.6(b)**.

"**Warrant Consideration**" shall mean the sum of all Net Warrant Values attributable to the Company Warrants.

(b) Effect on Capital Stock. At the Effective Time, by virtue of the Merger and without any action on the part of Sub, the Company or the holders of shares of Company Capital Stock, each share of Company Capital Stock (other than any Dissenting Shares and excluding, for avoidance of doubt, Company Options and Company Warrants, which shall be treated as provided for in **Section 1.6(c)** below) issued and outstanding immediately prior to the Effective Time, upon the terms and subject to the conditions set forth in this **Section 1.6(b)** and the escrow provisions set forth in **Article VII** hereof, will be canceled and extinguished and will be converted automatically into the right to receive upon surrender of the certificate (or appropriate affidavit of loss) representing such share of Company Capital Stock in the manner provided in **Section 1.8** hereof, an amount of cash (without interest) equal to: (i) with respect to each share of the Company Capital Stock other than the Company Series A Preferred Stock, the Per Share Amount and, (ii) with respect to each share of Company Series A Preferred Stock, the Series A Per Share Amount.

(c) Treatment of Company Warrants and Company Options; Cancellation of Company Warrants.

(i) Effect on Company Warrants. At the Effective Time, each Company Warrant that is outstanding and not cancelled by the Company at or prior to the Effective Time hereof shall be converted, upon the terms and subject to the conditions set forth in this **Section 1.6(c)(i)** and the escrow provisions set forth in **Section 1.8(b)** and **Article VII** hereof, upon surrender of such Company Warrants (or appropriate affidavit of loss) in the manner provided in **Section 1.8** hereof, into an amount of cash (without interest) equal to: the product of (x) the maximum number of shares of Company Capital Stock into which such Company Warrant is exercisable (assuming the full exercise of such Company Warrant) and (y) the Per Share Amount, minus the aggregate exercise price of such Company Warrant rounded to the nearest cent ($0.01) (with amounts greater than or equal to $0.005 rounded up) (the "**Net Warrant Value**").

(ii) Effect on Company Options. No outstanding Company Options (whether vested or unvested) shall be assumed by Parent, and each such Company Option shall be canceled or terminated prior to the Closing. Prior to the Effective Time, and subject to the review and approval of Parent, the Company shall take all actions necessary to effect the transactions anticipated by this **Section 1.6(c)** under all agreements relating to Company Option and any other plan or arrangement of the Company (whether written or oral, formal or informal), including delivering all required notices.

(iii) Termination of Non-Converted Company Warrants and Company Options. No outstanding Company Warrants that are not converted into the right to receive the consideration set forth in **Section 1.6(c)(i)** and no outstanding Company Options shall be assumed by Parent, and each such non-converted Company Warrant and Company Option shall be canceled and extinguished prior to the Closing.

(d) Withholding Taxes. The Company, and on its behalf Parent and the Surviving Corporation, shall be entitled to deduct and withhold from any consideration payable or otherwise deliverable pursuant to this Agreement such amounts as may be required to be deducted or withheld therefrom under any provision of federal, local or foreign tax law or under any applicable legal requirement. To the extent such amounts are so deducted or withheld, such amounts shall be treated for all purposes under this Agreement as having been paid to the Person to whom such amounts would otherwise have been paid.

(e) Capital Stock of Sub. Each share of common stock of Sub issued and outstanding immediately prior to the Effective Time shall be converted into and exchanged for one validly issued, fully paid and nonassessable share of common stock of the Surviving Corporation. Each stock certificate of Sub evidencing ownership of any such shares shall continue to evidence ownership of such shares of capital stock of the Surviving Corporation.

1.7 Dissenting Shares.

(a) Notwithstanding any other provisions of this Agreement to the contrary, any shares of Company Capital Stock held by a holder who has not effectively withdrawn or lost such holder's appraisal, dissenters' or similar rights for such shares under Delaware Law (the "**Dissenting Shares**"), shall not be converted into or represent a right to receive the applicable consideration for Company Capital Stock set forth in **Section 1.6(b)** hereof, but the holder thereof shall only be entitled to such rights as are provided by Delaware Law.

(b) Notwithstanding the provisions of **Section 1.7(a)** hereof, if any holder of Dissenting Shares shall effectively withdraw or lose (through failure to perfect or otherwise) such holder's appraisal or dissenters' rights under Delaware Law, as applicable, then, as of the later of the Effective Time and the occurrence of such event, such holder's shares shall automatically be converted into and represent only the right to receive the consideration for Company Capital Stock, as applicable, set forth in **Section 1.6(b)** hereof, without interest thereon, and subject to the provisions of **Section 7.5** hereof, upon surrender of the certificate representing such shares.

(c) The Company shall give Parent (i) prompt notice of any written demand for appraisal received by the Company pursuant to the applicable provisions of Delaware Law and (ii) the opportunity to participate in all negotiations and proceedings with respect to such demands. The Company shall not, except with the prior written consent of Parent or if directed to do so by a court order or judgment, make any payment with respect to any such demands or offer to settle or settle any such demands. Any communication to be made by the Company to any Stockholder with respect to such demands shall be submitted to Parent in advance and shall not be presented to any Stockholder prior to the Company receiving Parent's consent. Notwithstanding the foregoing, to the extent that Parent, the Surviving Corporation or the Company (a) makes any payment or payments in respect of any Dissenting Shares in excess of the consideration that otherwise would have been payable in respect of such shares in accordance with this Agreement or (b) incurs any Losses, (including attorneys' and consultants' fees, costs and expenses and including any such fees, costs and expenses incurred in connection with investigating, defending against or settling any action or proceeding) in respect of any Dissenting Shares (excluding payments for such shares) ((a) and (b) together "**Dissenting Share Payments**"), Parent shall be entitled to recover under the terms of **Article VII** hereof the amount of such Dissenting Share Payments.

1.8 Surrender of Certificates.

(a) Exchange Agent. The Secretary of Parent, or another Person selected by Parent, shall serve as the exchange agent (the "**Exchange Agent**") for the Merger. Any cash deposited with the Exchange Agent shall be referred to as the "**Exchange Fund**."

(b) Exchange Agent and Escrow Deposits. At the Closing, Parent shall make available to the Exchange Agent for exchange in accordance with this Agreement an amount of cash equal to the Merger Consideration (less the Escrow Amount and the Escrow Reserve Amount). Notwithstanding **Sections 1.6(b)** and **1.6(c)(i)** hereof, Parent shall deposit into the Escrow Fund a portion of the Merger Consideration and the Series A Consideration otherwise payable pursuant to **Sections 1.6(b)** and **1.6(c)(i)** hereof equal to the Escrow Amount. Parent shall be deemed to have contributed with respect to each Securityholder his, her or its Pro Rata Portion of the Escrow Amount at such time, rounded to the nearest cent ($0.01) (with amounts greater than or equal to $0.005 rounded up).

(c) Exchange Procedures. As soon as commercially practicable after the Closing Date, Parent or the Exchange Agent shall mail a letter of transmittal in substantially the form of **Exhibit D** (the "**Letter of Transmittal**") to each Securityholder at the address set forth opposite each such Securityholder's name on the Spreadsheet. After receipt of such Letter of Transmittal and any other documents that Parent or the Exchange Agent may require in order to effect the exchange (the "**Exchange Documents**"), the Securityholders will surrender the certificates (or appropriate affidavit of loss) representing their shares of Company Capital Stock (the "**Company Stock Certificates**") or Company Warrants (or appropriate affidavit of loss), as the case may be, to the Exchange Agent for cancellation together with duly completed and validly executed Exchange Documents. Upon surrender of a Company Stock Certificate or Company Warrant, as the case may be, for cancellation to the Exchange Agent, or such other agent or agents as may be appointed by Parent, together with such Exchange Documents, duly completed and validly executed in accordance with the instructions thereto, and subject to the terms of **Section 1.8(d)** hereof, the holder of such Company Stock Certificate or Company Warrant, as the case may be, shall be entitled to receive from the Exchange Agent in exchange therefor, the cash amount to which such holder is entitled pursuant to **Sections 1.6(b)** or **1.6(c)(i)**, in each case less the amount of cash deposited or to be deposited into the Escrow Fund on such Securityholder's behalf pursuant to **Section 1.8(b)** hereof and **Article VII** hereof, and the Company Stock Certificate or Company Warrant, as the case may be, so surrendered shall be cancelled. Until so surrendered, each Company Stock Certificate outstanding after the Effective Time will be deemed, for all corporate purposes thereafter, to evidence only the right to receive the consideration provided for in this **Article I**. No portion of the Merger Consideration will be paid to the holder of any unsurrendered Company Stock Certificate with respect to shares of Company Capital Stock formerly represented thereby until the holder of record of such Company Stock Certificate shall surrender such Company Stock Certificate and deliver the Exchange Documents pursuant hereto.

(d) Transfers of Ownership. If any cash amounts are to be disbursed pursuant to **Section 1.6(b)** hereof to a Person other than the Person whose name is reflected on the Company Stock Certificate surrendered in exchange therefor, it will be a condition of the issuance or delivery thereof that the certificate so surrendered will be properly endorsed and otherwise in proper form for transfer and that the person requesting such exchange will have paid to Parent or any agent designated by it any transfer or other taxes required by reason of the payment of any portion of the Merger Consideration in any name other than that of the registered holder of the certificate surrendered, or established to the satisfaction of Parent or any agent designated by it that such tax has been paid or is not payable.

(e) Exchange Agent to Return Merger Consideration. At any time following the last day of the sixth month following the Effective Time, Parent shall be entitled to require the Exchange Agent to

deliver to Parent or its designated successor or assign all cash amounts relating to the Merger Consideration that have been deposited with the Exchange Agent and any and all interest thereon or other income or proceeds thereof not disbursed to the holders of Company Stock Certificates or Company Warrant Agreements pursuant to **Section 1.8(c)** hereof. Following return to Parent of any portion of the Merger Consideration as provided in this **Section 1.8(e)**, thereafter the holders of Company Stock Certificates and Company Warrants shall be entitled to look only to Parent (subject to the terms of **Section 1.8(g)** hereof) only as general creditors thereof with respect to any and all cash amounts that may be payable to such holders of Company Stock Certificates and Company Warrants pursuant to **Sections 1.6(b)** and **1.6(c)(i)** hereof upon the due surrender of such Company Stock Certificates or Company Warrants, as the case may be, and delivery of duly executed Exchange Documents in the manner set forth in **Section 1.8(c)** hereof. No interest shall be payable for the cash amounts delivered to Parent pursuant to the provisions of this **Section 1.8(e)** and which are subsequently delivered to the holders of Company Stock Certificates and Company Warrants.

(f) Investment of Exchange Fund. The Exchange Agent shall invest the cash deposited by Parent into the Exchange Fund as directed by Parent on a daily basis; *provided, however,* that no such investment or loss thereon shall affect the amounts payable to the Securityholders pursuant to **Sections 1.6(b)** and **1.6(c)(i)** hereof. Any interest and other income resulting from such investment shall become a part of the Exchange Fund, and any amounts in excess of the amounts payable to the Securityholders pursuant to **Sections 1.6(b)** and **1.6(c)(i)** hereof shall promptly be paid to Parent. Any loss or other reduction resulting from such investment shall be reimbursed by Parent such that the total cash in the Exchange Fund shall at all times be an amount equal to or greater than the Merger Consideration and the Series A Consideration then payable less amounts previously paid to holders of Company Stock Certificates and Company Warrants pursuant to **Sections 1.6(b)** and **1.6(c)(i)** or deposited in the Escrow Fund pursuant to **Section 1.8(b)** and **Article VII** hereof.

(g) No Liability. Notwithstanding anything to the contrary in this **Section 1.8**, neither the Exchange Agent, the Surviving Corporation, nor any party hereto shall be liable to a holder of shares of Company Capital Stock or Company Warrants for any amount paid to a public official pursuant to any applicable abandoned property, escheat or similar law.

1.9 No Further Ownership Rights in Company Capital Stock or Company Warrants. The cash amounts paid in respect of the surrender for exchange of shares of Company Capital Stock and Company Warrants in accordance with the terms hereof shall be deemed to be full satisfaction of all rights pertaining to such shares of Company Capital Stock and Company Warrants, and there shall be no further registration of transfers on the records of the Surviving Corporation of shares of Company Capital Stock or Company Warrants that were outstanding immediately prior to the Effective Time. If, after the Effective Time, Company Stock Certificates or Company Warrants are presented to the Surviving Corporation for any reason, they shall be canceled and exchanged as provided in this **Article I**.

1.10 Lost, Stolen or Destroyed Company Stock Certificates or Company Warrants. In the event any Company Stock Certificates or Company Warrant shall have been lost, stolen or destroyed, the Exchange Agent shall issue in exchange for such lost, stolen or destroyed certificates or warrants, as the case may be, upon the making of an affidavit of that fact by the holder thereof, such amount, if any, as may be required pursuant to **Section 1.6(b)** hereof; *provided, however,* that Parent may, in its discretion and as a condition precedent to the issuance of such amount, require the Stockholder who is the owner of such lost, stolen or destroyed certificates to either (a) deliver a bond in such amount as it may reasonably direct or (b) provide an indemnification agreement in a form and substance acceptable to Parent, against any claim that may be made against Parent or the Exchange Agent with respect to the certificates or warrants alleged to have been lost, stolen or destroyed.

1.11 Taking of Necessary Action; Further Action. If at any time after the Effective Time, any further action is necessary or desirable to carry out the purposes of this Agreement and to vest the Surviving Corporation with full right, title and possession to all assets, property, rights, privileges, powers and franchises of the Company, Parent, Sub, and the officers and directors of the Company, Parent and Sub are fully authorized in the name of their respective corporations or otherwise to take, and will take, all such lawful and necessary action.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF THE COMPANY AND THE PRINCIPAL STOCKHOLDERS

The Company hereby represents and warrants to Parent and Sub, and each of the Principal Stockholders, severally and not jointly, hereby represent and warrant to their Knowledge to Parent and Sub, subject to such exceptions as are specifically disclosed in the disclosure schedule (referencing the appropriate section and subsection numbers) supplied by the Company and the Principal Stockholders to Parent and dated as of the date hereof (the "**Disclosure Schedule**"), on the date hereof and (except where a representation or warranty is made as of the date hereof or a specific date herein) as of the Closing Date, as though made on the Closing Date, as set forth below (it being understood and hereby agreed that the disclosure set forth in each section and subsection of the Disclosure Schedule shall qualify (A) the representations and warranties set forth in the corresponding section or subsection of this **Article II** and (B) any other representations and warranties set forth in this **Article II** if, and solely to the extent that, it is readily apparent on the face of such disclosure (without reference to the documents referenced therein) that the disclosure applies to such other representations and warranties).

2.1 Organization of the Company.

(a) The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. The Company has the corporate power to own its properties and to carry on its business as currently conducted and as currently contemplated to be conducted by the Company as of the Closing. The Company is duly qualified or licensed to do business and in good standing as a foreign corporation in each jurisdiction in which the character or location of its assets or properties (whether owned, leased or licensed) or the nature of its business make such qualifications necessary. The Company has delivered a true and correct copy of its certificate of incorporation, as amended to date (the "**Certificate of Incorporation**") and bylaws, as amended to date, each in full force and effect on the date hereof (collectively, the "**Charter Documents**"), to Parent. The Board of Directors of the Company (the "**Board**") has not approved or proposed any amendment to any of the Charter Documents.

(b) **Section 2.1(b)** of the Disclosure Schedule lists the directors and officers of the Company as of the date hereof.

(c) **Section 2.1(c)** of the Disclosure Schedule lists every state or foreign jurisdiction in which the Company has Employees or facilities or otherwise conducts its business.

2.2 Company Capital Structure.

(a) The authorized capital stock of the Company consists of 20,000,000 shares of Common Stock, 30,000 shares of Company Series A Preferred Stock, 200,000 shares of Company Series B Preferred Stock and 1,200,000 shares of Company Series C Preferred Stock. As of the date hereof, (i) 8,032,245 shares of Common Stock are issued and outstanding, (ii) 23,232 shares of Company Series A Preferred Stock are issued and outstanding, (iii) 159,529 shares of Company Series B Preferred Stock are issued and

outstanding and (iv) 314,285 shares of Company Series C Preferred Stock are issued and outstanding. Each share of Company Preferred Stock other than the Company Series A Preferred Stock is convertible on a one-share for five-share basis into Company Common Stock. The shares of Company Series A Preferred Stock are not convertible into shares of Company Common Stock or shares of any other Company Capital Stock. As of immediately prior to the Closing, (1) the total number of shares of Company Capital Stock outstanding (assuming the conversion, exercise, or exchange of all securities, other than Company Warrants, convertible into, or exercisable or exchangeable for, shares of Company Capital Stock) and (2) the total number of Company Warrants outstanding will be as set forth in **Section 2.2(a)** of the Disclosure Schedule. The Company Capital Stock is held of record by the Persons with the domicile addresses of record set forth in **Section 2.2(a)** of the Disclosure Schedule, which further sets forth for each such Person the number of shares held, class and series of such shares and the number of the applicable Company Stock Certificates representing such shares. All outstanding shares of Company Capital Stock are duly authorized, validly issued, fully paid and non-assessable and are not subject to preemptive rights created by statute, the Charter Documents or any agreement to which the Company is a party or by which it is bound.

(b) All outstanding shares of Company Capital Stock, Company Options and Company Warrants have been issued or repurchased (in the case of shares that were outstanding and repurchased by the Company or any Stockholder) in compliance with all applicable federal, state, foreign, or local statutes, laws, rules, or regulations, including federal and state securities laws, and were issued, transferred and repurchased (in the case of shares that were outstanding and repurchased by the Company or any stockholder of the Company) in accordance with any right of first refusal or similar right or limitation Known to the Company or Known to the Principal Stockholders, including those in the Charter Documents. There are no outstanding shares of Company Capital Stock that constitute unvested restricted stock or that are otherwise subject to a repurchase or redemption right. There are no declared or accrued but unpaid dividends with respect to any shares of Company Capital Stock. The Company has no other capital stock authorized, issued or outstanding.

(c) Except for the Plans, the Company has never adopted, sponsored or maintained any stock option plan or any other plan or agreement providing for equity compensation to any person. The Company has reserved 2,500,000 shares of Company Common Stock for issuance to employees and directors of, and consultants to, the Company upon the issuance of stock or the exercise of options granted under the Plans, of which, (i) no shares are issuable, as of the date hereof, upon the exercise of outstanding, unexercised options granted under the Plans, (ii) 2,337,100 shares have been issued upon the exercise of options granted under the Plans and remain outstanding as of the date hereof, (iii) no shares have been issued in the form of restricted stock granted under the Plans, and (iv) 162,900 shares remain available for future grant. **Section 2.2(a)** of the Disclosure Schedule sets forth for each outstanding Company Warrant, (1) the name of the holder of such Company Warrant, (2) the domicile address of record of such holder, (3) the number of shares of Company Capital Stock issuable upon the exercise of such Company Warrant, (4) the exercise price of such Company Warrant, (5) the date of issuance of such Company Warrant and (6) whether such Company Warrant constitutes deferred compensation under Section 409A of the Code. All shares of Company Capital Stock issuable upon the exercise of the Company Warrants are fully vested. The terms of the Plans authorize the administrator of such Plans to amend the Plans, as required, to effect the provisions set forth in **Section 1.6(c)** hereof with respect to each Company Option without the consent of any holder of any Company Option granted under such Plans. True and complete copies of all agreements and instruments relating to or issued under the Plans have been provided to Parent or its legal counsel and such agreements and instruments have not been amended, modified or supplemented, and there are no agreements to amend, modify or supplement such agreements or instruments from the forms thereof provided to Parent or its legal counsel.

(d) As of the date hereof, no shares of Company Capital Stock are issuable upon the exercise of outstanding Company Options that have not been issued under the Plans. Except for the Company Preferred Stock and the Company Warrants, there are no options, warrants, calls, rights, convertible securities, commitments or agreements of any character, written or oral, to which the Company is a party or by which the Company is bound obligating the Company to issue, deliver, sell, repurchase or redeem, or cause to be issued, delivered, sold, repurchased or redeemed, any shares of the capital stock of the Company or obligating the Company to grant, extend, accelerate the vesting of, change the price of, otherwise amend or enter into any such option, warrant, call, right, commitment or agreement. There are no outstanding or authorized stock appreciation, phantom stock, profit participation, or other similar rights with respect to the Company. Except as contemplated hereby, there are no voting trusts, proxies, or other agreements or understandings with respect to the voting stock of the Company. There are no agreements to which the Company is a party relating to the registration, sale or transfer (including agreements relating to rights of first refusal, co-sale rights or "drag-along" rights) of any Company Capital Stock. As a result of the Merger, assuming Parent is the sole record and beneficial holder of all issued and outstanding shares of capital stock of Sub, Parent will be the sole record and beneficial holder of all issued and outstanding shares of Company Capital Stock and all rights to acquire or receive any shares of Company Capital Stock, whether or not such shares of Company Capital Stock are outstanding.

(e) The allocation of the Merger Consideration and the Series A Consideration set forth in **Section 1.6(b)** hereof is consistent with the certificate of incorporation of the Company as amended as of immediately prior to the Effective Time.

(f) The information contained in the Spreadsheet will be complete and correct as of the Closing Date.

2.3 Subsidiaries. **Section 2.3(a)** of the Disclosure Schedule lists each corporation, limited liability company, partnership, association, joint venture or other business entity of which the Company owns, directly or indirectly, more than 50% of the stock or other equity interest entitled to vote on the election of the members of the board of directors or similar governing body (each, a "**Subsidiary**" and collectively, the "**Subsidiaries**"). Except for the Subsidiaries, the Company does not have and has never had any subsidiaries and does not otherwise own and has never otherwise owned any shares of capital stock or any interest in, or control, directly or indirectly, any other corporation, limited liability company, partnership, association, joint venture or other business entity. Each Subsidiary is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation or organization. Each Subsidiary has the corporate power to own its properties and to carry on its business as currently conducted and as currently contemplated to be conducted by the Company as of the Closing. Each Subsidiary is duly qualified or licensed to do business and in good standing as a foreign corporation in each jurisdiction in which the character or location of its assets or properties (whether owned, leased or licensed) or the nature of its business make such qualifications necessary. The Company has delivered a true and correct copy of each Subsidiary's charter documents and bylaws, each as amended to date and in full force and effect on the date hereof, to Parent or its legal counsel (the "**Subsidiary Organizational Documents**"). **Section 2.3(c)** of the Disclosure Schedule lists the directors and officers of each Subsidiary as of the date of this Agreement. The operations now being conducted by each Subsidiary are not now and have never been conducted under any other name. All of the outstanding shares of capital stock of each Subsidiary are owned of record and beneficially by the Company. All outstanding shares of stock of each Subsidiary are duly authorized, validly issued, fully paid and non-assessable and not subject to preemptive rights created by statute, the Subsidiary Organizational Documents, or any agreement to which such Subsidiary is a party or by which it is bound, and have been issued in compliance with all applicable legal requirements. There are no options, warrants, calls, rights, commitments or agreements of any character, written or oral, to which each Subsidiary is a party or by which it is bound obligating the Subsidiary to issue, deliver, sell, repurchase or redeem, or cause to be issued, sold, repurchased or redeemed, any shares of the capital stock of each Subsidiary or obligating each

Subsidiary to grant, extend, accelerate the vesting of, change the price of, otherwise amend or enter into any such option, warrant, call right, commitment or agreement. There are no outstanding or authorized stock appreciation, phantom stock, profit participation, or other similar rights with respect to any of the Subsidiaries. Neither the Company nor any Subsidiary has agreed or is obligated to make any future investment in, or capital contribution to, any Person.

2.4 Authority. The Company has all requisite corporate power and authority to enter into this Agreement and any Related Agreements to which it is a party and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and any Related Agreements to which the Company is a party and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate action on the part of the Company and no further action is required on the part of the Company to authorize this Agreement and any Related Agreements to which it is a party and the transactions contemplated hereby and thereby, subject only to the approval of this Agreement by the Stockholders. The vote required to approve this Agreement by the Stockholders is set forth in **Section 2.4** of the Disclosure Schedule. This Agreement and the Merger have been unanimously approved by the Board. This Agreement and each of the Related Agreements to which the Company is a party have been duly executed and delivered by the Company and assuming the due authorization, execution and delivery by the other parties hereto and thereto, constitute the valid and binding obligations of the Company enforceable against it in accordance with their respective terms, subject to (i) laws of general application relating to bankruptcy, insolvency, moratorium, the relief of debtors and enforcement of creditors' rights in general, and (ii) rules of law governing specific performance, injunctive relief, other equitable remedies and other general principles of equity.

2.5 No Conflict. The execution and delivery by the Company of this Agreement and any Related Agreement to which the Company is a party, and the consummation by the Company of the transactions contemplated hereby and thereby, will not conflict with or result in any violation of or default under (with or without notice or lapse of time, or both) or give rise to a right of termination, cancellation, modification or acceleration of any obligation or loss of any benefit under (any such event, a "**Conflict**") (i) any provision of the Charter Documents or the Subsidiary Organizational Documents, (ii) any Contract to which the Company or any Subsidiary is a party or by which any of their properties or assets (whether tangible or intangible) are bound, or (iii) any judgment, order, decree, statute, law, ordinance, rule or regulation applicable to the Company, any Subsidiary or any of their properties or assets (whether tangible or intangible). **Section 2.5** of the Disclosure Schedule sets forth all necessary consents, waivers and approvals of parties to any Contracts as are required thereunder in connection with the Merger, or for any such Contract to remain in full force and effect without limitation, modification or alteration after the Effective Time so as to preserve all rights of, and benefits to, the Company and the Subsidiaries under such Contracts from and after the Effective Time. Following the Effective Time, the Surviving Corporation and each of its subsidiaries will be permitted to exercise all of their rights under the Contracts without the payment of any additional amounts or consideration other than ongoing fees, royalties or payments which the Company or any Subsidiary would otherwise be required to pay pursuant to the terms of such Contracts had the transactions contemplated by this Agreement not occurred.

2.6 Consents. No consent, notice, waiver, approval, order or authorization of, or registration, declaration or filing with any court, administrative agency or commission or other federal, state, county, local or other foreign governmental authority, instrumentality, agency or commission (each, a "**Governmental Entity**") or any third party, including a party to any agreement with the Company or any of its Subsidiaries (so as not to trigger any Conflict), is required at or prior to the Effective Time by, or with respect to, the Company or any Subsidiary or the Principal Stockholders, in connection with the execution and delivery of this Agreement and any Related Agreement to which the Company or a Principal Stockholder is a party or the consummation of the transactions contemplated hereby and thereby, except for (a) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware and (b) the adoption of this Agreement and

approval of the transactions contemplated by this Agreement by the Stockholders. The Company is its own "Ultimate Parent Entity" as that term is defined under the Hart Scott Rodino Antitrust Improvements Act of 1976, as amended, and the regulations promulgated thereunder. The Company had less then $10 million in total revenue (calculated in accordance with GAAP) in its last fiscal year ended December 31, 2005. The Company regularly prepares unaudited balance sheets on a monthly basis; in its last such regularly prepared balance sheet, dated December 31, 2005, the Company had less than $10 million in total assets.

2.7 Company Financial Statements. The Company has delivered to Parent the Company's (a) unaudited consolidated balance sheet (the "**Balance Sheet**") as of December 31, 2005 (the "**Balance Sheet Date**"), and (b) related consolidated statements of income, cash flow and stockholders' equity for the 12 month period then ended (the "**Financials**"). The Financials have been prepared in accordance with GAAP applied on a consistent basis throughout the periods indicated and consistent with each other, subject to normal year-end adjustments (which adjustments shall not be material in amount or significance) and except that the Financials do not contain footnotes that may be required by GAAP. The Financials present fairly in all material respects the Company's consolidated financial condition, operating results and cash flows as of the dates and during the periods indicated therein, subject to the absence of footnotes.

2.8 Internal Controls. The Company and each of its Subsidiaries has established and maintains a system of internal accounting controls sufficient to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements in accordance with GAAP (including the Financials), including policies and procedures that (a) require the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the Company and its Subsidiaries, (b) provide assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP, and that receipts and expenditures of the Company and its Subsidiaries are being made only in accordance with appropriate authorizations of management and the Board and (c) provide assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the assets of the Company and its Subsidiaries. Neither the Company nor any of its Subsidiaries (including any Employee thereof) nor the Company's independent auditors has identified or been made aware of (x) any significant deficiency or material weakness in the system of internal accounting controls utilized by the Company and its Subsidiaries, (y) any fraud, whether or not material, that involves the Company's management or other Employees who have a role in the preparation of financial statements or the internal accounting controls utilized by the Company and its Subsidiaries or (z) any claim or allegation regarding any of the foregoing.

2.9 No Undisclosed Liabilities. Neither the Company nor any Subsidiary has any liability, indebtedness, obligation, expense, claim, deficiency, guaranty or endorsement of any type, whether accrued, absolute, contingent, matured or unmatured, except for (a) liabilities and other obligations that have been reflected on or reserved against in the Balance Sheet, (b) liabilities and other obligations that have arisen in the ordinary course of business consistent with past practices since the Balance Sheet Date, (c) performance obligations under executory Contracts by which the Company is bound and (d) liabilities and other obligations incurred under this Agreement; *provided, however,* that the foregoing shall not be deemed to cover any liability the facts and circumstances of which are more explicitly addressed by another representation or warranty contained in this **Article II**.

2.10 No Changes. Since the Balance Sheet Date, except as expressly permitted under, required or specifically consented to by Parent in writing, there has not been, occurred or arisen any:

(a) transaction by the Company or any Subsidiary except in the ordinary course of business as conducted on that date and consistent with past practices;

(b) modifications, amendments or changes to the Charter Documents or the Subsidiary Organizational Documents except as expressly contemplated by this Agreement;

(c) payment, discharge, waiver or satisfaction by the Company or any Subsidiary, in any amount in excess of $10,000 individually or, with respect to any related payments, in excess of $25,000 in the aggregate when combined, of any claim, liability, right or obligation (absolute, accrued, asserted or unasserted, contingent or otherwise), other than payments, discharges or satisfactions in the ordinary course of business of liabilities reflected or reserved against in the Balance Sheet not in excess of the amount reserved against such liabilities on the Balance Sheet;

(d) damage to or destruction or loss of (whether or not covered by insurance) any material assets (whether tangible or intangible) or material business of the Company or any Subsidiary or any loss of, or material adverse change in the Company's or any Subsidiary's relationships with, any of their material customers;

(e) employment dispute, including claims or matters raised by any individual, Governmental Entity, or any workers' representative organization, bargaining unit or union regarding labor trouble or claim of wrongful discharge or other unlawful employment or labor practice or action with respect to the Company or any Subsidiary;

(f) adoption or change in accounting policies or procedures (including any change in reserves for excess or obsolete inventory, doubtful accounts or other reserves, or depreciation or amortization policies or rates) by the Company or any Subsidiary other than as required by GAAP;

(g) adoption of or change in any material election in respect of Taxes, adoption or change in any accounting method in respect of Taxes, agreement or settlement of any claim or assessment in respect of Taxes, or extension or waiver of the limitation period applicable to any claim or assessment in respect of Taxes by the Company or any Subsidiary;

(h) declaration, setting aside or payment of a dividend or other distribution (whether in cash, stock or property) in respect of any Company Capital Stock or capital stock of any Subsidiary, or any split, combination or reclassification in respect of any shares of Company Capital Stock or capital stock of any Subsidiary, or any issuance or authorization of any issuance of any other securities in respect of, in lieu of or in substitution for shares of Company Capital Stock or capital stock of any Subsidiary, or any direct or indirect repurchase, redemption, or other acquisition by the Company of any shares of Company Capital Stock or capital stock of any Subsidiary (or options, warrants or other rights convertible into, exercisable or exchangeable therefor), except in accordance with the agreements evidencing Company Options;

(i) termination (other than terminations in connection with the scheduled end of term of such Contract) or extension, or any material amendment, waiver or modification of the terms, of any Contract;

(j) other than in the ordinary course of business consistent with past practices, sale, lease, sublease, license or other disposition of any of the material assets (whether tangible or intangible) or material properties of the Company or any Subsidiary, including, but not limited to, the sale of any accounts receivable of the Company or any Subsidiary, or any creation of any Lien in such material assets or material properties;

(k) loan by the Company or any Subsidiary to any Person, incurring by the Company or any Subsidiary of any indebtedness, guaranteeing by the Company or any Subsidiary of any indebtedness, issuance or sale of any debt securities of the Company or any Subsidiary or guaranteeing of any debt

securities of others, except for trade payables and advances to Employees for travel and business expenses, in each case in the ordinary course of business consistent with past practices;

(l) waiver or release of any material right or claim of the Company or any Subsidiary, including any write off, discount or other compromise of any account receivable of the Company or any Subsidiary other than write-off's of accounts receivable in the ordinary course of business consistent with past practices;

(m) commencement, settlement, notice or, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, threat of any lawsuit or proceeding or other investigation against the Company or any Subsidiary or their respective businesses, properties, assets or affairs;

(n) notice of any claim or potential claim of ownership by any Person other than the Company of the Company Intellectual Property owned by or developed or created by the Company or of infringement by the Company or any Subsidiary of any other Person's Intellectual Property Rights;

(o) other than pursuant to exercises of Company Options or Company Warrants, issuance or sale, or contract to issue or sell, by the Company or any Subsidiary of any shares of Company Capital Stock or capital stock of any Subsidiary, or securities convertible into, or exercisable or exchangeable for, shares of Company Capital Stock or capital stock of any Subsidiary, or any securities, warrants, options or rights to purchase any of the foregoing;

(p) (i) sale, lease, license or transfer of any Company Intellectual Property or execution of any agreement with respect to the Company Intellectual Property with any Person or with respect to the Intellectual Property Rights of any Person other than in the ordinary course of business consistent with past practice pursuant to Standard Form Agreements, or (ii) purchase or in-license of any Intellectual Property Rights or execution of any agreement with respect to the Intellectual Property Rights of any other Person other than Shrink-Wrap Code, (iii) agreement with respect to the development of any Intellectual Property Rights with a third party, or (iv) change in pricing or royalties set or charged by the Company or any Subsidiary to its customers or licensees or in pricing or royalties set or charged by Persons who have licensed Intellectual Property Rights to the Company or any Subsidiary;

(q) circumstance, change, event or effect of any character that has had a Material Adverse Effect with respect to the Company or any Subsidiary; or

(r) agreement by the Company or any Subsidiary, or any officer or Employees on behalf of the Company or any Subsidiary, to do any of the things described in the preceding clauses (a) through (p) of this **Section 2.10** (other than negotiations with Parent and its representatives regarding the transactions contemplated by this Agreement and any Related Agreements).

2.11 Accounts Receivable.

(a) The Company has made available to Parent a list of all accounts receivable of the Company and each of its Subsidiaries as of the Balance Sheet Date, together with an aging schedule indicating a range of days elapsed since invoice.

(b) All of the accounts receivable of the Company and each Subsidiary arose in the ordinary course of business, are carried at values determined in accordance with GAAP consistently applied, are not subject to any valid setoff or counterclaim, do not represent obligations for goods sold on consignment, on approval or on a sale-or-return basis or subject to any other repurchase or return arrangement or, for receivables arising subsequent to the Balance Sheet Date, as reflected on the books and

records of the Company (which receivables are recorded in accordance with GAAP consistently applied). No person has any Lien on any accounts receivable of the Company or any Subsidiary, and no request or agreement for deduction or discount has been made with respect to any accounts receivable of the Company or any Subsidiary.

2.12 Tax Matters.

(a) Definition of Taxes. For the purposes of this Agreement, the term "**Tax**" or, collectively, "**Taxes**" shall mean (i) any and all U.S. federal, state, local and non-U.S. taxes, assessments and other governmental charges, duties, impositions and liabilities, including taxes based upon or measured by gross receipts, income, profits, sales, use and occupation, and value added, ad valorem, transfer, franchise, withholding, payroll, recapture, employment, excise and property taxes as well as public imposts, fees and social security charges (including health, unemployment, workers' compensation and pension insurance), together with all interest, penalties and additions imposed with respect to such amounts, (ii) any liability for the payment of any amounts of the type described in clause (i) of this **Section 2.12(a)** as a result of being a member of an affiliated, consolidated, combined or unitary group for any period (including any arrangement for group or consortium relief or similar arrangement), and (iii) any liability for the payment of any amounts of the type described in clauses (i) or (ii) of this **Section 2.12(a)** as a result of any express or implied obligation to indemnify any other person or as a result of any obligation under any agreement or arrangement with any other person with respect to such amounts and including any liability for taxes of a predecessor entity.

(b) Tax Returns and Audits.

(i) The Company and each of its Subsidiaries has (a) prepared and timely filed all required federal, state, local and foreign returns, estimates, information statements and reports ("**Returns**") relating to any and all Taxes concerning or attributable to the Company or any of its Subsidiaries or their respective operations, and such Returns are true and correct and have been completed in accordance with applicable law and (b) timely paid all Taxes it is required to pay.

(ii) The Company and each of its Subsidiaries has paid or withheld with respect to their respective Employees and other third parties, all federal, state and foreign income Taxes and social security charges and similar fees, Federal Insurance Contribution Act, Federal Unemployment Tax Act and other Taxes required to be paid or withheld, and have timely paid such Taxes over to the appropriate authorities.

(iii) Neither the Company nor any of its Subsidiaries has been delinquent in the payment of any Tax, nor is there any Tax deficiency outstanding, assessed or, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, proposed against the Company or any of its Subsidiaries, nor has the Company or any of its Subsidiaries executed any waiver of any statute of limitations on or extending the period for the assessment or collection of any Tax.

(iv) No audit or other examination of any Return of the Company or any of its Subsidiaries is presently in progress, nor has the Company or any of its Subsidiaries been notified of any request for such an audit or other examination. No adjustment relating to any Return filed by the Company or any of its Subsidiaries has been proposed formally or, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, informally by any Tax authority to the Company or any of its Subsidiaries or any representative thereof. No claim has ever been made by any authority in a jurisdiction where the Company or any its Subsidiaries does not file Tax Returns that the Company or any of its Subsidiaries is or may be subject to taxation by that jurisdiction.

(v) Neither the Company nor any of its Subsidiaries has liabilities for unpaid Taxes which have not been accrued or reserved on the Balance Sheet, whether asserted or unasserted, contingent or otherwise, and neither the Company nor any of its Subsidiaries has incurred any liability for Taxes since the Balance Sheet Date other than in the ordinary course of business.

(vi) The Company has made available to Parent or its legal counsel, copies of all Returns for the Company and its Subsidiaries filed for all periods since its inception.

(vii) There are (and immediately following the Effective Time there will be) no Liens on the assets of the Company or any of its Subsidiaries relating to or attributable to Taxes other than Liens for Taxes not yet due and payable. To the Knowledge of the Company and the Knowledge of the Principal Stockholders, there is no basis for the assertion of any claim relating or attributable to Taxes which, if adversely determined, would result in any Lien on the assets of the Company or any of its Subsidiaries.

(viii) Neither the Company nor any of its Subsidiaries has (A) ever been a member of an affiliated group (within the meaning of Code §1504(a)) filing a consolidated federal income Tax Return (other than a group the common parent of which was the Company), (B) ever been a party to any Tax sharing, indemnification or allocation agreement, (C) any liability for the Taxes of any person (other than the Company or any of its Subsidiaries), under Treasury Regulation § 1.1502-6 (or any similar provision of state, local or non-U.S. law, including any arrangement for group or consortium relief or similar arrangement), as a transferee or successor, by contract or agreement, or otherwise and (D) ever been a party to any joint venture, partnership or other arrangement that could be treated as a partnership for Tax purposes.

(ix) Neither the Company nor any of its Subsidiaries has been, at any time, a "United States Real Property Holding Corporation" within the meaning of Section 897(c)(2) of the Code.

(x) Neither the Company nor any of its Subsidiaries has constituted either a "distributing corporation" or a "controlled corporation" in a distribution of stock intended to qualify for tax-free treatment under Section 355 of the Code.

(xi) Neither the Company nor any of its Subsidiaries has engaged in a reportable transaction under Treasury Regulation Section 1.6011-4(b), including a transaction that is the same or substantially similar to one of the types of transactions that the Internal Revenue Service has determined to be a Tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction, as set forth in Treasury Regulation Section 1.6011-4(b)(2).

(xii) Neither the Company nor any of its Subsidiaries will be required to include any income or gain or exclude any deduction or loss from taxable income as a result of (A) any change in method of accounting under Section 481(c) of the Code, (B) closing agreement under Section 7121 of the Code, (C) deferred intercompany gain or excess loss account under Treasury Regulations under Section 1502 of the Code (or in the case of each of (A), (B) and (C), under any similar provision of applicable law), (D) installment sale or open transaction disposition or (E) prepaid amount.

(xiii) Each of the Company and its Subsidiaries is and has at all times been resident for Tax purposes in its country of incorporation or formation and is not and has not at any time been treated as resident in any other country for any Tax purpose (including any arrangement for the avoidance of double taxation). Neither the Company nor any of its Subsidiaries is subject to Tax in any country other than its country of incorporation or formation by virtue of having a permanent establishment or other place of business or by virtue of having a source of income in that country. To the Knowledge of the Company and the Knowledge of the Principal Stockholders, neither the Company nor any of its Subsidiaries is liable for any

Tax as the agent of any other Person or business or constitutes a permanent establishment or other place of business of any other Person, business or enterprise for any Tax purpose.

(xiv) Each of the Company and its Subsidiaries is in full compliance with all terms and conditions of any Tax exemption, Tax holiday or other Tax reduction agreement or order of a territorial or non-U.S. government and the consummation of the transactions contemplated by this Agreement will not have any adverse effect on the continued validity and effectiveness of any such Tax exemption, Tax holiday or other Tax reduction agreement or order.

(c) Executive Compensation Tax. There is no contract, agreement, plan or arrangement to which the Company or any Subsidiary is a party, including the provisions of this Agreement, covering any Employee of the Company or any Subsidiary, which, individually or collectively, could give rise to the payment of any amount that would not be deductible pursuant to Sections 404 or 280G of the Code or as a result of the transactions contemplated hereby.

2.13 Restrictions on Business Activities. There is no agreement (non-competition or otherwise), commitment, judgment, injunction, order or decree to which the Company or any Subsidiary is a party or otherwise binding upon the Company or any Subsidiary which has or may reasonably be expected to have the effect of prohibiting or impairing any business practice of the Company or any Subsidiary, any acquisition of property (tangible or intangible) by the Company or any Subsidiary, the conduct of business by the Company or any Subsidiary, or its ability to engage in any line of business or to compete with any Person. Without limiting the generality of the foregoing, neither the Company nor any Subsidiary has entered into any Contract under which the Company or any Subsidiary is restricted from selling, licensing, manufacturing or otherwise distributing any of its technology or products or from providing services to customers or potential customers or any class of customers, in any geographic area, during any period of time, or in any segment of the market.

2.14 Title to Properties; Absence of Liens and Encumbrances; Condition of Equipment.

(a) Neither the Company nor any Subsidiary owns any real property, nor has the Company or any Subsidiary ever owned any real property.

(b) The Company has provided Parent counsel true, correct and complete copies of all leases, lease guaranties, subleases, agreements for the leasing, use or occupancy of, or otherwise granting a right in or relating to all real property currently leased, subleased or licensed by or from the Company or any Subsidiary or otherwise used or occupied by the Company or any Subsidiary for the operation of its business (the "**Leased Real Property**"), including all amendments, terminations and modifications thereof ("**Lease Agreements**"); and there are no other Lease Agreements for real property affecting the Leased Real Property or to which the Company or any Subsidiary is bound, other than those identified in **Section 2.14(b)** of the Disclosure Schedule. All such Lease Agreements are valid and effective in accordance with their respective terms, and there is not, under any of such leases, any existing default, no rentals are past due, or event of default (or event which with notice or lapse of time, or both, would constitute a default). Neither the Company nor any Subsidiary has received any notice of a default, alleged failure to perform, or any offset or counterclaim with respect to any such Lease Agreement, which has not been fully remedied and withdrawn. The Closing will not affect the enforceability against any person of any such Lease Agreement or the rights of the Company or the Surviving Corporation or any of its Subsidiaries to the continued use and possession of the Leased Real Property for the conduct of business as presently conducted. Assuming the physical condition of the Leased Real Property as of the date of this Agreement, the Company will not be required to incur material costs or expenses to restore the Leased Real Property upon surrender at the end of the term of the Lease Agreements for the Leased Real Property.

(c) The Company and each Subsidiary has good and valid title to, or, in the case of leased properties and assets, valid leasehold interests in, all of their respective tangible properties and assets, real, personal and mixed, used or held for use in and/or necessary for the conduct of the business of the Company and each Subsidiary as currently conducted, free and clear of any Liens, except (i) Liens for Taxes not yet due and payable, (ii) such imperfections of title and encumbrances, if any, which do not detract from the value or interfere with the present use of the property subject thereto or affected thereby, (iii) Permitted Liens and (iv) as reflected in the Balance Sheet. **Section 2.14(c)** of the Disclosure Schedule sets forth the tangible properties and assets, real, personal and mixed, used, held for use in and/or necessary for the conduct of the business of the Company and the Subsidiaries as currently conducted.

(d) **Section 2.14(d)** of the Disclosure Schedule lists all material items of equipment owned or leased by the Company and the Subsidiaries, which items of equipment are (i) adequate for the conduct of the business of the Company and the Subsidiaries as currently conducted and as currently contemplated to be conducted by the Company as of the Closing, and (ii) in good operating condition, regularly and properly maintained, subject to normal wear and tear.

2.15 Intellectual Property.

(a) Definitions. For all purposes of this Agreement, the following terms shall have the following respective meanings:

"**Company Intellectual Property**" shall mean any and all Intellectual Property Rights that are owned or purported to be owned by or exclusively licensed to the Company or any Subsidiary.

"**Intellectual Property Rights**" shall mean worldwide (i) patents, patent applications and inventors' certificates, (ii) copyrights, copyright registrations and applications for registration of copyright, "moral" rights and mask work rights, (iii) trade secrets and confidential information, (iv) trademarks, trade names and service marks, (v) divisions, continuations, renewals, reissuances and extensions of the foregoing (as applicable) and (vi) the right to enforce and recover remedies for any of the foregoing.

"**Products**" shall mean all products and technologies developed, owned, made, provided, distributed, imported, sold or licensed to a third party by or on behalf of the Company or any Subsidiary since their inception or which is under development and the Company or any Subsidiary intends to provide, distribute, import, sell or license to a third party, not including ShrinkWrap Code or Open Source Material.

"**Registered Intellectual Property**" shall mean applications, registrations and filings for Intellectual Property Rights that have been registered, filed, certified or otherwise perfected or recorded with or by any state, government or other public or quasi-public legal authority.

"**Shrink-Wrap Code**" means generally commercially available binary code (other than development tools and development environments) available for a cost of not more than $10,000 for a perpetual license for a single user or work station (or $25,000 in the aggregate for all users and work stations).

"**Source Code**" shall mean computer programming code that can be printed out or displayed in human readable form including related programmer comments and annotations.

"**Technology**" shall mean any or all of the following (i) works of authorship including computer programs, source code, and executable code, whether embodied in software, firmware or otherwise, architecture, documentation, designs, files, records, and data, (ii) inventions (whether or not

patentable), discoveries, improvements, and technology, (iii) proprietary and confidential information, trade secrets and know how, (iv) databases, data compilations and collections and technical data, (v) logos, trade names, trade dress, trademarks and service marks, (vi) domain names, web addresses and sites, (vii) tools, methods and processes, (viii) devices, prototypes and schematics and (ix) any and all instantiations of the foregoing in any form and embodied in any media.

(b) **Section 2.15(b)(1)** of the Disclosure Schedule lists (i) all Registered Intellectual Property owned by, or filed on behalf of or in the name of, the Company or any Subsidiary, (ii) any proceedings or actions that must be taken by the Company or any Subsidiary within 60 days of the Closing Date with respect to the Registered Intellectual Property included in (i), including the payment of any registration, maintenance and renewal fees or the filing of any documents, applications or certificates, and (iii) all domain names registered in the name of the Company or any Subsidiary and all unregistered trademarks, trade names or service marks used by the Company. **Section 2.15(b)(2)** of the Disclosure Schedule lists all Products by name and major version number. As of the Closing Date, each item of Company Registered Intellectual Property is valid and subsisting, and all necessary registration, maintenance and renewal fees in connection with such Company Registered Intellectual Property have been paid and all necessary documents and certificates in connection with such Company Registered Intellectual Property have been filed with the relevant patent, copyright, trademark or other authorities in the United States or foreign jurisdictions, as the case may be, for the purposes of maintaining such Company Registered Intellectual Property.

(c) All Company Intellectual Property will be fully transferable, alienable or licensable by Surviving Corporation and/or Parent without restriction and without payment of any kind to any third party.

(d) Each item of Company Intellectual Property is free and clear of any Liens other than Permitted Liens and those set forth on **Section 2.14(d)** of the Disclosure Schedule.

(e) Other than Intellectual Property Rights licensed to the Company under (i) licenses for public or open source technology listed in **Section 2.15(m)** of the Disclosure Schedule, (ii) licenses for Shrink-Wrap Code and (iii) the licenses set forth on **Section 2.15(e)** of the Disclosure Schedule, the Company Intellectual Property constitutes all of the Intellectual Property Rights used in, necessary to or that would otherwise be infringed by the conduct of the business of the Company and the Subsidiaries as currently conducted and as currently contemplated to be conducted by the Company as of the Closing, including the design, development, manufacture, use, import and sale of any Product. The Company possesses all Technology that is used in and necessary to the conduct of the business of the Company and the Subsidiaries as currently conducted and as currently contemplated to be conducted by the Company as of the Closing, including the design, development, manufacture, use, import and sale of any Product.

(f) Other than (i) non-disclosure agreements and (ii) non-exclusive licenses of the Products to end-users, distributors and resellers (in each case, pursuant to written agreements that have been entered into in the ordinary course of business that do not materially differ in substance from the Company's standard form(s) including attachments and which is or are included in **Section 2.15(f)(i)** of the Disclosure Schedule (the "**Standard Form Agreements**")), **Section 2.15(f)(ii)** of the Disclosure Schedule lists all contracts, licenses and agreements to which the Company or any Subsidiary is a party and under which the Company or any Subsidiary has granted or provided any Technology or Intellectual Property Rights to third parties. There are no Contracts, licenses or agreements under which the Company or any Subsidiary is obligated to indemnify any third party for infringement or misappropriation of any Intellectual Property Rights other than those covered by (i) and (ii) of this **Section 2.15(f)**.

(g) As of the date hereof, the operation of the business of the Company and the Subsidiaries as currently conducted and as currently contemplated to be conducted by the Company as of

the Closing and the Subsidiaries, including the design, development, use, import, branding, advertising, promotion, marketing, manufacture and sale of any Product does not infringe or misappropriate, and will not infringe or misappropriate when such business is conducted by Parent and/or Surviving Corporation following the Closing, any Intellectual Property Rights of any Person, violate any right of any Person (including any right to privacy or publicity), or constitute unfair competition or trade practices under the laws of any jurisdiction in which the Company conducts business as of the Closing Date. Other than as set forth in **Section 2.15(g)** of the Disclosure Schedule, neither the Company nor any Subsidiary has received written notice from any Person claiming that such operation or any act, any Product, any Technology used by the Company or any Company Intellectual Property infringes or misappropriates any Intellectual Property Rights of any Person or constitutes unfair competition or trade practices under the laws of any jurisdiction (nor to the Knowledge of the Company and to the Knowledge of the Principal Stockholders is there any basis therefor).

(h) Neither this Agreement nor the transactions contemplated by this Agreement, including the assignment to Parent by operation of law or otherwise of any contracts or agreements to which the Company or any Subsidiary is a party, will result in: (i) Parent, any of its subsidiaries or the Surviving Corporation granting to any third party any right to or with respect to any Company Intellectual Property, (ii) Parent, any of its subsidiaries or the Surviving Corporation, being bound by, or subject to, any non-compete or other material restriction on the operation or scope of their respective businesses, or (iii) Parent, any of its subsidiaries or the Surviving Corporation being obligated to pay any royalties or other material amounts, or offer any discounts, to any third party in excess of those payable by, or required to be offered by, any of them, respectively, in the absence of this Agreement or the transactions contemplated hereby.

(i) To the Knowledge of the Company and to the Knowledge of the Principal Stockholders, as of the date hereof, no Person is infringing or misappropriating any Company Intellectual Property.

(j) The Company and each Subsidiary has taken reasonable steps to protect the Company's rights in confidential information and trade secrets of the Company and the Subsidiaries or provided by any other Person to the Company under an obligation to maintain the confidentiality thereof. Without limiting the foregoing, (i) the Company and its Subsidiaries have, and reasonably enforce, a policy requiring each current and former employee to execute proprietary information, confidentiality and assignment agreements substantially in the Company's standard form for employees (a copy of which is attached as **Schedule 2.15(j)(i)** hereto (the "**Employee Proprietary Information Agreement**")), (ii) the Company and its Subsidiaries have, and reasonably enforce, a policy requiring each current and former consultant or contractor to execute a consulting agreement containing proprietary information, confidentiality and assignment provisions substantially in the Company's standard form for consultants or contractors (a copy of which is attached as **Schedule 2.15(j)(ii)** hereto (the "**Consultant Proprietary Information Agreement**")) and, (iii) except as set forth on **Schedule 2.15(j)(iii)** of the Disclosure Schedule, all current and former employees, consultants and contractors of the Company and each Subsidiary have executed the applicable form of agreement described above. **Schedule 2.15(j)(iii)** of the Disclosure Schedule lists all current and former employees, consultants and contractors of the Company and each Subsidiary who have not executed the applicable form of agreement described above. No current or former employee, consultant or contractor of the Company or any Subsidiary who has claimed any prior invention, original work of authorship, development, improvement or trade secret pursuant to the applicable form of agreement described above or otherwise is participating, or has ever participated, in the development of any Technology or Intellectual Property Rights for the Company.

(k) No Company Intellectual Property or Product is subject to any proceeding or outstanding decree, order, judgment, settlement agreement, forbearance to sue, consent, stipulation or similar obligation that restricts in any manner the use, transfer or licensing thereof by the Company and the

Subsidiaries or may affect the validity, use or enforceability of such Company Intellectual Property or Product.

(l) No government funding, facilities or resources of a university, college, other educational institution or research center or funding from third parties was used in the development of any Technology or Intellectual Property Rights for the Company.

(m) **Section 2.15(m)** of the Disclosure Schedule lists all software or other material that is distributed as "free software", "open source software" or under a similar licensing or distribution model (including but not limited to the GNU General Public License (GPL), GNU Lesser General Public License (LGPL), Mozilla Public License (MPL), BSD licenses, the Artistic License, the Netscape Public License, the Sun Community Source License (SCSL), the Sun Industry Standards License (SISL) and the Apache License) (collectively, "**Open Source Materials**") used by the Company or any Subsidiary in any way, and describes the manner in which such Open Source Materials were used (such description shall include, without limitation, whether (and, if so, how) the Open Source Materials were modified and/or distributed by the Company or any Subsidiary). Neither the Company nor any Subsidiary has used Open Source Materials in any manner that (i) requires the disclosure or distribution in source code form of any Product, (ii) requires the licensing of any Product for the purpose of making derivative works, (iii) imposes any restriction on the consideration to be charged for the distribution of any Product, (iv) creates, or purports to create, obligations for the Company or any Subsidiary with respect to Intellectual Property Rights owned by or purported to be owned by the Company or any Subsidiary, or grant, or purport to grant, to any third party, any rights or immunities under Intellectual Property Rights owned by or purported to be owned by the Company or any Subsidiary or (v) imposes any other material limitation, restriction, or condition on the right of the Company or any Subsidiary to use or distribute any Product. With respect to any Open Source Materials that are or have been used by the Company or any Subsidiary in any way, the Company and each such Subsidiary has been and is in compliance with all applicable licenses with respect thereto.

(n) Neither the Company nor any Subsidiary nor any other Person acting on any of their behalf has disclosed, delivered or licensed to any third party that is or was not a consultant or contractor of the Company, agreed to disclose, deliver or license to any third party that is or was not a consultant or contractor of the Company, or permitted the disclosure or delivery to any escrow agent or other third party that is or was not a consultant or contractor of the Company of, any Source Code, in each case, which consultant or contractor has executed a Consultant Proprietary Information Agreement.

(o) All Products and Technology used by the Company (and all parts thereof) are free of any disabling codes or instructions and any "back door," "time bomb," "Trojan horse," "worm," "drop dead device," "virus" or other software routines or hardware components that are intended to permit unauthorized access or the unauthorized disablement or erasure of such Product or Technology or data or other software of users.

(p) Except as set forth in **Section 2.15(p)** of the Disclosure Schedule, neither the Company nor any Subsidiary has collected any personally identifiable information from any third parties. The Company and the Subsidiaries have complied with all applicable laws and its internal privacy policies relating to (i) the privacy of users of their products and services and all Internet websites owned, maintained or operated by the Company and the Subsidiaries and (ii) the collection, storage and transfer of any personally identifiable information collected by the Company and the Subsidiaries or by third parties having authorized access to the records of the Company and the Subsidiaries. The execution, delivery and performance of this Agreement complies with all applicable laws relating to privacy and with the Company's and the Subsidiaries' privacy policies. Copies of all current and prior privacy policies of the Company and the Subsidiaries, including the privacy policies included in the Company's and the Subsidiaries' Internet websites, are attached to **Section 2.15(p)** of the Disclosure Schedule. Each such

privacy policy and all materials distributed or marketed by the Company and the Subsidiaries have at all times made all disclosures to users or customers as required by applicable laws, and none of such disclosures made or contained in any such privacy policy or in any such materials have been inaccurate, misleading or deceptive or in violation of any applicable laws.

(q) With respect to all personal and user information described in **Section 2.15(p)**, the Company and the Subsidiaries have at all times taken reasonable steps (including, without limitation, implementing and monitoring compliance with adequate measures with respect to technical and physical security) to protect the information against loss and against unauthorized access, use, modification, disclosure or other misuse. To the Knowledge of the Company and the Knowledge of the Principal Stockholders, there has been no unauthorized access to or other misuse of that information.

(r) **Section 2.15(r)** of the Disclosure Schedule sets forth Company's current list of known open bugs maintained by its development and quality control groups with respect to the Products.

2.16 Agreements, Contracts and Commitments.

(a) **Section 2.16(a)** of the Disclosure Schedule (specifying the appropriate paragraph), sets forth a complete and accurate list of all Contracts to which the Company or any Subsidiary is otherwise bound, as follows (each such Contract required to be disclosed in **Section 2.16(a)** of the Disclosure Schedule, a "**Material Contract**" and collectively, the "**Material Contracts**"):

(i) any employment, contractor or consulting agreement, contract or commitment currently in effect with an employee or individual consultant, contractor, or salesperson, any agreement, contract or commitment currently in effect to grant any severance or termination pay (in cash or otherwise) to any employee, or any contractor, consulting or sales agreement, contract, or commitment with a firm or other organization, other than (A) offer letters in the Company's standard form that do not contain severance, change in control or similar payments, (B) agreements in the Company's standard form relating to acquisition of equity securities of the Company that do not involve any ongoing obligations of the Company thereunder and (C) settlement and release agreements entered into with employees of the Company in connection with their termination of employment with the Company that do not involve any ongoing obligations of the Company thereunder.

(ii) any agreement or plan, including any stock option plan, stock appreciation rights plan or stock purchase plan, any of the benefits of which will be increased, or the vesting of benefits of which will be accelerated, by the occurrence of any of the transactions contemplated by this Agreement or the value of any of the benefits of which will be calculated on the basis of any of the transactions contemplated by this Agreement;

(iii) any fidelity or surety bond or completion bond;

(iv) any lease of personal property currently in effect;

(v) any agreement of indemnification or guaranty other than pursuant to end-user license agreements that do not materially differ in substance from the Standard Form Agreements;

(vi) any agreement, contract or commitment relating to capital expenditures involving future payments in excess of $10,000 individually or $25,000 in the aggregate;

(vii) any agreement, contract or commitment relating to the disposition or acquisition of assets or any interest in any business enterprise outside the ordinary course of the Company's business;

(viii) any mortgages, indentures, guarantees, loans or credit agreements, security agreements or other agreements or instruments relating to the borrowing of money or extension of credit;

(ix) any pending purchase order or contract for the purchase of materials involving in excess of $10,000 individually or $25,000 in the aggregate;

(x) any dealer, distribution, joint marketing, strategic alliance, affiliate or development agreement;

(xi) other than Material Contracts listed in **Section 2.16(a)(x)** of the Disclosure Schedule, any sales representative, original equipment manufacturer, manufacturing, value added, remarketer, reseller, or independent software vendor, or other agreement for use or distribution of the products, technology or services of the Company or any Subsidiary; or

(xii) any other agreement, contract or commitment that involves in excess of $50,000 in the current or any future fiscal year and is not cancelable without penalty within 30 days.

(b) Each Material Contract to which the Company or any Subsidiary is a party or any of its properties or assets (whether tangible or intangible) is subject is a valid and binding agreement of the Company (or such Subsidiary, as applicable) enforceable against each of the parties thereto in accordance with its terms, and is in full force and effect with respect to the Company (or such Subsidiary, as applicable) and, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, any other party thereto. The Company (or such Subsidiary, as applicable) is in material compliance with and has not breached, violated or defaulted under, or received notice that it has breached, violated or defaulted under, any of the terms or conditions of any such Material Contract, nor to the Knowledge of the Company and the Knowledge of the Principal Stockholders, is any party obligated to the Company (or such Subsidiary, as applicable) pursuant to any such Material Contract subject to any breach, violation or default thereunder, nor to the Knowledge of the Company and the Knowledge of the Principal Stockholders is there any event that with the lapse of time, giving of notice or both would constitute such a breach, violation or default by the Company (or such Subsidiary, as applicable) or any such other party. True and complete copies of each Material Contract disclosed in the Disclosure Schedule or required to be disclosed pursuant to **Section 2.16** have been delivered to Parent.

(c) The Company (and each Subsidiary, as applicable) has fulfilled all material obligations required to have been performed by the Company (or the Subsidiary, as applicable) prior to the date hereof pursuant to each Material Contract to which the Company (or the Subsidiary, as applicable) is a party or any of its respective properties or assets (whether tangible or intangible) is bound.

(d) All outstanding indebtedness of the Company may be prepaid without penalty.

2.17 Interested Party Transactions.

(a) Except for transactions involving salaries, bonuses and other compensation under employment contracts or employee benefit plans, transactions involving the acquisition of equity securities from the Company, transactions involving reimbursement of expenses and other transactions entered into in the ordinary course of business and related to such person's capacity as an officer, director or employee of the Company, no officer, director, Principal Stockholder or, to the Knowledge of the Company and the

Knowledge of the Principal Stockholders, any other stockholder of the Company or any Subsidiary (nor any ancestor, sibling, descendant or spouse of any of such Persons, or any trust, partnership or corporation in which any of such Persons has an interest), has or has had, directly or indirectly, (i) any interest in any entity which furnished or sold, or furnishes or sells, services, products, technology or Intellectual Property that the Company or any Subsidiary furnishes or sells, (ii) any interest in any entity that purchases from or sells or furnishes to the Company or any Subsidiary, any goods or services, or (iii) any interest in, or is a party to, any Contract to which the Company or any Subsidiary is a party; *provided, however,* that ownership of no more than one percent (1%) of the outstanding voting stock of a publicly traded corporation or mutual fund and holdings of an investment fund in which a director is a partner or member shall not be deemed to be an "interest in any entity" for purposes of this **Section 2.17**.

(b) All transactions pursuant to which any Interested Party has purchased any services, products, or technology from, or sold or furnished any services, products or technology to, the Company or any Subsidiary that were entered into on or after the inception of the Company have been on an arms-length basis on terms no less favorable to the Company than would be available from an unaffiliated party.

2.18 Company Authorizations. Each consent, license, permit, grant or other authorization (i) pursuant to which the Company or any Subsidiary currently operates or holds any interest in any of its properties, or (ii) that is required for the operation of the Company's or any Subsidiary's business as currently conducted and as currently contemplated to be conducted by the Company as of the Closing or the holding of any such interest (collectively, "**Company Authorizations**") has been issued or granted to the Company (or such Subsidiary, as applicable). The Company Authorizations are in full force and effect and constitute all Company Authorizations required to permit the Company and each Subsidiary to operate or conduct its businesses or hold any interest in their respective properties or assets.

2.19 Litigation. There is no action, suit, claim or proceeding of any nature pending, or to the Knowledge of the Company and the Knowledge of the Principal Stockholders, threatened, against the Company, any Subsidiary, their properties (tangible or intangible) or any of their officers or directors, nor to the Knowledge of the Company and the Knowledge of the Principal Stockholders is there any reasonable basis therefor. There is no investigation or other proceeding pending or, to the Knowledge of the Company threatened, against the Company, any Subsidiary, any of their properties (tangible or intangible) or any of their officers or directors by or before any Governmental Entity, nor to the Knowledge of the Company, is there any reasonable basis therefor.

2.20 Minute Books. The minutes of the Company and the Subsidiaries delivered to counsel for Parent contain complete and accurate records of all actions taken, and materially complete and accurate summaries of all meetings held, by the stockholders and the Board and each Subsidiary (and any committees thereof) since the time of incorporation of the Company or such Subsidiary, as the case may be. At the Closing, the minute books of the Company and the Subsidiaries will be in the possession of the Company or its counsel.

2.21 Environmental Matters.

(a) Hazardous Material. Except as would not be reasonably expected to result in material liability to the Company or any Subsidiary, no amount of any substance that has been designated by any Governmental Entity or by applicable federal, state or local law to be radioactive, toxic, hazardous or otherwise a danger to health, reproduction or the environment, including PCBs, asbestos, petroleum, and urea-formaldehyde and all substances listed as hazardous substances pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or defined as a hazardous waste pursuant to the United States Resource Conservation and Recovery Act of 1976, as amended, and the regulations promulgated pursuant to said laws (a "**Hazardous Material**") are present in, on or under any

property, including the land and the improvements, ground water and surface water thereof, that the Company or any Subsidiary has at any time owned, operated, occupied or leased (excluding office and janitorial supplies properly and safely maintained).

(b) Hazardous Materials Activities. Neither the Company nor any Subsidiary has transported, stored, used, manufactured, disposed of, released or exposed their employees or others to Hazardous Materials in violation of any law or in a manner that would result in liability to the Company or any Subsidiary, nor has the Company or any Subsidiary disposed of, transported, sold, or manufactured any product containing a Hazardous Material (any or all of the foregoing being collectively referred to herein as "**Hazardous Materials Activities**") in violation of any rule, regulation, treaty or statute promulgated by any Governmental Entity to prohibit, regulate or control Hazardous Materials or any Hazardous Material Activity.

(c) Permits. Neither the Company nor any Subsidiary has, nor is required to have, any environmental approvals, permits, licenses, clearances or consents in connection with its business or facilities. Neither the Company nor any subsidiary has entered into any agreement that may require it to guarantee, reimburse, pledge, defend, hold harmless or indemnify any other party with respect to liabilities arising out of or relating to the Hazardous Materials Activities of the Company, any Subsidiary or any third party.

2.22 Brokers' and Finders' Fees; Third Party Expenses. Neither the Company nor any Subsidiary has incurred, nor will it incur, directly or indirectly, any liability for brokerage or finders' fees or agents' commissions, fees related to investment banking or similar advisory services or any similar charges in connection with this Agreement or any transaction contemplated hereby, nor will Parent or the Surviving Corporation incur, directly or indirectly, any such liability based on arrangements made by or on behalf of the Company or any Subsidiary.

2.23 Employees, Employee Benefit Plans and Compensation.

(a) Definitions. For all purposes of this Agreement, the following terms shall have the following respective meanings:

"**Company Employee Plan**" shall mean any plan, program, policy, practice, contract, agreement or other arrangement providing for compensation, severance, termination pay, deferred compensation, performance awards, stock or stock-related awards, welfare benefits, fringe benefits or other employee benefits or remuneration of any kind, whether written, unwritten or otherwise, funded or unfunded, including each "employee benefit plan," within the meaning of Section 3(3) of ERISA which is or has been maintained, contributed to, or required to be contributed to, by the Company or any ERISA Affiliate for the benefit of any Employee, or with respect to which the Company or any ERISA Affiliate has or may have any liability or obligation and any International Employee Plan.

"**COBRA**" shall mean the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

"**DOL**" shall mean the United States Department of Labor.

"**Employee**" shall mean any current or former employee, consultant, independent contractor or director of the Company or any ERISA Affiliate.

"**Employee Agreement**" shall mean each management, employment, severance, separation, consulting, contractor, relocation, repatriation, expatriation, loan, visa, work permit or other

agreement, or contract (including, any offer letter or any agreement providing for acceleration of Company Options) between the Company or any ERISA Affiliate and any Employee.

"**ERISA**" shall mean the Employee Retirement Income Security Act of 1974, as amended.

"**ERISA Affiliate**" shall mean any other current or former Person or entity under common control with the Company within the meaning of Section 414(b), (c), (m) or (o) of the Code, and the regulations issued thereunder.

"**FMLA**" shall mean the Family Medical Leave Act of 1993, as amended.

"**HIPAA**" shall mean the Health Insurance Portability and Accountability Act of 1996, as amended.

"**International Employee Plan**" shall mean each Company Employee Plan or Employee Agreement that has been adopted or maintained by the Company or any ERISA Affiliate, whether formally or informally, or with respect to which the Company or any ERISA Affiliate will or may have any liability, for the benefit of Employees who perform services outside the United States.

"**IRS**" shall mean the United States Internal Revenue Service.

"**PBGC**" shall mean the United States Pension Benefit Guaranty Corporation.

"**Pension Plan**" shall mean each Company Employee Plan that is an "employee pension benefit plan," within the meaning of Section 3(2) of ERISA.

"**WARN**" shall mean the Worker Adjustment and Retraining Notification Act.

(b) Schedule. **Section 2.23(b)(1)** of the Disclosure Schedule contains an accurate and complete list of each Company Employee Plan and each Employee Agreement. Neither the Company nor any ERISA Affiliate has made any plan or commitment to establish or enter into any new Company Employee Plan or Employee Agreement, to materially modify any Company Employee Plan or Employee Agreement (except to the extent required by law or to conform any such Company Employee Plan or Employee Agreement to the requirements of any applicable law, in each case as previously disclosed to Parent in writing, or as required by this Agreement or the terms of the applicable Company Employee Plan or Employee Agreement. **Section 2.23(b)(2)** of the Disclosure Schedule sets forth a table setting forth the name and annual base salary of each employee of the Company and each Subsidiary as of the date hereof. To the Knowledge of the Company and the Knowledge of the Principal Stockholders, no employee listed on **Section 2.23(b)(2)** of the Disclosure Schedule intends to terminate his or her employment for any reason, other than in accordance with the employment arrangements provided for in this Agreement. **Section 2.23(b)(3)** of the Disclosure Schedule contains an accurate and complete list of all Persons that have a consulting or advisory relationship with the Company and each Subsidiary.

(c) Documents. The Company has provided to Parent (i) correct and complete copies of all documents embodying each Company Employee Plan and each Employee Agreement including all amendments thereto and all related trust documents, (ii) the three most recent annual reports (Form Series 5500 and all schedules and financial statements attached thereto), if any, required under ERISA or the Code in connection with each Company Employee Plan, (iii) if the Company Employee Plan is funded, the most recent annual and periodic accounting of Company Employee Plan assets to the extent such reports have been prepared, (iv) the most recent summary plan description together with the summary(ies) of

material modifications thereto, if any, required under ERISA with respect to each Company Employee Plan, (v) all material written agreements and contracts relating to each Company Employee Plan, including administrative service agreements and group insurance contracts, (vi) all communications material to any Employee or Employees relating to any Company Employee Plan and any proposed Company Employee Plan, in each case, relating to any amendments, terminations, establishments, increases or decreases in benefits, acceleration of payments or vesting schedules or other events which would result in any liability to the Company or any ERISA Affiliate, (vii) all correspondence to or from any governmental agency relating to any Company Employee Plan other than routine correspondence in the normal course of operations of the Company Employee Plan, (viii) all model COBRA forms and related notices, (ix) all policies pertaining to fiduciary liability insurance covering the fiduciaries for each Company Employee Plan, (x) all discrimination tests for each Company Employee Plan for the three most recent plan years, if applicable, (xi) all registration statements, annual reports (Form 11-K and all attachments thereto) and prospectuses prepared in connection with each Company Employee Plan, (xii) the form of all HIPAA Privacy Notices and all Business Associate Agreements disseminated by the Company and to the extent required under HIPAA and (xiii) the most recent IRS determination or opinion letter issued with respect to each Company Employee Plan.

(d) Employee Plan Compliance. The Company and each Subsidiary has performed all material obligations required to be performed by it under, is not in default or violation of, and to the Knowledge of the Company and the Knowledge of the Principal Stockholders there is no default or violation by any other party to, any Company Employee Plan, and each Company Employee Plan has been established and maintained in accordance with its terms and in material compliance with all applicable laws, statutes, orders, rules and regulations, including ERISA or the Code. Any Company Employee Plan intended to be qualified under Section 401(a) of the Code has obtained a favorable determination letter (or opinion letter, if applicable) as to its qualified status under the Code. No "prohibited transaction," within the meaning of Section 4975 of the Code or Sections 406 and 407 of ERISA, and not otherwise exempt under Section 408 of ERISA, has occurred with respect to any Company Employee Plan. There are no actions, suits or claims pending or, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, threatened or reasonably anticipated (other than routine claims for benefits) against any Company Employee Plan or against the assets of any Company Employee Plan. Each Company Employee Plan can be amended, terminated or otherwise discontinued after the Effective Time in accordance with its terms, without material liability to Parent, the Company or any ERISA Affiliate (other than ordinary administration expenses). There are no audits, inquiries or proceedings pending or to the Knowledge of the Company and any ERISA Affiliates and the knowledge of the Principal Stockholders, threatened by the IRS, DOL, or any other Governmental Entity with respect to any Company Employee Plan. Neither the Company nor any ERISA Affiliate is subject to any penalty or Tax with respect to any Company Employee Plan under Section 502(i) of ERISA or Sections 4975 through 4980 of the Code. The Company has timely made all contributions and other payments required by and due under the terms of each Company Employee Plan. The Company has made a reasonable effort to operate each "nonqualified deferred compensation plan" (as defined in Section 409A(d)(1) of the Code) since January 1, 2005 in good faith compliance with Section 409A of the Code and IRS Notice 2005-1. No nonqualified deferred compensation plan has been "materially modified" (within the meaning of IRS Notice 2005-1) at any time after October 3, 2004 based on a reasonable interpretation of the term "materially modified" or, if materially modified, such plans Amended and Restated compliant with Section 409A of the Code.

(e) No Pension Plan. Neither the Company nor any ERISA Affiliate has ever maintained, established, sponsored, participated in, or contributed to, any Pension Plan subject to Part 3 of Subtitle B of Title I of ERISA, Title IV of ERISA or Section 412 of the Code.

(f) No Self-Insured Plan. Neither the Company nor any ERISA Affiliate has ever maintained, established, sponsored, participated in or contributed to any self-insured plan that provides

medical benefits to employees (including any such plan pursuant to which a stop-loss policy or contract applies).

(g) Collectively Bargained, Multiemployer and Multiple-Employer Plan. At no time has the Company or any ERISA Affiliate contributed to or been obligated to contribute to any multiemployer plan (as defined in Section 3(37) of ERISA). Neither the Company nor any ERISA Affiliate has at any time ever maintained, established, sponsored, participated in or contributed to any multiple employer plan or to any plan described in Section 413 of the Code.

(h) No Post-Employment Obligations. No Company Employee Plan or Employee Agreement provides, or reflects or represents any liability to provide, post-termination or retiree life insurance, health or other employee welfare benefits to any Person for any reason, except as may be required by COBRA or other applicable statute and except for continuation of coverage through the month of termination, and neither the Company nor any Subsidiary has ever represented, promised or contracted (whether in oral or written form) to any Employee (either individually or to Employees as a group) or any other Person that such Employee(s) or other Person would be provided with life insurance, health or other employee welfare benefits post-termination, except to the extent required by statute.

(i) COBRA; FMLA; HIPAA. The Company and each ERISA Affiliate has, prior to the Effective Time, complied with COBRA, FMLA, HIPAA, the Women's Health and Cancer Rights Act of 1998, the Newborns' and Mothers' Health Protection Act of 1996, and any similar provisions of state law applicable to its Employees. The Company has no material unsatisfied obligations to any Employees or qualified beneficiaries pursuant to COBRA, HIPAA or any state law governing health care coverage or extension.

(j) Effect of Transaction. Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby or any termination of employment or service in connection therewith will (i) result in any payment (including severance, golden parachute, bonus or otherwise), becoming due to any Employee, (ii) result in any forgiveness of indebtedness, (iii) materially increase any benefits otherwise payable by the Company or any Subsidiary or (iv) result in the acceleration of the time of payment or vesting of any such benefits except as required under Section 411(d)(3) of the Code.

(k) Parachute Payments. There is no agreement, plan, arrangement or other contract by which the Company is bound covering any Employee that, considered individually or considered collectively with any other such agreements, plans, arrangements or other contracts, will, or could reasonably be expected to, give rise directly or indirectly to the payment of any amount that would be characterized as a "parachute payment" within the meaning of Section 280G(b)(2) of the Code. There is no agreement, plan, arrangement or other contract by which the Company is bound to compensate any Employee for excise taxes paid pursuant to Section 4999 of the Code. **Section 2.23(k)** of the Disclosure Schedule lists all persons whom the Company reasonably believes are "disqualified individuals" (within the meaning of Section 280G of the Code and the regulations promulgated thereunder) as determined as of the date hereof.

(l) Employment Matters. The Company and each Subsidiary is in compliance with all applicable foreign, federal, state and local laws, rules and regulations respecting employment, employment practices, terms and conditions of employment, employee safety and health and wages and hours, and in each case, with respect to Employees: (i) has withheld and reported all amounts required by law or by agreement to be withheld and reported with respect to wages, salaries and other payments to Employees, (ii) is not liable for any arrears of wages, severance pay or any Taxes or any penalty for failure to comply with any of the foregoing, and (iii) is not liable for any payment to any trust or other fund governed by or

maintained by or on behalf of any governmental authority, with respect to unemployment compensation benefits, social security or other benefits or obligations for Employees (other than routine payments to be made in the normal course of business and consistent with past practice). There are no actions, suits, claims or administrative matters pending, threatened or reasonably anticipated against the Company, any Subsidiary or any of their Employees relating to any Employee, Employee Agreement or Company Employee Plan (other than matters related to state workers compensation, unemployment compensation laws or routine claims for benefits). There are no pending or threatened or reasonably anticipated claims or actions against Company, any Subsidiary or any Company or Subsidiary trustee under any worker's compensation policy or long-term disability policy. The services provided by each of the Company's and their ERISA Affiliates' Employees is terminable at the will of the Company and its ERISA Affiliates and any such termination would result in no liability to the Company or any ERISA Affiliate other than claims for severance pay and benefits as set forth below. **Section 2.23(l)** of the Disclosure Schedule lists all liabilities of the Company to any Employee that result from the termination by the Company or Parent of such Employee's employment or provision of services, a change of control of the Company, or a combination thereof. To the Knowledge of the Company and the Knowledge of the Principal Stockholders, neither the Company nor any ERISA Affiliate has direct or indirect liability with respect to any misclassification of any Person as an independent contractor rather than as an employee, or with respect to any employee leased from another employer.

(m) Labor. No work stoppage or labor strike against the Company or any Subsidiary is pending, or to the Knowledge of the Company and the Knowledge of the Principal Stockholders, threatened, or reasonably anticipated. To the knowledge of the Company and the Knowledge of the Principal Stockholders there are no activities or proceedings of any labor union to organize any Employees. There are no actions, suits, claims, labor disputes or grievances pending or threatened or, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, reasonably anticipated relating to any labor matters involving any Employee, including charges of unfair labor practices. Neither the Company nor any Subsidiary has engaged in any unfair labor practices within the meaning of the National Labor Relations Act. Neither the Company nor any Subsidiary presently, nor have they in the past been, a party to, or bound by, any collective bargaining agreement or union contract with respect to Employees and no collective bargaining agreement is being negotiated by the Company or any Subsidiary. Within the past year, the Company has not incurred any liability or obligation under WARN or any similar state or local law that remains unsatisfied, and no terminations prior to the Closing Date shall result in unsatisfied liability or obligation under WARN or any similar state or local law.

(n) No Interference or Conflict. To the Knowledge of the Company and the Knowledge of the Principal Stockholders, no stockholder, director, officer, Employee or consultant of the Company or any Subsidiary is obligated under any contract or agreement, subject to any judgment, decree, or order of any court or administrative agency that would interfere with such person's efforts to promote the interests of the Company or any Subsidiary or that would interfere with the Company's or any Subsidiary's business. Neither the execution nor delivery of this Agreement, nor the carrying on of the Company's or any Subsidiary's business as presently conducted or contemplated to be conducted by the Company as of the Closing nor any activity of such officers, directors, Employees or consultants in connection with the carrying on of the Company's or any Subsidiary's business or businesses as presently conducted or currently proposed to be conducted will, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, conflict with or result in a breach of the terms, conditions, or provisions of, or constitute a default under, any contract or agreement under which any of such officers, directors, Employees, or consultants is now bound.

(o) International Employee Plan. Neither the Company nor any ERISA Affiliate currently or has it ever had the obligation to maintain, establish, sponsor, participate in, be bound by or contribute to any International Employee Plan.

(p) Certain Employee Matters. The Company has previously provided to Parent a complete and accurate list of the Employees of the Company and its Subsidiaries as of the date hereof and shows with respect to each such Employee: (i) the Employee's name, position held, all remuneration payable and other benefits provided or which the Company is bound to provide (whether at present or in the future) to each such Employee, or any person connected with any such person, and includes, if any, particulars of all profit sharing, incentive and bonus arrangements to which the Company is a party, whether legally binding or not, (ii) the date of hire, (iii) vacation eligibility for the current calendar year, (iv) leave status (including type of leave, expected return date for non-disability related leaves and expiration dates for disability leaves), (v) visa status, (vi) the name of any union, collective bargaining agreement or other similar labor agreement covering such Employee, and (vii) any issues recorded, or otherwise Known to the Company or Known to the Principal Stockholders, relating to any performance (including any matters recorded in any performance reviews and including any violations of ethical rules or codes of conduct), incidents of violence or drug abuse, or criminal record of such Employee.

2.24 Insurance. **Section 2.24** of the Disclosure Schedule contains a complete and accurate list of all insurance policies and fidelity bonds covering the assets, business, equipment, properties, operations, employees, officers and directors of the Company and each Subsidiary. There is no claim by the Company or any Subsidiary pending under any of such policies or bonds as to which coverage has been questioned, denied or disputed by the underwriters of such policies or bonds. All premiums due and payable under all such policies and bonds have been paid, and the Company, the Subsidiaries and their affiliates are otherwise in material compliance with the terms of such policies and bonds (or other policies and bonds providing substantially similar insurance coverage). As of the date hereof, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, there is no threatened termination of, or premium increase with respect to, any of such policies.

2.25 Compliance with Laws. The Company and each Subsidiary has complied with, is not in violation of, and has not received any notices of violation with respect to, any foreign, federal, state or local statute, law or regulation; *provided, however,* that the foregoing shall not be deemed to cover any notices or violations of laws that are explicitly covered in another representation or warranty of the Company in this **Article II**.

2.26 Export Control Laws. The Company and each Subsidiary has at all times conducted its export transactions in accordance with (i) all applicable U.S. export and reexport controls, including the United States Export Administration Act and Regulations and Foreign Assets Control Regulations and (ii) all other applicable import/export controls in other countries in which the Company conducts business. Without limiting the foregoing:

(a) The Company and each Subsidiary has obtained all export licenses, license exceptions and other consents, notices, waivers, approvals, orders, authorizations, registrations, declarations and filings with any Governmental Entity required for (i) the export and reexport of products, services, software and technologies to other countries into which the Company conducts such export or reexport business and (ii) releases of technologies and software to foreign nationals to whom the Company has released the Company's Technology located in the United States and abroad ("**Export Approvals**");

(b) The Company and each Subsidiary is in compliance with the terms of all applicable Export Approvals;

(c) There are no pending or, to the Knowledge of the Company and the Knowledge of the Principal Stockholders, threatened claims against the Company or any Subsidiary with respect to such Export Approvals; and

(d) To the Knowledge of the Company and the Knowledge of the Principal Stockholders, and as of the date hereof, there are no actions, conditions or circumstances pertaining to the export transactions of the Company and its Subsidiaries that are reasonably likely to give rise to any future claims; and

(e) Absent relevant extraordinary circumstances relating to Parent or the Surviving Corporation, no Export Approvals for the transfer of export licenses to Parent or the Surviving Corporation are required, or Parent or the Surviving Corporation should be able to obtain, such Export Approvals expeditiously without material cost.

2.27 Customers and Suppliers.

(a) **Section 2.27(a)** of the Company Disclosure Schedule lists the 15 largest customers of the Company and its Subsidiaries on the basis of revenues collected or accrued for the 12 month period ending on the Balance Sheet Date.

(b) **Section 2.27(b)** of the Company Disclosure Schedule lists the 15 largest suppliers of the Company and its Subsidiaries on the basis of cost of goods or services purchased for the 12 month period ending on the Balance Sheet Date.

(c) Except as disclosed in **Section 2.27(c)** of the Company Disclosure Schedule, none of the customers listed in **Section 2.27(a)** of the Company Disclosure Schedule or supplier listed in **Section 2.27(b)** of the Company Disclosure Schedule has (i) ceased or materially reduced its purchases from or sales or provision of services to the Company or any Subsidiary since the beginning of such 12 month period, (ii) to the Knowledge of the Company and the Knowledge of the Principal Stockholders, threatened to cease or materially reduce such purchases or sales or provision of services or (iii) to the Knowledge of the Company and the Knowledge of the Principal Stockholders, been threatened with bankruptcy or insolvency.

2.28 Complete Copies of Materials. The Company has delivered true and complete copies of each document (or summaries of same) that has been requested by Parent or its counsel, including all Contracts and other documents listed on the Disclosure Schedule.

2.29 Representations Complete. Without giving effect to any limitation as to "materiality" (including "Material Adverse Effect") set forth therein, none of the representations or warranties made by the Company or the Principal Stockholders (as modified by the Disclosure Schedule) in this Agreement contains any untrue statement of a material fact, or omits to state any material fact necessary in order to make the statements contained herein or therein, in the light of the circumstances under which made, not misleading.

2.30 Information Statement. The information furnished on or in any document mailed, delivered or otherwise furnished to Stockholders by the Company in connection with the solicitation of their consent to this Agreement and the Merger, did not contain, on the date such document was mailed, delivered or otherwise furnished to Stockholders, any untrue statement of a material fact and did not omit to state any material fact necessary in order to make the statements made therein, in light of the circumstances under which they were made not misleading.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF PARENT AND SUB

Each of Parent and Sub hereby represents and warrants to the Company and the Principal Stockholders that on the date hereof and as of the Closing Date as set forth below.

3.1 Organization. Parent is a corporation duly incorporated, validly existing and in good standing under the laws of the state of Delaware, and Sub is a corporation duly incorporated, validly existing and in good standing under the laws of the state of Delaware. Each of Parent and Sub has the corporate power to own its properties and to carry on its business as currently conducted. Sub was formed solely for the purpose of engaging in the transactions contemplated hereby, has engaged in no other business activities and has conducted its operations only as contemplated hereby.

3.2 Authority. Each of Parent and Sub has all requisite corporate power and authority to enter into this Agreement and any Related Agreements to which it is a party and to consummate the transactions contemplated hereby and thereby. The execution and delivery by each of Parent and Sub of this Agreement and any Related Agreements to which it is a party and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate action on the part of Parent and Sub. This Agreement and any Related Agreements to which Parent and Sub are parties have been duly executed and delivered by Parent and Sub and, assuming the due authorization, execution and delivery by the other parties hereto and thereto constitute the valid and binding obligations of Parent and Sub, enforceable against each of Parent and Sub in accordance with their terms, subject to (i) laws of general application relating to bankruptcy, insolvency, moratorium, the relief of debtors and enforcement of creditors' rights in general, and (ii) rules of law governing specific performance, injunctive relief, other equitable remedies and other general principles of equity.

3.3 Consents. No consent, waiver, approval, order or authorization of, or registration, declaration or filing with, any Governmental Entity, or any third party is required by or with respect to Parent or Sub in connection with the execution and delivery of this Agreement and any Related Agreements to which Parent or Sub is a party or the consummation of the transactions contemplated hereby and thereby, except for (a) such consents, waivers, approvals, orders, authorizations, registrations, declarations and filings as may be required under applicable securities laws, (b) such consents, waivers, approvals, orders, authorizations, registrations, declarations and filings which, if not obtained or made, would not have a Material Adverse Effect with respect to Parent and (c) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware.

3.4 Cash Resources. Parent has sufficient cash resources to pay the Merger Consideration and the Series A Consideration.

ARTICLE IV

RESERVED

ARTICLE V

ADDITIONAL AGREEMENTS

5.1 Company Stockholder Approval.

(a) To the extent required by Delaware Law, the Company has delivered to each Stockholder who did not execute a Written Consent a notice of the approval of the Merger and adoption of this Agreement by written consent of the Stockholders pursuant to the applicable provisions of Delaware Law, which notice shall have constituted the notice to Stockholders required by applicable law that dissenters' and/or appraisal rights may be available to Stockholders in accordance with Delaware Law.

(b) The Board shall not withdraw, alter, modify, change or revoke its unanimous approval of this Agreement, the Merger and the transactions contemplated hereby nor its unanimous recommendation to the Stockholders to vote in favor of this Agreement, the Merger and the transactions contemplated hereby, subject to applicable law.

5.2 Access to Information. No information or knowledge obtained in any investigation made in connection with this Agreement or otherwise shall affect or be deemed to modify any representation or warranty contained herein or the conditions to the obligations of the parties to consummate the Merger in accordance with the terms and provisions hereof.

5.3 Confidentiality. Each of the parties hereto hereby agrees that the information obtained in any investigation pursuant to **Section 5.2** hereof, or pursuant to the negotiation and execution of this Agreement or the effectuation of the transactions contemplated hereby, shall be governed by the terms of the Mutual Non-Disclosure Agreement effective as of October 14, 2005 (the "**Confidential Nondisclosure Agreement**"), between the Company and Parent. In this regard, the Company acknowledges that Parent's Class A Common Stock is publicly traded and that any information obtained during the course of its due diligence could be considered to be material non-public information within the meaning of federal and state securities laws.

5.4 Public Disclosure. Neither the Company, the Principal Stockholders nor any of their respective representatives shall issue any statement or communication to any third party (other than its agents that are bound by confidentiality restrictions) regarding the subject matter of this Agreement or the transactions contemplated hereby, including, if applicable, the termination of this Agreement and the reasons therefor, without the consent of Parent; *provided, however*, that (a) a Securityholder shall be permitted to communicate, without such consent, with its current and prospective investors after the Effective Date regarding the existence of the Merger, the return on a Securityholder's investment in the Company and other summary terms of the Merger, including the name of Parent, provided that (i) such Securityholder takes all reasonable precautions to have such current and prospective investors maintain the confidentiality of such information and (ii) the aggregate purchase price paid directly or indirectly by Parent for the Company is neither disclosed nor ascertainable from such communication, and (b) a Securityholder shall be permitted to communicate, without such consent, information regarding the subject matter of this Agreement to the extent that such information is or becomes generally known to the public without violation of this Agreement or any other agreement or obligation restricting the disclosure of such information. Notwithstanding any provision contained in the Confidential Nondisclosure Agreement to the contrary, neither Parent nor any of its representatives shall issue any statement or communication to any third party (other than its agents that are bound by confidentiality restrictions) regarding the subject matter of this Agreement or the transactions contemplated hereby, including, if applicable, the termination of this Agreement and the reasons therefor, without first consulting the Company, except that this restriction shall be subject to Parent's obligation to comply with applicable securities laws and the rules of The Nasdaq Stock Market.

5.5 Additional Documents and Further Assurances. Subject to the terms and conditions provided in this Agreement, each of the parties hereto shall use all reasonable efforts to take promptly, or cause to be taken promptly, all actions, and to do promptly, or cause to be done promptly, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated hereby.

5.6 New Employment Benefits. Continuing Employees shall be eligible to receive employee benefits consistent with Parent's applicable human resources policies. Parent will, or will cause the Surviving Corporation to, give Continuing Employees full credit under such policies for prior service at the Company for purposes of eligibility and determination of the level of benefits under Parent's benefit plans, programs or policies, provided that such credit does not result in duplication of benefits.

5.7 Expenses. Whether or not the Merger is consummated, all fees and expenses incurred in connection with the Merger including all legal, accounting, financial advisory, consulting and all other fees and expenses of third parties incurred by a party in connection with the negotiation and effectuation of the terms and conditions of this Agreement and the transactions contemplated hereby, including, but not limited to, any payments made or anticipated to be made by the Company as a brokerage or finders' fee, agents' commission or any similar charge ("**Third Party Expenses**"), shall be the obligation of the respective party incurring such fees and expenses; *provided, however,* that, if the Merger is consummated, Parent shall pay up to a maximum of $50,000 in reasonable and documented legal fees (which are included as Third Party Expenses) incurred by the Company in connection with the negotiation and effectuation of the terms and conditions of this Agreement and the transactions contemplated hereby. The Company has provided Parent with a statement of its estimated Third Party Expenses showing detail of both the paid and unpaid Third Party Expenses incurred by the Company as of the Closing Date in form reasonably satisfactory to Parent (the "**Statement of Expenses**"), and the Statement of Expenses has been certified as true and correct in form acceptable to Parent as of the Closing Date by the Company's Chief Financial Officer. The Statement of Expenses reflects all Third Party Expenses incurred and expected to be incurred by the Company as a result of the negotiation and effectuation of this Agreement and the transactions contemplated hereby (including any Third Party Expenses anticipated to be incurred after the Closing). Any Third Party Expenses incurred by the Company that are not reflected on the Statement of Expenses, and thus not part of the Third Party Expense Adjustment Amount ("**Excess Third Party Expenses**"), shall be paid out of the Escrow Amount and shall not be subject to the Basket.

5.8 Spreadsheet. The Company delivered to Parent and the Exchange Agent a spreadsheet (the "**Spreadsheet**") substantially in the form attached hereto as **Schedule 5.8**, which spreadsheet has been certified as complete and correct by the Chief Executive Officer and Chief Financial Officer of the Company as of the Closing and includes, among other things, as of the Closing, (a) all Stockholders of record and their respective addresses of record, the number of shares of Company Capital Stock held by such persons (including the respective certificate numbers), the date of acquisition of such shares, the Pro Rata Portion applicable to such Stockholder, the amount of cash to be deposited into the Escrow Fund on behalf of each Stockholder in respect of the Escrow Amount and such other information relevant thereto or which Parent or the Exchange Agent may reasonably request, (b) all holders of record of Company Warrants and their respective addresses of record, the number of shares of Company Capital Stock underlying each such Company Warrant, the Pro Rata Portion applicable to each such holder, the amount of cash to be deposited into the Escrow Fund on behalf of each such holder in respect of the Escrow Amount, the issuance dates of such Company Warrants, the per share and aggregate exercise prices of such Company Warrants and such other information relevant thereto or which Parent or the Exchange Agent may have reasonably requested.

5.9 Indemnification.

(a) Parent will, or will cause the Surviving Corporation to, fulfill and honor in all respects the obligations of the Company pursuant to (i) each indemnification agreement in effect between the Company and each person who is a director or officer of the Company or any of its Subsidiaries at the Effective Time and (ii) any indemnification provision under the certificate of incorporation or bylaws or equivalent organizational documents of the Company or any of its Subsidiaries as in effect on the date of this Agreement.

(b) For a period of six years after the Effective Time, Parent will refrain and will cause the Surviving Corporation to refrain from terminating the effectiveness of any policies of directors' and officers' and fiduciary liability insurance for the benefit of officers and directors of the Company and its Subsidiaries prior to the Effective Time obtained and fully paid for by the Company prior to the Effective Time (provided that the Surviving Corporation may substitute therefor policies of at least the same coverage and amounts containing terms and conditions that are not materially less advantageous to former officers and directors of Company), but only with respect to claims arising from facts or events which occurred at or before the Effective Time, provided that such policies remain available to the Surviving Corporation during such period, and provided further than nothing in this paragraph shall be interpreted to require the Parent or Surviving Corporation to pay any amounts for such insurance.

ARTICLE VI

CONDITIONS TO THE MERGER

6.1 Conditions to Obligations of Each Party to Effect the Merger. The respective obligations of the Company, Parent and Sub to effect the Merger shall be subject to the satisfaction or waiver, at or prior to the Effective Time, of the following conditions:

(a) No Order. No Governmental Entity shall have enacted, issued, promulgated, enforced or entered any statute, rule, regulation, executive order, decree, injunction, order or other legal restraint (whether temporary, preliminary or permanent) which is in effect and which has the effect of making the Merger illegal or otherwise prohibiting or preventing consummation of the Merger.

(b) No Injunctions; Restraints; Illegality. No temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal restraint or prohibition preventing the consummation of the Merger shall be in effect, nor shall any proceeding brought by a Governmental Entity seeking any of the foregoing be threatened or pending.

6.2 Conditions to Obligations of Parent and Sub. The obligations of Parent and Sub to effect the Merger shall be subject to the satisfaction at or prior to the Effective Time of each of the following conditions, any of which may be waived, in writing, exclusively by Parent and Sub:

(a) Representations, Warranties and Covenants. (i) The representations and warranties of the Company and the Principal Stockholders in this Agreement (other than the representations and warranties of the Company and the Principal Stockholders as of a specified date, which shall have been true and correct as of such date) shall be true and correct on and as of the Closing Date, and (ii) the Company and the Principal Stockholders shall have performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed and complied with by such parties as of the Closing.

(b) No Material Adverse Effect. There shall not have occurred any event or condition of any character that has had or is reasonably likely to have, either individually or in the aggregate with all such other events or conditions, a Material Adverse Effect with respect to the Company since the Balance Sheet Date.

(c) Stockholder Approval. Stockholders constituting the Closing Stockholder Consent shall have approved this Agreement, the Certificate of Merger, the Merger, and the transactions contemplated hereby and thereby.

(d) Unanimous Board Approval. This Agreement, the Merger and the transactions contemplated hereby shall have been unanimously approved by the Board, which unanimous approval shall not have been altered, modified, changed or revoked.

(e) Litigation. There shall be no action, suit, claim, order, injunction or proceeding of any nature pending, or overtly threatened, against Parent or the Company, their respective properties or any of their respective officers, directors or subsidiaries arising out of, or in any way connected with, the Merger or the other transactions contemplated by the terms of this Agreement or otherwise seeking any of the results set forth in **Section 6.1(a)** hereof.

(f) Warrantholder Agreements. Each holder of Company Warrants shall have executed and delivered the Warrantholder Agreements in substantially the form attached hereto as **Exhibit E** (the "**Warrantholder Agreements**").

(g) Exercise or Termination of Company Options. Prior to the Closing, all Company Options shall have been either (i) exercised by the holder(s) of such Company Options in full or (ii) to the extent not exercised in full, terminated and canceled as of immediately prior to the Effective Time either pursuant to their own terms or pursuant to an agreement with the holder(s) thereof, and the Company shall have delivered to Parent written evidence of such exercise, termination or cancellation.

(h) Termination of Agreements. The Company shall have terminated the Investors' Rights Agreement and the Voting and Right of First Refusal and Co-Sale Agreement, each dated July 16, 2004, and each such agreement shall be of no further force or effect.

(i) New Employment Arrangements. Each of the individuals listed on **Schedule 6.2(i)** hereto (i) shall have entered into "at-will" employment arrangements with Parent and/or the Surviving Corporation pursuant to their execution of an offer letter in Parent's standard form, which shall be in full force and effect, (ii) shall have agreed to be employees of Parent or the Surviving Corporation after the Closing, (iii) shall be employees of the Company immediately prior to the Effective Time and (iv) shall not have notified (whether formally or informally) Parent or the Company or any Subsidiary of such employee's intention of leaving the employ of Parent or the Company or any Subsidiary following the Effective Time.

(j) Non-Competition Agreements. Each of the individuals listed on **Schedule 6.2(j)** shall have executed and delivered to Parent a Non-Competition Agreement, in substantially the form attached hereto as **Exhibit F** (the "**Non-Competition Agreement**"), and shall not have taken any action which would be prohibited thereby were such agreement in effect at the time of such action and such Non-Competition Agreement shall be in effect immediately prior to the Effective Time.

(k) Terminating Employee Releases. Parent shall have received from each employee of the Company or any Subsidiary whose employment is terminated prior to the Closing, a valid release and waiver, substantially in the form attached hereto as **Exhibit G** (a "**Terminating Employee Release**").

(l) Resignation of Officers and Directors. Parent shall have received a duly executed Director and Officer Resignation Letter, substantially in the form attached hereto as **Exhibit H** (the "**Director and Officer Resignation Letter**"), from each of the officers and directors of the Company and its Subsidiaries effective as of the Effective Time.

(m) Termination of 401(k) Plans. Unless Parent has explicitly instructed otherwise, Parent shall have received from the Company evidence reasonably satisfactory to Parent that all 401(k) Plans have been terminated pursuant to resolution of the Board or the ERISA Affiliate, as the case may be, (the form

and substance of which shall have been subject to review and approval of Parent), effective as of no later than the day immediately preceding the Closing Date.

(n) Statement of Expenses. Parent shall have received from the Company the Statement of Expenses pursuant to **Section 5.7** hereof three Business Days prior to the Closing Date, and such Statement of Expenses shall be certified as true and correct in form acceptable to Parent as of the Closing Date by the Company's Chief Financial Officer.

(o) Spreadsheet. Parent and the Exchange Agent shall have received from the Company three Business Days prior to the Closing Date the Spreadsheet pursuant to **Section 5.8** hereof, which shall have been certified as of the Closing Date as complete and correct by the Chief Executive Officer and the Chief Financial Officer of the Company.

(p) Legal Opinion. Parent shall have received a legal opinion from legal counsel to the Company in the form attached hereto as **Exhibit I**.

(q) Certificate of the Company. Parent shall have received a certificate from the Company, validly executed by the Chief Executive Officer and Chief Financial Officer of the Company for and on the Company's behalf, to the effect that, as of the Closing:

(i) the representations and warranties of the Company in this Agreement (other than the representations and warranties of the Company as of a specified date, which were true and correct as of such date) are true and correct on and as of the Closing Date;

(ii) the Company has performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed and complied with by the Company as of the Closing; and

(iii) the conditions to the obligations of Parent and Sub set forth in this **Section 6.2** have been satisfied (unless otherwise waived in accordance with the terms hereof).

(r) Certificate of the Principal Stockholders. Parent shall have received certificates from each Principal Stockholder, validly executed by such Principal Stockholder, to the effect that, as of the Closing:

(i) the representations and warranties of such Principal Stockholder in this Agreement (other than the representations and warranties of such Principal Stockholder as of a specified date, which were true and correct as of such date) are true and correct on and as of the Closing Date;

(ii) such Principal Stockholder has performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed and complied with by such party as of the Closing; and

(iii) the conditions to the obligations of Parent and Sub set forth in this **Section 6.2** have been satisfied (unless otherwise waived in accordance with the terms hereof).

(s) Certificate of Secretary of Company. Parent shall have received a certificate, validly executed by the Secretary of the Company, certifying as to (i) the terms and effectiveness of the Charter Documents, (ii) the valid adoption of resolutions of the Board (whereby the Merger and the transactions contemplated hereunder were unanimously approved by the Board) and (iii) that the Stockholders

constituting the Closing Stockholder Consent have adopted and approved the Merger, this Agreement and the consummation of the transactions contemplated hereby.

(t) Certificate of Good Standing. Parent shall have received a long-form certificate of good standing from the Secretary of State of the State of Delaware which is dated within two Business Days prior to Closing with respect to the Company. Parent shall have received a Certificate of Status of Foreign Corporation of the Company issued by the Secretary of State of Colorado dated within ten Business Days prior to the Closing.

(u) FIRPTA Certificate. Parent shall have received a copy of the FIRPTA Compliance Certificate, validly executed by a duly authorized officer of the Company.

(v) TUPE. Parent shall have received from the Company evidence reasonably satisfactory to Parent that each Subsidiary subject to such regulations shall have complied with the consultation and other requirements set out in Regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 and §613a para. 5 German Civil Code (BGB), as applicable, and any other information as Parent may have requested in order to verify such compliance.

6.3 Conditions to Obligations of the Company and the Principal Stockholders. The obligations of the Company and each of the Principal Stockholders to effect the Merger shall be subject to the satisfaction at or prior to the Effective Time of each of the following conditions, any of which may be waived, in writing, exclusively by the Company:

(a) Representations, Warranties and Covenants. (i) The representations and warranties of Parent and Sub in this Agreement (other than the representations and warranties of Parent and Sub as of a specified date, which shall be true and correct as of such date) shall have been true and correct on and as of the Closing Date, and (ii) each of Parent and Sub shall have performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed and complied with by such parties as of the Closing Date.

(b) Certificate of Parent. Company shall have received a certificate executed on behalf of Parent by a Vice President for and on its behalf to the effect that, as of the Closing:

(i) all representations and warranties made by Parent and Sub in this Agreement (other than the representations and warranties of Parent and Sub as of a specified date, which were true and correct as of such date) are true and correct on and as of the Closing Date;

(ii) Parent and Sub have performed and complied in all material respects with all covenants and obligations under this Agreement required to be performed or complied with by such parties as of the Closing; and

(iii) the conditions to the obligations of the Company and the Principal Stockholders set forth in this **Section 6.3** have been satisfied (unless otherwise waived in accordance with the terms hereof).

ARTICLE VII

SURVIVAL OF REPRESENTATIONS AND WARRANTIES; ESCROW

7.1 Survival of Representations and Warranties. The representations and warranties of the Company and the Principal Stockholders contained in this Agreement or any certificate or other instrument delivered

pursuant to **Sections 6.2(n), 6.2(o), 6.2(q), 6.2(r), 6.2(s)** or **6.2(u)** of this Agreement (each, an "**Instrument**" and collectively, the "**Instruments**"), shall survive for a period of 18 months following the Closing Date (the date of expiration of such 18 month period, the "**Survival Date**"); *provided, however,* that in the event of any fraud or intentional misrepresentation on the part of the Company or the Principal Stockholders with respect to any representation or warranty contained in this Agreement or any Instrument, such representation or warranty shall survive indefinitely; *provided further, however,* that the representations and warranties of the Company and the Principal Stockholders contained in **Section 2.2** (Company Capital Structure), **Section 2.7** (Company Financial Statements) and **Section 2.12** (Tax Matters) hereof (collectively, the "**Surviving Representations**") shall survive until the expiration of the applicable statute of limitations. The representations and warranties of Parent and Sub contained in this Agreement or any Instrument shall terminate at the Closing.

7.2 Indemnification.

(a) By virtue of the Merger, each of the Securityholders (including the Principal Stockholders), in accordance with their respective Pro Rata Portion of the Merger Consideration and Series A Consideration, agrees to, severally and not jointly, indemnify and hold harmless Parent and its officers, directors, affiliates, employees, agents and representatives, including the Surviving Corporation (the "**Indemnified Parties**"), against all claims, losses, liabilities, damages, deficiencies, diminution in value, costs, interest, awards, judgments, penalties and expenses, including reasonable attorneys' and consultants' fees and expenses and including any such expenses incurred in connection with investigating, defending against or settling any of the foregoing (hereinafter individually a "**Loss**" and collectively "**Losses**") incurred or sustained by the Indemnified Parties, or any of them (including the Surviving Corporation), directly or indirectly, as a result of (the following, the "**Indemnifiable Matters**"):

(i) any inaccuracy of a representation or warranty of the Company, the Principal Stockholders or any other Person (other than Parent or Sub) contained in this Agreement or any Instrument;

(ii) any failure by the Company, the Principal Stockholders or any other Person (other than Parent or Sub) to perform or comply with any covenant applicable to any of them contained in this Agreement or any Instrument;

(iii) any fraud or intentional misrepresentation on the part of the Company, the Principal Stockholders or any other Person (other than Parent or Sub) with respect to any representation or warranty contained in this Agreement or any Instrument;

(iv) any Dissenting Share Payments;

(v) any Excess Third Party Expenses; or

(vi) any of the matters disclosed on **Schedule 7.2(a)(vi)** hereto.

The Securityholders (including the Principal Stockholders and any officer or director of the Company or any Subsidiary) shall not have any right of contribution, indemnification or right of advancement from the Surviving Corporation or Parent with respect to any Loss claimed by an Indemnified Party.

(b) Any Person committing, or having actual knowledge of, any fraud or intentional misrepresentation with respect to any representation or warranty contained in this Agreement or any Instrument shall be liable for, and shall indemnify and hold harmless the Indemnified Parties from any

Losses incurred or sustained by the Indemnified Parties, or any of them (including the Surviving Corporation), directly or indirectly, as a result of such fraud or intentional misrepresentation.

(c) For the purpose of determining the amount of the Loss, any "materiality" or "Material Adverse Effect" qualifiers or words of similar import contained in such representation or warranty giving rise to the claim of indemnity hereunder shall in each case be disregarded and without effect (as if such standard or qualification were deleted from such representation or warranty).

(d) Nothing in this Agreement shall limit the right of Parent or any other Indemnified Party to pursue remedies under the Related Agreements, Confidential Nondisclosure Agreement, Letters of Transmittal, Non-Competition Agreements, Terminating Employee Releases or Director and Officer Resignation Letters against the parties thereto.

7.3 Maximum Payments; Remedy.

(a) Except as set forth in **Section 7.3(b)** and **Section 7.3(c)** hereof and the second sentence of this **Section 7.3(a)** regarding Losses arising out of any Surviving Representation, the maximum amount the Indemnified Parties may recover from each Securityholder (including each Principal Stockholder) pursuant to the indemnity set forth in **Section 7.2** hereof for Losses shall be limited to such Securityholder's Pro Rata Portion of the Escrow Fund, which Escrow Fund shall be the sole and exclusive remedy in connection therewith except as set forth in **Section 7.3(b)** and **Section 7.3(c)** hereof and the second sentence of this **Section 7.3(a)** regarding Losses arising out of any Surviving Representation. Notwithstanding the foregoing, the maximum amount that the Indemnified Parties may recover from each Securityholder pursuant to **Section 7.2** for Losses arising out of any Surviving Representation shall be limited to such Securityholder's Pro Rata Portion of the Merger Consideration and Series A Consideration (including such Securityholder's Pro Rata Portion of the Escrow Fund).

(b) Nothing in this **Article VII** shall limit the liability of any Securityholder (including the Principal Stockholders) in respect of Losses arising out of any fraud or intentional misrepresentation on the part of such Securityholder, or of which such Securityholder had actual knowledge, with respect to any representation or warranty contained in this Agreement or any Instrument.

(c) Nothing in this **Article VII** shall limit the liability of the Company or the Securityholders (including the Principal Stockholders) for any inaccuracy of any representation or warranty contained in this Agreement or any Instrument or breach of any covenant contained in this Agreement if the Merger is not consummated.

(d) Notwithstanding anything to the contrary herein, the parties hereto agree and acknowledge that any Indemnified Party may bring a claim for indemnification for any Loss under this **Article VII** notwithstanding the fact that such Indemnified Party had knowledge of the breach, event or circumstance giving rise to such Loss prior to the Closing or waived any condition to the Closing related thereto. Further, no information or knowledge obtained in any investigation made in connection with this Agreement or otherwise shall affect or be deemed to modify any representation or warranty contained in this Agreement or the conditions to the obligations of the parties to consummate the Merger in accordance with the terms and provisions of this Agreement.

(e) Subject to **Section 7.3(b)** and **Section 7.3(c)** hereof, the parties hereto agree and acknowledge that from and after the Closing Date, the indemnification provisions in this Agreement shall be the exclusive remedy of Parent and the other Indemnified Parties with respect to inaccuracies of the representations and warranties, and breaches of covenants and agreements, contained in this Agreement;

provided, however, that Parent shall not be precluded from seeking equitable remedies with respect to breaches of covenants and agreements contained in this Agreement.

(f) Notwithstanding the foregoing, no Indemnified Party shall be entitled to indemnification for any Losses hereunder until the aggregate amount of all Losses under all claims of all Indemnified Parties shall exceed Three Hundred Twenty Five Thousand Dollars ($325,000) (the "**Basket**"), at which time all Losses incurred shall be subject to indemnification hereunder in full including the amount of the Basket to the first dollar; *provided, however,* that the provisions of this **Section 7.3(f)** shall not apply as a threshold to any and all claims or payments made with respect to all Losses incurred pursuant to clauses **(ii)**, **(iii)**, **(iv)**, **(v)** or **(vi)** of **Section 7.2(a)**, each of which shall be indemnified in full without regard to the Basket.

7.4 Claims for Indemnification; Resolution of Conflicts.

(a) Claims for Indemnification.

(i) An Indemnified Party may seek recovery of Losses pursuant to this **Article VII** by delivering to the Stockholder Representative an Officer's Certificate in respect of such claim. The date of such delivery of an Officer's Certificate is referred to herein as the "**Claim Date**" of such Officer's Certificate (and the claims for indemnification contained therein). For purposes hereof, "**Officer's Certificate**" shall mean a certificate signed by any officer of Parent: (A) stating that an Indemnified Party has paid, sustained, incurred, or accrued, or reasonably anticipates that it will have to pay, sustain, incur or accrue Losses and (B) specifying in reasonable detail the individual items of Losses included in the amount so stated, the date each such item was paid, sustained, incurred, or accrued, or the basis for such anticipated liability, the nature of the Indemnifiable Matter to which such item is related and the basis for indemnification under **Section 7.2**.

(ii) In the event that an Indemnified Party pursues a claim directly against any Securityholder(s) or any other Person for Losses resulting from any fraud or intentional misrepresentation with respect to any representation or warranty or, after the Escrow Period, any inaccuracy of a Surviving Representation, subject to the provisions of **Section 7.3, Section 7.4(a)(iii), Section 7.4(a)(v), Section 7.4(b)** and **Section 9.9** hereof, each Person from whom indemnification is sought (an "**Indemnifying Party**") shall promptly, and in no event later than 30 days after delivery of an Officer's Certificate to each such Indemnifying Party, wire transfer to the Indemnified Party an amount of cash equal to the amount of the Loss.

(iii) The Stockholder Representative may object to a claim for indemnification set forth in an Officer's Certificate by delivering to the Indemnified Party seeking indemnification (and, in the case of a claim against the Escrow Fund, to the Escrow Agent) a written statement of objection to the claim made in the Officer's Certificate (an "**Objection Notice**"), *provided, however,* that, to be effective, such Objection Notice must (A) be delivered to the Indemnified Party (and, in the case of a claim for recourse against the Escrow Fund, to the Escrow Agent) prior to midnight (California time) on or prior to the 30th day following the Claim Date of the Officer's Certificate (such deadline, the "**Objection Deadline**" for such Officer's Certificate and the claims for indemnification contained therein) and (B) set forth in reasonable detail the nature of the objections to the claims in respect of which the objection is made. Notwithstanding the foregoing, the Stockholder Representative (and each Securityholder) hereby waives the right to object to any claims against the Escrow Fund or otherwise, in each case in respect of any Agreed-Upon Loss.

(iv) If the Stockholder Representative does not object in writing (as provided in **Section 7.4(a)(iii)**) to the claims contained in an Officer's Certificate prior to the Objection Deadline for such Officer's Certificate, such failure to so object shall be an irrevocable acknowledgment by the Stockholder Representative and the Securityholders that the Indemnified Party is entitled to the full amount of the claims

for Losses set forth in such Officer's Certificate (and such entitlement shall be conclusively and irrefutably established) (any such claim, an "**Unobjected Claim**").

(v) Except to the extent that the Losses resulted from any fraud or intentional misrepresentation with respect to any representation or warranty on the part of any Person, claims by an Indemnified Party for Losses pursuant to this Agreement shall be satisfied: (A) first, from the Escrow Fund, and (B) second, against the Securityholders directly for Losses arising out of any Surviving Representation. Claims by an Indemnified Party for Losses pursuant to this Agreement resulting from any fraud or intentional misrepresentation with respect to any representation or warranty on the part of any Person shall be satisfied at the election of Parent in its sole discretion from the Escrow Fund and/or the Person directly.

(b) Resolution of Conflicts.

(i) In case the Stockholder Representative timely delivers an Objection Notice in accordance with **Section 7.4(a)(iii)** hereof (other than in connection with Agreed-Upon Losses as defined in **Section 7.4(b)(iv)** hereof), the dispute shall, subject to **Section 7.4(b)(iii)** be resolved in accordance with the provisions of **Section 9.9** hereof. If the Stockholder Representative (or the objecting Securityholder(s)) and Parent reach an agreement with respect to such dispute pursuant to **Sections 9.9(a)** or **9.9(b)** or otherwise, a memorandum setting forth such agreement shall be prepared and signed by both parties and, in the case of a claim against the Escrow Fund, shall be furnished to the Escrow Agent and, in the case of a claim directly against the Securityholders, to the Securityholders (any claims covered by such an agreement, "**Settled Claims**"). The Escrow Agent shall be entitled to rely on any such memorandum and make distributions from the Escrow Fund in accordance with the terms thereof.

(ii) Except as set forth in **Section 7.4(b)(iv)** hereof, the procedures described in **Section 9.9** shall apply to any dispute among the Securityholders (including the Principal Stockholders) and the Indemnified Parties under this **Article VII** hereof, whether relating to claims upon the Escrow Fund or to any other indemnification obligations set forth in this **Article VII**.

(iii) If no agreement with respect to a dispute relating to indemnification obligations of this **Article VII** can be reached after good faith negotiation (and, if applicable, mediation) prior to 45 days after delivery of an Objection Notice with respect to such claim, any party to such dispute may demand arbitration of the matter unless the amount of the Loss that is at issue is the subject of a pending litigation with a third party, in which event arbitration shall not be commenced until such amount is ascertained, or both parties agree to arbitration prior to such time, and in either such event the matter shall be settled by arbitration conducted pursuant to **Section 9.9**. The decision of the arbitrator or a majority of the three arbitrators, as the case may be, under **Section 9.9** as to the validity and amount of any claim in such Officer's Certificate shall be final, binding, and conclusive upon the parties to this Agreement and the Securityholders. Such decision shall be written and shall be supported by written findings of fact and conclusions which shall set forth the award, judgment, decree or order awarded by the arbitrator(s), and the Escrow Agent shall be entitled to rely on, and make distributions from the Escrow Fund in accordance with, the terms of such award, judgment, decree or order as applicable. Claims determined by arbitration are referred to as "**Resolved Claims.**" Within 30 days of a decision of the arbitrator(s) requiring payment by one party to another, such party shall make the payment to such other party, including any distributions out of the Escrow Fund, as applicable.

(iv) The procedures described in **Section 9.9** shall not apply to claims made in respect of any Dissenting Share Payments or any Excess Third Party Expenses (each, an "**Agreed-Upon Loss**").

7.5 Escrow Arrangements.

(a) Escrow Fund. By virtue of this Agreement and as security for the indemnity obligations provided for in **Section 7.2** hereof, at the Effective Time, Parent will deposit the Escrow Amount with the Escrow Agent without any act of the Securityholders (any and all of such deposits to constitute an escrow fund to be governed by the terms set forth herein). The Escrow Amount (plus any interest paid on such Escrow Amount in accordance with **Section 7.5(c)(ii)** hereof) collectively, the "**Escrow Fund**") shall be available to compensate the Indemnified Parties for any claims by such parties for any Losses suffered or incurred by them and for which they are entitled to recovery under this **Article VII** and the remaining portion of the Escrow Fund shall, subject to **Section 7.4** above and **Section 7.5(c)(ii)** below, be distributed to the Securityholders in accordance with such Securityholder's Pro Rata Portion of the Escrow Fund in accordance with and subject to **Section 7.5(b)**.

(b) Escrow Period; Distribution upon Termination of Escrow Periods. Subject to the following requirements, the Escrow Fund shall be in existence immediately following the Effective Time and shall terminate at 5:00 p.m., local time at Parent's corporate headquarters in California, on the date 5 days following the Survival Date (the "**Escrow Period**"), and the Escrow Agent shall distribute any remaining funds in the Escrow Fund to the Securityholders following such termination; *provided, however,* that the Escrow Fund shall not terminate with respect to any amount in respect of any Unresolved Claims relating to facts and circumstances existing prior to the Survival Date, and any such amount shall not be distributed to the Securityholders at such time. As soon as all such claims have been resolved, the Escrow Agent shall deliver the remaining portion of the Escrow Fund, if any, not required to satisfy such Unresolved Claims. Deliveries of the remaining Escrow Amount out of the Escrow Fund to the Securityholders pursuant to this **Section 7.5(b)** shall be made in accordance with each Securityholder's Pro Rata Portion of the remaining amounts in the Escrow Fund, with the amount delivered to each Securityholder rounded to the nearest cent ($0.01) (with amounts of $0.005 and above rounded up).

(c) Protection of Escrow Fund.

(i) The Escrow Agent shall hold and safeguard the Escrow Fund during the Escrow Period, shall treat such fund as a trust fund in accordance with the terms of this Agreement and shall hold and dispose of the Escrow Fund only in accordance with the terms of this **Article VII**.

(ii) The Escrow Amount shall be invested in U.S. Treasury bills with maturities of not more than 30 days and any interest paid on such Escrow Amount shall be added to the Escrow Fund and become a part thereof. For any period of time before such U.S. Treasury bills can be purchased by the Escrow Agent or after such bills mature, the Escrow Amount shall be invested in a U.S. Bank Money Market Account of the Escrow Agent (or another nationally recognized banking institution) and any interest paid on such Escrow Amount shall be added to the Escrow Fund and become a part thereof and available for satisfaction of claims and shall be distributed to the Indemnifying Parties in accordance with such Securityholder's Pro Rata Portion of the Escrow Fund in accordance with **Section 7.5(b)**. The parties hereto agree that Parent is the owner of any cash in the Escrow Fund, and that all interest on or other taxable income, if any, earned from the investment of such cash pursuant to this Agreement shall be treated for tax purposes as earned by Parent. At the end of Parent's taxable year, an amount equal to four percent (4%) of the income earned from the investment of cash contained in the Escrow Fund shall be distributed to Parent. Parent shall be responsible for any Taxes due with respect to the income earned from the investment of cash contained in the Escrow Fund.

(d) Claims for Indemnification. Upon receipt by the Escrow Agent at any time on or before the last day of the Escrow Period of an Officer's Certificate, the Escrow Agent shall, subject to the provisions of **Section 7.4(a)(v)** and **Section 7.4(b)** hereof, deliver to Parent, as promptly as practicable, cash held in the Escrow Fund equal to the Losses claimed in the Officer's Certificate; *provided, however,* that until the Objection Deadline relating to an Officer's Certificate, the Escrow Agent shall make no

delivery to Parent of any Escrow Amount pursuant to this **Section 7.5(d)** (other than Agreed-Upon Losses as described below) unless the Escrow Agent shall have received written authorization from the Stockholder Representative to make such delivery (a claim with respect to which such an authorization has been delivered, an "**Authorized Claim**"). Upon the Objection Deadline relating to an Officer's Certificate, to the extent that no Objection Notice has been timely delivered with respect to Losses claimed in such Officer's Certificate, the Escrow Agent shall make delivery of cash from the Escrow Fund equal to the amount of Losses claimed in the Officer's Certificate. Notwithstanding the foregoing, the Stockholder Representative hereby authorizes the Escrow Agent to deliver cash from the Escrow Fund equal to the amount of Losses claimed in any Officer's Certificate in respect of any Agreed-Upon Loss upon receipt of such Officer's Certificate without regard to the Objection Deadline period set forth in this **Section 7.5(d)**.

(e) Escrow Agent's Duties.

(i) The Escrow Agent shall be obligated only for the performance of such duties as are specifically set forth herein, and as set forth in any additional written escrow instructions which the Escrow Agent may receive after the date of this Agreement which are signed by an officer of Parent and the Stockholder Representative, and may rely and shall be protected in relying or refraining from acting on any instrument reasonably believed to be genuine and to have been signed or presented by the proper party or parties. The Escrow Agent shall not be liable for any act done or omitted hereunder as Escrow Agent while acting in good faith and in the exercise of reasonable judgment, and any act done or omitted pursuant to the advice of legal counsel shall be conclusive evidence of such good faith.

(ii) The Escrow Agent is hereby expressly authorized to disregard any and all warnings given by any of the parties hereto or by any other person, excepting only orders or process of courts of law, and is hereby expressly authorized to comply with and obey orders, judgments or decrees of any court. In case the Escrow Agent obeys or complies with any such order, judgment or decree of any court, the Escrow Agent shall not be liable to any of the parties hereto or to any other person by reason of such compliance, notwithstanding any such order, judgment or decree being subsequently reversed, modified, annulled, set aside, vacated or found to have been entered without jurisdiction.

(iii) The Escrow Agent shall not be liable in any respect on account of the identity, authority or rights of the parties executing or delivering or purporting to execute or deliver this Agreement or any documents or papers deposited or called for hereunder.

(iv) The Escrow Agent shall not be liable for the expiration of any rights under any statute of limitations with respect to this Agreement or any documents deposited with the Escrow Agent.

(v) In performing any duties under this Agreement, the Escrow Agent shall not be liable to any party for damages, losses or expenses, except for negligence or willful misconduct on the part of the Escrow Agent. The Escrow Agent shall not incur any such liability for (A) any act or failure to act made or omitted in good faith, or (B) any action taken or omitted in reliance upon any instrument, including any written statement of affidavit provided for in this Agreement that the Escrow Agent shall in good faith believe to be genuine, nor will the Escrow Agent be liable or responsible for forgeries, fraud, impersonations, or determining the scope of any representative authority. In addition, the Escrow Agent may consult with legal counsel in connection with performing the Escrow Agent's duties under this Agreement and shall be fully protected in any act taken, suffered, or permitted by him/her in good faith in accordance with the advice of counsel. The Escrow Agent is not responsible for determining and verifying the authority of any person acting or purporting to act on behalf of any party to this Agreement.

(vi) If any controversy arises between the parties to this Agreement, or with any other party, concerning the subject matter of this Agreement, its terms or conditions, the Escrow Agent will

not be required to determine the controversy or to take any action regarding it. The Escrow Agent may hold all documents and the Escrow Amount and may wait for settlement of any such controversy by final appropriate legal proceedings or other means as, in the Escrow Agent's discretion, may be required, despite what may be set forth elsewhere in this Agreement. In such event, the Escrow Agent will not be liable for damages. Furthermore, the Escrow Agent may at its option, file an action of interpleader requiring the parties to answer and litigate any claims and rights among themselves. The Escrow Agent is authorized to deposit with the clerk of the court all documents and the Escrow Amount held in escrow, except all costs, expenses, charges and reasonable attorney fees incurred by the Escrow Agent due to the interpleader action and which the parties jointly and severally agree to pay. Upon initiating such action, the Escrow Agent shall be fully released and discharged of and from all obligations and liability imposed by the terms of this Agreement.

(vii) Subject to the limitations on the liability of Parent, Sub and the Surviving Corporation set forth in **Section 7.7(c)** hereof, the parties hereto and their respective successors and assigns agree jointly and severally to indemnify and hold Escrow Agent harmless against any and all losses, claims, damages, liabilities and expenses, including reasonable costs of investigation, counsel fees, including allocated costs of in-house counsel and disbursements that may be imposed on the Escrow Agent or incurred by the Escrow Agent in connection with the performance of its duties under this Agreement, including but not limited to any litigation arising from this Agreement or involving its subject matter, other than those arising out of the negligence or willful misconduct of the Escrow Agent.

(viii) The Escrow Agent may resign at any time upon giving at least thirty (30) days written notice to the Parent and the Stockholder Representative; *provided, however,* that no such resignation shall become effective until the appointment of a successor escrow agent which shall be accomplished as follows: Parent and the Stockholder Representative shall use their best efforts to mutually agree on a successor escrow agent within thirty (30) days after receiving such notice. If the parties fail to agree upon a successor escrow agent within such time, the Escrow Agent shall have the right to appoint a successor escrow agent authorized to do business in the State of California. The successor escrow agent shall execute and deliver an instrument accepting such appointment and it shall, without further acts, be vested with all the estates, properties, rights, powers, and duties of the predecessor escrow agent as if originally named as escrow agent. Upon appointment of a successor escrow agent, the Escrow Agent shall be discharged from any further duties and liability under this Agreement.

(f) Fees. All fees of the Escrow Agent for performance of its duties hereunder shall be paid by Parent in accordance with the standard fee schedule of the Escrow Agent. It is understood that the fees and usual charges agreed upon for services of the Escrow Agent shall be considered compensation for ordinary services as contemplated by this Agreement. In the event that the conditions of this Agreement are not promptly fulfilled, or if the Escrow Agent renders any service not provided for in this Agreement, or if the parties request a substantial modification of its terms, or if any controversy arises, or if the Escrow Agent is made a party to, or intervenes in, any litigation pertaining to the Escrow Fund or its subject matter, the Escrow Agent shall be reasonably compensated for such extraordinary services and reimbursed for all costs, attorney's fees, including allocated costs of in-house counsel, and expenses occasioned by such default, delay, controversy or litigation.

(g) Successor Escrow Agents. Any corporation into which the Escrow Agent in its individual capacity may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Escrow Agent in its individual capacity shall be a party, or any corporation to which substantially all the corporate trust business of the Escrow Agent in its individual capacity may be transferred, shall be the Escrow Agent under this Escrow Agreement without further act.

7.6 Third-Party Claims. In the event Parent becomes aware of a third party claim (other than a claim that is the subject of an Agreed-Upon Loss) (a "**Third Party Claim**") that Parent reasonably believes may result in a demand against the Escrow Fund or for other indemnification pursuant to this **Article VII**, Parent shall notify the Stockholder Representative of such claim, and the Stockholder Representative shall be entitled on behalf of the Securityholders, at their expense, to participate in, but not to determine or conduct, the defense of such Third Party Claim. Parent shall have the right in its sole discretion to conduct the defense of, and to settle, any such claim; *provided, however,* that except with the consent of the Stockholder Representative, no settlement of any such Third Party Claim with third party claimants shall be determinative of (a) the amount of Losses relating to such matter or (b) whether Parent is entitled to indemnification pursuant to this **Article VII**. In the event that the Stockholder Representative has consented to any such settlement, the Securityholders (including the Principal Stockholders) shall have no power or authority to object under any provision of this **Article VII** to the amount of the Losses with respect to such settlement. If there is a Third Party Claim that, if adversely determined would give rise to a right of recovery for Losses hereunder, then any amounts incurred or sustained by the Indemnified Parties in defense of such Third Party Claim, regardless of the outcome of such claim, shall be deemed Losses hereunder. Notwithstanding anything in this Agreement to the contrary, this **Section 7.6** shall not apply to any third party claim that is the subject of an Agreed-Upon Loss. Claims against the Escrow Fund made in respect of any Agreed-Upon Loss shall be resolved in the manner described in **Section 7.5(d)** above.

7.7 Stockholder Representative.

(a) Each of the Securityholders hereby appoints Philip L. Reed, III as its agent and attorney-in-fact as the Stockholder Representative for and on behalf of the Securityholders to give and receive notices and communications, to authorize payment to Parent from the Escrow Fund in satisfaction of claims by Parent, to object to such payments, to agree to, negotiate, enter into settlements and compromises of, and demand arbitration and comply with orders of courts and awards of arbitrators with respect to such claims, and with respect to other disputes that may arise under this Agreement, and to take all other actions that are either (i) necessary or appropriate in the judgment of either of the Stockholder Representative for the accomplishment of the foregoing or (ii) specifically mandated by the terms of this Agreement. Such agency may be changed by the Securityholders from time to time upon not less than 15 days prior written notice to Parent; *provided, however,* that the Stockholder Representative may not be removed unless Securityholders of a majority in interest of the Escrow Fund agree to such removal and to the identity of the substituted agent. A vacancy in the position of Stockholder Representative may be filled by the holders of a majority in interest of the Escrow Fund. No bond shall be required of the Stockholder Representative. Notices or communications to or from the Stockholder Representative shall constitute notice to or from the Securityholders (including the Principal Stockholders).

(b) The Stockholder Representative shall not be liable for any act done or omitted hereunder as Stockholder Representative while acting in good faith and in the exercise of reasonable judgment. Securityholders on whose behalf the Escrow Amount was contributed to the Escrow Fund shall indemnify the Stockholder Representative and hold the Stockholder Representative harmless against any loss, liability or expense incurred without negligence or bad faith on the part of the Stockholder Representative and arising out of or in connection with the acceptance or administration of the Stockholder Representative's duties hereunder, including the reasonable fees and expenses of any legal counsel retained by the Stockholder Representative ("**Stockholder Representative Expense**"). Following the termination of the Escrow Period and the resolution of all pending claims made by the Indemnified Parties for Losses, the Stockholder Representative shall have the right to recover the Stockholder Representative Expenses from any remaining portion of the Escrow Fund prior to any distribution to the Securityholders, and prior to any such distribution, shall deliver to the Escrow Agent a certificate setting forth the Stockholder Representative Expenses actually incurred. Upon receipt of such certificate, the Escrow Agent shall pay such Stockholder Representative Expenses to the Stockholder Representative. Notwithstanding the

foregoing, the Stockholder Representative's right to recover Stockholder Representative Expenses shall not prejudice Parent's right to recover the full amount of indemnifiable Losses that Parent is entitled to recover from the Escrow Fund.

(c) In addition, the Stockholder Representative shall deduct $100,000 (the "**Expenses Reserve Amount**") from the Merger Consideration to be distributed to the Securityholders, which Expenses Reserve Amount shall be deposited by Parent at the Effective Time and without any act of the Securityholders, into an escrow account (the "**Expenses Escrow Account**") separately maintained by the Escrow Agent pursuant to this **Section 7.7(c)**. The Stockholder Representative may use the funds in the Expenses Escrow Account to pay any Stockholder Representative Expense actually incurred. The Escrow Agent shall pay any Stockholder Representative Expenses from the Expenses Escrow Account upon receipt of a certificate from the Stockholder Representative setting forth the Stockholder Representative Expense actually incurred. Any remaining funds in the Expenses Escrow Account after payment of all Stockholder Representative Expenses following the later of (i) the resolution of all indemnification claims under **Article VII** of this Agreement and the determination by the Stockholder Representative that such funds are no longer necessary in connection with indemnification claims that may be brought hereunder and (ii) the payment of the full amount of the Escrow Fund to the Indemnified Parties, shall be distributed to the Securityholders in accordance with the Securityholders' Pro Rata Portion of the Expenses Escrow Account (with the amount delivered to each Securityholder rounded to the nearest cent ($0.01) (with amounts of $0.005 and above rounded up)); *provided, however,* that in the sole discretion of the Stockholder Representative, any or all of the funds in the Expenses Escrow Account may be earlier distributed to the Stockholders. The Expenses Reserve Amount shall be invested in U.S. Treasury bills with maturities of not more than 30 days and any interest paid on such Expenses Reserve Amount shall be added to the Expenses Escrow Account and become a part thereof. For any period of time before such U.S. Treasury bills can be purchased by the Escrow Agent or after such bills mature, the Expenses Reserve Amount shall be invested in a U.S. Bank Money Market Account of the Escrow Agent (or another nationally recognized banking institution) and any interest paid on such Expenses Reserve Amount shall be added to the Expenses Escrow Account and become a part thereof and available for to pay the expenses incurred by the Stockholder Representative as set forth in this **Section 7.7(c)**. The Expenses Escrow Account shall not be used for any purposes other than as set forth in this **Section 7.7(c)** and shall not be available to the Parent or any of the Indemnified Parties to satisfy any claims under **Article VII** of this Agreement. The Securityholders and their respective successors and assigns shall jointly and severally indemnify and hold Escrow Agent harmless against any and all losses, claims, damages, liabilities and expenses, including reasonable costs of investigation, counsel fees, including allocated costs of in-house counsel and disbursements that may be imposed on the Escrow Agent or incurred by the Escrow Agent in connection with the performance of its duties with respect to the Expenses Escrow Account and the Expenses Reserve Amount, other than those arising out of the negligence or willful misconduct of the Escrow Agent. For the avoidance of doubt, notwithstanding any other provisions of this Agreement to the contrary, neither Parent, Sub nor Surviving Corporation shall be liable to the Escrow Agent in any way with respect to the Expenses Escrow Account or the Expenses Reserve Amount. Notwithstanding the foregoing, nothing in this **Section 7.7(c)** shall prejudice the Stockholder Representative's right to recover Stockholder Representative Expenses pursuant to **Section 7.7(b)**, whether from any remaining portion of the Escrow Fund prior to any distribution to the Securityholders or by seeking reimbursement from Securityholders, or both; *provided, however*, that the Stockholder Representative shall first seek reimbursement under this **Section 7.7(c)** prior to seeking reimbursement under **Section 7.7(b)**.

(d) A decision, act, consent or instruction of the Stockholder Representative, including but not limited to an amendment, extension or waiver of this Agreement pursuant to **Section 9.10** hereof, shall constitute a decision of the Securityholders and shall be final, binding and conclusive upon the Securityholders; and the Escrow Agent and Parent may rely upon any such decision, act, consent or instruction of the Stockholder Representative as being the decision, act, consent or instruction of the

Securityholders. The Escrow Agent and Parent are hereby relieved from any liability to any person for any acts done by them in accordance with such decision, act, consent or instruction of the Stockholder Representative.

ARTICLE VIII

RESERVED

ARTICLE IX

GENERAL PROVISIONS

9.1 Notices. All notices and other communications hereunder shall be in writing and shall be deemed given if delivered personally or by commercial messenger or courier service, or mailed by registered or certified mail (return receipt requested) or sent via facsimile (with acknowledgment of complete transmission) to the parties at the following addresses (or at such other address for a party as shall be specified by like notice or, if specifically provided for elsewhere in this Agreement, by email); *provided, however,* that notices sent by mail will not be deemed given until received:

(a) if to Parent or Sub, to:

Google Inc.
1600 Amphitheatre Parkway
Mountain View, California 94043
Attention: General Counsel
Facsimile No.: (650) 618-1806

with a copy to:

Wilson Sonsini Goodrich & Rosati
Professional Corporation
650 Page Mill Road
Palo Alto, California 94304
Attention: David J. Segre, Esq.
Ricardo E. Velez, Esq.
Facsimile No.: (650) 493-6811

(b) if to the Company or the Stockholder Representative, to:

Village Ventures Partners Fund, L.P.
160 Water Street
Williamstown, MA 01267
Attention: Philip L. Reed, III
Facsimile No.: (208) 345-8484

with a copy to:

Cooley Godward LLP
30 Interlocken Crescent, Suite 900
Broomfield, CO 80021
Attention: Michael L. Platt, Esq.
Laura M. Medina, Esq.
Facsimile No.: (720) 720-4099

(c) If to the Principal Stockholders, to the addresses set forth in **Section 9.1** of the Disclosure Schedule

with a copy to:

Village Ventures Partners Fund, L.P.
160 Water Street
Williamstown, MA 01267
Attention: Philip L. Reed, III
Facsimile No.: (208) 345-8484

(d) If to the Escrow Agent, to:

U.S. Bank, National Association
Corporate Trust Services
One California Street, Suite 2100
San Francisco, California 94111
Attention: Michael P. Susnow
Facsimile No.: (415) 273-4591

9.2 Interpretation. The words "include," "includes" and "including" when used herein shall be deemed in each case to be followed by the words "without limitation." The table of contents and headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. Unless otherwise specifically stated herein, references to section, schedules and exhibits made herein shall refer to the sections, schedules and/or exhibits of this Agreement, as applicable.

9.3 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other party, it being understood that all parties need not sign the same counterpart.

9.4 Entire Agreement; Assignment. This Agreement, the exhibits hereto, the Disclosure Schedule, the Confidential Nondisclosure Agreement, and the documents and instruments and other agreements among the parties hereto referenced herein: (i) constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all prior agreements and understandings both written and oral, among the parties with respect to the subject matter hereof, (ii) are not intended to confer upon any other person any rights or remedies hereunder, and (iii) shall not be assigned by operation of law or otherwise, except that Parent may assign its rights and delegate its obligations hereunder to its affiliates as long as Parent remains ultimately liable for all of Parent's obligations hereunder. All exhibits and schedules attached hereto are hereby incorporated by reference into, and made a part of, this Agreement.

9.5 Severability. In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void or unenforceable, the remainder of this Agreement will continue in full force and effect and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto. The parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision.

9.6 Other Remedies. Except as expressly provided herein, any and all remedies herein expressly conferred upon a party will be deemed cumulative with and not exclusive of any other remedy conferred hereby, or by law or equity upon such party, and the exercise by a party of any one remedy will not preclude the exercise of any other remedy.

9.7 Governing Law; Exclusive Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof. Subject to **Section 9.9** hereof, each of the parties hereto irrevocably consents to the exclusive jurisdiction and venue of any court within Santa Clara County, State of California, in connection with any matter based upon or arising out of this Agreement or the matters contemplated herein, agrees that process may be served upon them in any manner authorized by the laws of the State of California for such persons and waives and covenants not to assert or plead any objection which they might otherwise have to such jurisdiction, venue and such process. Subject to **Section 9.9** hereof, each party agrees not to commence any legal proceedings related hereto except in such courts.

9.8 Rules of Construction. The parties hereto agree that they have been represented by counsel during the negotiation and execution of this Agreement and, therefore, waive the application of any law, regulation, holding or rule of construction providing that ambiguities in an agreement or other document will be construed against the party drafting such agreement or document.

9.9 Resolution of Conflicts; Arbitration. Any claim or dispute arising out of or related to this Agreement, or the interpretation, making, performance, breach or termination thereof, shall (except as specifically set forth in this Agreement) be resolved pursuant to the procedures set forth below.

(a) The parties to the dispute shall attempt in good faith to agree upon the respective rights of the parties with respect to such dispute.

(b) Either party may, but shall not be obligated to, initiate non-binding mediation of the dispute with the assistance of a neutral arbitrator belonging to and under the rules of the CPR Institute for Dispute Resolution. The party requesting the mediation shall arrange for mediation services, subject to the approval of the other party, which shall not be unreasonably withheld. Mediation shall take place in Santa Clara County, California during reasonable business hours and upon reasonable advance notice. Mediation may be scheduled to begin at any time, but with at least ten (10) business days' written notice to all parties. If one party initiates mediation, the parties (i) shall participate in the mediation in good faith and shall devote reasonable time and energy to the mediation so as to promptly resolve the dispute or conclude that they cannot resolve the dispute and (ii) shall not pursue other remedies while such mediation is proceeding, other than injunctive relief.

(c) If no such agreement can be reached after good faith negotiation (and, if applicable, mediation) prior to 45 days after commencement of such negotiation (and, if applicable, mediation) (or in the case of a dispute over a claim for indemnification under **Article VII**, prior to 45 days following delivery of an Objection Notice with respect to such claim) either party may demand arbitration of the matter, and the matter shall be settled by binding arbitration pursuant to this **Section 9.9** in the County of Santa Clara,

California in accordance with the then current Commercial Arbitration Rules of the American Arbitration Association. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. The arbitrator(s) shall have the authority to grant any equitable and legal remedies that would be available in any judicial proceeding instituted to resolve a dispute.

(d) Selection of Arbitrators. Such arbitration shall be conducted by a single arbitrator chosen by mutual agreement of Parent and the Stockholder Representative. Alternatively, at the request of either party before the commencement of arbitration, the arbitration shall be conducted by three independent arbitrators, none of whom shall have any competitive interests with Parent or the Stockholder Representative, in which case Parent and the Stockholder Representative shall each select one arbitrator, and the two arbitrators so selected shall select a third arbitrator.

(e) Discovery. In any arbitration under this **Section 9.9**, each party shall be limited to calling a total of three witnesses both for purposes of deposition and the arbitration hearing. Subject to the foregoing limitation on the number of witnesses, the arbitrator or arbitrators, as the case may be, shall set a limited time period and establish procedures designed to reduce the cost and time for discovery while allowing the parties an opportunity, adequate in the sole judgment of the arbitrator or majority of the three arbitrators, as the case may be, to discover relevant information from the opposing parties about the subject matter of the dispute. The arbitrator, or a majority of the three arbitrators, as the case may be, shall rule upon motions to compel or limit discovery and shall have the authority to impose sanctions for discovery abuses, including attorneys' fees and costs, to the same extent as a competent court of law or equity, should the arbitrators or a majority of the three arbitrators, as the case may be, determine that discovery was sought without substantial justification or that discovery was refused or objected to without substantial justification.

(f) Decision. The decision of the arbitrator or a majority of the three arbitrators, as the case may be, as to the validity and amount of any claim in such Officer's Certificate shall be final, binding, and conclusive upon the parties to this Agreement. Such decision shall be written and shall be supported by written findings of fact and conclusions which shall set forth the award, judgment, decree or order awarded by the arbitrator(s). Within 30 days of a decision of the arbitrator(s) requiring payment by one party to another, such party shall make the payment to such other party, including any distributions out of the Escrow Fund, as applicable.

(g) Other Relief. The parties to the arbitration may apply to a court of competent jurisdiction for a temporary restraining order, preliminary injunction or other interim or conservatory relief, as necessary, without breach of this arbitration provision and without abridgement of the powers of the arbitrator(s).

(h) Costs and Expenses. Notwithstanding anything to the contrary herein (including but not limited to the definition of "Loss" and "Losses" in Section 7.2(a)), the parties agree that each party shall pay its own costs and expenses (including counsel fees) of any such arbitration, and each party waives its right to seek an order compelling the other party to pay its portion of its costs and expenses (including counsel fees) for any arbitration.

9.10 Amendment and Waiver. This Agreement may be amended by the parties hereto at any time by execution of an instrument in writing signed on behalf of the party against whom enforcement is sought. For purposes of this **Section 9.10**, the Securityholders (including the Principal Stockholders) agree that any amendment of this Agreement signed by the Stockholder Representative shall be binding upon and effective against the Securityholders whether or not they have signed such amendment. Parent, on the one hand, and the Company and the Stockholder Representative, on the other hand, may, to the extent legally allowed, (i) waive any inaccuracies in the representations and warranties made to such party contained herein or in any

document delivered pursuant hereto and (ii) waive compliance with any of the covenants, agreements or conditions for the benefit of such party contained herein. Any agreement on the part of a party hereto to any such waiver shall be valid only if set forth in an instrument in writing signed on behalf of such party. For purposes of this **Section 9.10**, the Securityholders agree that any waiver signed by the Stockholder Representative shall be binding upon and effective against all Securityholders whether or not they have signed such waiver.

[remainder of page intentionally left blank]

IN WITNESS WHEREOF, Parent, Sub, the Company, the Principal Stockholders, the Escrow Agent and the Stockholder Representative have caused this Agreement to be signed, all as of the date first written above.

GOOGLE INC.

By: _____
David C. Drummond
Vice President, Corporate Development

@LAST SOFTWARE, INC.

By: _____
Name:
Title:

STEELCURTAIN INC.

By: _____
David C. Drummond
President

U.S. BANK, NATIONAL ASSOCIATION

By: _____
Michael P. Susnow
Vice President

STOCKHOLDERS' REPRESENTATIVE

By: _____
Philip L. Reed, III

IN WITNESS WHEREOF, Parent, Sub, the Company, the Principal Stockholders, the Escrow Agent and the Stockholder Representative have caused this Agreement to be signed, all as of the date first written above.

GOOGLE INC.

By: _____
David C. Drummond
Vice President, Corporate Development

@LAST SOFTWARE, INC.

By: _____
Name: Mark D. Sawyer
Title: CEO & President

STEELCURTAIN INC.

By: _____
David C. Drummond
President

U.S. BANK, NATIONAL ASSOCIATION

By: _____
Michael P. Susnow
Vice President

STOCKHOLDERS' REPRESENTATIVE

By: _____
Philip L. Reed, III

IN WITNESS WHEREOF, Parent, Sub, the Company, the Principal Stockholders, the Escrow Agent and the Stockholder Representative have caused this Agreement to be signed, all as of the date first written above.

GOOGLE INC.

By: _____
David C. Drummond
Vice President, Corporate Development

@LAST SOFTWARE, INC.

By: _____
Name:
Title:

STEELCURTAIN INC.

By: _____
David C. Drummond
President

U.S. BANK, NATIONAL ASSOCIATION

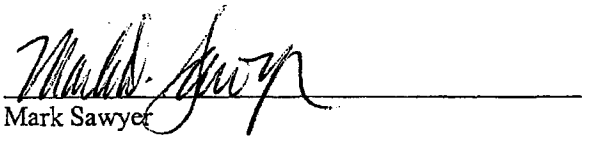
By: _____
Michael P. Susnow
Vice President

STOCKHOLDERS' REPRESENTATIVE

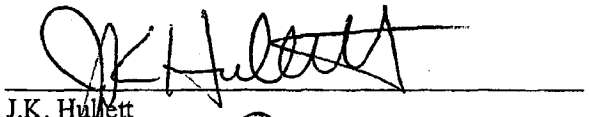
By: _____
Philip L. Reed, III

IN WITNESS WHEREOF, Parent, Sub, the Company, the Principal Stockholders, the Escrow Agent and the Stockholder Representative have caused this Agreement to be signed, all as of the date first written above.

PRINCIPAL STOCKHOLDERS



Mark Sawyer



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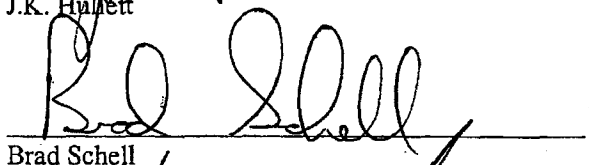
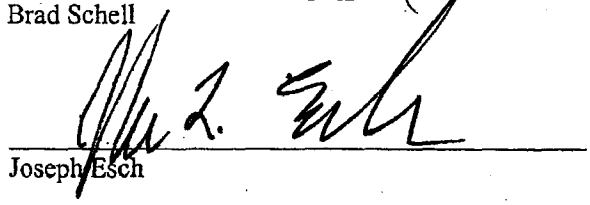
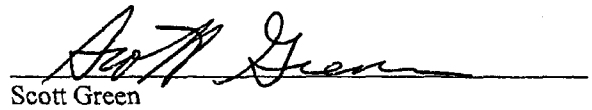


Brad Schell



Joseph Esch



Scott Green