

**TRADEMARK ASSIGNMENT**

Electronic Version v1.1  
 Stylesheet Version v1.1

<b>SUBMISSION TYPE:</b>	NEW ASSIGNMENT		
<b>NATURE OF CONVEYANCE:</b>	ASSIGNS THE ENTIRE INTEREST AND THE GOODWILL		
<b>CONVEYING PARTY DATA</b>			
<b>Name</b>	<b>Formerly</b>	<b>Execution Date</b>	<b>Entity Type</b>
WebFives Corporation		11/06/2007	CORPORATION: WASHINGTON
<b>RECEIVING PARTY DATA</b>			
<b>Name:</b>	Microsoft Corporation		
<b>Street Address:</b>	One Microsoft Way		
<b>City:</b>	Redmond		
<b>State/Country:</b>	WASHINGTON		
<b>Postal Code:</b>	98052		
<b>Entity Type:</b>	CORPORATION: WASHINGTON		
<b>PROPERTY NUMBERS Total: 5</b>			
<b>Property Type</b>	<b>Number</b>	<b>Word Mark</b>	
Serial Number:	77158778	CRYSTAL PLAY	
Serial Number:	77158767	WEB FIVES	
Serial Number:	76568315	VIZREA	
Serial Number:	78750623	VIZREA SNAP	
Serial Number:	76568316	STREAMLINING YOUR DIGITAL WORLD	
<b>CORRESPONDENCE DATA</b>			
<b>Fax Number:</b>	(206)587-2308		
	<i>Correspondence will be sent via US Mail when the fax attempt is unsuccessful.</i>		
<b>Email:</b>	trademark@cairncross.com		
<b>Correspondent Name:</b>	Elizabeth Chambers		
<b>Address Line 1:</b>	524 Second Avenue		
<b>Address Line 2:</b>	Suite 500		
<b>Address Line 4:</b>	Seattle, WASHINGTON 98104		
<b>ATTORNEY DOCKET NUMBER:</b>	5318-010		

OP \$140.00 77158778

NAME OF SUBMITTER:	Elizabeth Chambers
Signature:	/elizabethchambers/
Date:	12/13/2007

**Total Attachments: 29**

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**ASSET PURCHASE AGREEMENT**

among:

**WEBFIVES CORPORATION,**  
a Washington corporation;

**MICHAEL TOUTONGHI,**  
an individual;

and

**MICROSOFT CORPORATION,**  
a Washington corporation

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Dated as of November 6, 2007

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## ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement dated November 10, 2007 ("*Agreement*") is by and among: WebFives Corporation, a Washington corporation ("*Seller*"); its founder, Michael Toutonghi, an individual ("*Founder*"); and Microsoft Corporation, a Washington corporation ("*Buyer*").

Seller has developed certain intellectual property which enables users to post, share and synchronize digital media (including video, audio, photos and text) across multiple device types including mobile phones, client software and browser-based web services. The intellectual property that enables this service in the version that is available and has been presented to Buyer in the technical due diligence process that commenced on October \_\_, 2007 ("*TDD*"), and all concurrent or subsequent maintenance releases, error corrections, upgrades, enhancements, additions, improvements, extensions, modifications, successor versions, functionally equivalent replacements, and substitutions thereto, however named, is hereinafter defined as "*Software*."

Seller desires to sell, and Buyer desires to buy, certain of Seller's assets on the terms and subject to the conditions set forth in this Agreement.

The parties agree as follows:

### 1. Purchase and Sale of Assets; Purchase Price; Closing

**1.1 Sale of Assets.** On the terms and subject to the conditions set forth in this Agreement, at the Closing (as defined below), the Seller shall sell, assign, and transfer, to Buyer, free and clear of any and all Encumbrances (as defined below), all of Seller's right, title and interest in and to the following assets of Seller:

(a) the Software and all related algorithms, application programming interfaces, data, databases, data collections, data structures, diagrams, formulae, inventions (whether or not patentable), know-how, methods, processes, proprietary information, protocols, schematics, specifications, software, software code (in any form, including source code and executable or object code), routines and subroutines, techniques, user interfaces, firmware listings, assemblers, applets, compilers, net lists, design tools, documentation, design documents, annotations, comments, system build software and instructions, diagrams, prototypes, all development and test related assets (including test suites, test codes and internally developed tools used for development and testing), test methodologies, software development kits, bug lists, support call logs, supplier and customer lists, materials that document design or design processes (including failed designs) or that document research or testing (including design, processes, and results), URLs or domain names with respect to the Software, web sites, works of authorship, and other forms of technology or intellectual property (whether or not embodied in any tangible form and including all tangible embodiments of the foregoing, such as instruction manuals, laboratory notebooks, prototypes, samples, studies, and summaries)(collectively, the "*Seller IP*");

(b) all past, present, and future rights of the following types, which may exist or be created under the laws of any jurisdiction in the world related to the Software: (A) rights associated with works of authorship, including but not limited to exclusive exploitation rights, copyrights, and moral rights; (B) trademark and trade name rights and similar rights; (C) trade secret rights; (D) patent and industrial property rights; (E) other proprietary rights in Seller IP; and (F) all tangible embodiments of and rights in or relating to registrations, renewals, extensions, combinations, divisions, and reissues of, and applications for, any of the rights referred to in clauses "(A)" through "(F)" above and related goodwill of Seller (including the right to use the name "WebFives," "Vizrea," and variations thereof) (collectively, the "*Seller IP Rights*");

(c) all rights of Seller under any written, oral, implied or other obligation, agreement, contract, understanding, arrangement, note, guaranty, indemnity, representation, warranty, deed, commitment, covenant, assurance or undertaking of any nature (each a "*Contract*") that: (i) is listed on Schedule 1.1(c) or (ii) is assigned to Buyer, at Buyer's election and without the payment of additional consideration, following the Closing in the event that such Contract was not previously disclosed by Seller to Buyer (provided that any such post-Closing assignment shall be inclusive of obligations and liabilities thereunder arising after the Closing Date in the ordinary course of business) (collectively, the "*Assigned Seller IP Contracts*");

(d) all claims (including claims for past infringement or misappropriation of Seller IP or Seller IP Rights) and causes of action of Seller against third parties (regardless of whether or not such claims and causes of action have been asserted by Seller), and all rights of indemnity, warranty rights, rights of contribution, rights to refunds, rights of reimbursement and other rights of recovery possessed by Seller (regardless of whether such rights are currently exercisable);

(e) those tangible assets described in Schedule 1.1(e); and

(f) all books, records, files and data of Seller embodying or related to Seller IP and Seller IP Rights.

Collectively, the assets described in this Section 1.1 are referred to as the "*Transferred Assets*".

For the purposes of this Agreement, "*Encumbrance*" shall mean any lien, pledge, hypothecation, charge, mortgage, security interest, encumbrance, equity, trust, equitable interest, claim, preference, right of possession, lease, tenancy, license, encroachment, covenant, infringement, interference, order, proxy, option, right of first refusal, preemptive right, legend, defect, or other restriction of any nature.

**1.2 Excluded Assets.** The Transferred Assets do not and shall not include any assets which are not described in Section 1.1, above, including without limitation:

(a) any cash or cash equivalents, marketable securities, or short-term investments held by Seller;

- (b) any bank accounts of Seller;
- (c) any rights to any of Seller's claims for federal, state, local or foreign refunds related to any Tax (as defined below);
- (d) permits, licenses, franchises, consents or authorizations issued by and filings with, any governmental agency, except to the extent that any such permits, licenses, franchises, consents or authorizations issued by and filings are related to Seller IP or Seller IP Rights;
- (e) the tangible assets associated with Seller's data center, located at the Westin Building in Seattle, Washington ("*Data Center*");
- (f) all other equipment, materials, prototypes, tools, supplies, vehicles, furniture, fixtures, improvements and other tangible assets other than those listed on Schedule 1.1(e);
- (g) all Contracts other than the Assigned Seller IP Contracts;
- (h) all books, records, files and data of Seller unrelated to Seller IP and Seller IP Rights, including without limitation the Seller's corporate books and records; and
- (i) all accounts receivable, notes receivable and other receivables of Seller.

Collectively, the assets described in this Section 1.2 are the "*Excluded Assets*".

**1.3 No Assumed Liability.** Other than the Assigned Seller IP Contracts, Buyer shall not assume, perform or discharge:

- (a) any account payable of Seller;
- (b) any debt, obligation, duty or liability of any nature (including any unknown, undisclosed, unmatured, unaccrued, unasserted, contingent, indirect, conditional, implied, vicarious, derivative, joint, several or secondary liability) (each a "*Liability*") of Seller;
- (c) any Liability in connection with the Excluded Assets;
- (d) any Liability of Seller for the payment of any tax (including any income tax, franchise tax, capital gains tax, estimated tax, gross receipts tax, value-added tax, surtax, excise tax, ad valorem tax, transfer tax, stamp tax, sales tax, use tax, property tax, business tax, occupation tax, inventory tax, occupancy tax, withholding tax or payroll tax), levy, assessment, tariff, impost, imposition, toll, duty, deficiency or fee, and any related charge or amount (including any fine, penalty or interest), that is, has been or may

in the future be imposed, assessed or collected by or under the authority of any governmental body ("*Tax*"); and

(e) any Liability of Seller to any employee, contractor or former employee or contractor of Seller, including without limitation for any wages, benefits or severance or arising out of any Plans (as defined below).

Collectively, the liabilities described in this Section 1.3 are referred to as the "*Excluded Liabilities*."

**1.4 Purchase Price.** The aggregate purchase price to be paid by Buyer to Seller for the sale of the Transferred Assets shall be \$1,250,000 ("*Purchase Price*"), by wire transfer, payable as follows:

(a) at the Closing, Buyer shall pay \$950,000 ("*Closing Payment*") to Seller; and

(b) at the Closing, Buyer shall deposit the remaining \$300,000 ("*Escrow Amount*") of the Purchase Price with Mellon Investor Services, LLC, as escrow agent ("*Escrow Agent*"), pursuant to the Escrow Agreement substantially in the form attached hereto as Exhibit A (the "*Escrow Agreement*") to secure claims by Buyer for indemnification pursuant to Section 6. Subject to any claims for indemnification pursuant to Section 6, the Escrow Amount shall be released subject to the terms of the Escrow Agreement thirty (30) days following the one year anniversary of Closing.

**1.5 Post-Closing Retention Payments.** In addition to the Purchase Price, Buyer shall make the following post-Closing retention payments (each a "*Post-Closing Retention Payment*") to the following individuals:

(a) Subject to the terms of Founder's offer letter, Buyer shall pay Founder a total of 9,839,865 Czech Korunas (which the parties acknowledge is equal to \$525,000 at the exchange rate of 18.7426 Czech Korunas to 1 U.S. dollar), payable in two equal payments of 4,919,932.50 Czech Korunas (which the parties acknowledge is equal to \$262,500 at the exchange rate of 18.7426 Czech Korunas to 1 U.S. dollar).

(b) Subject to the terms of each individual's offer letter, Buyer shall pay \$75,000 to each of Gary Glouner and Edmond Yu, and shall pay 1,405,695 Czech Korunas (which the parties acknowledge is equal to \$75,000 at the exchange rate of 18.7426 Czech Korunas to 1 U.S. dollar) to Jan Vorlicek.

**1.6 Sales Taxes.** Seller shall bear and pay, or shall reimburse Buyer for, any Taxes that may become payable in connection with the transactions contemplated by this Agreement ("*Transactions*"). To the extent applicable, Buyer will provide to Seller a Washington State resale certificate after Closing.

**1.7 Allocation.** The Purchase Price (including, for purposes of this Section 1.7, any other consideration paid to or deemed paid to Seller for federal income tax purposes) shall be allocated among the Transferred Assets as set forth on a schedule to be

agreed upon by Buyer and Seller within 60 days of the date hereof, which schedule shall be prepared in accordance with Section 1060 of the Internal Revenue Code of 1986, as amended (the "*Code*") and the Treasury Regulations thereunder, and which schedule shall include an Internal Revenue Service ("*IRS*") Form 8594, of which Part II shall be completed, subject to adjustments by mutual consent of Seller and Buyer. All parties hereto agree to file all federal, state, local, and foreign returns, tax reports, elections, information statements, and financial statements consistent with such allocation, and Seller and Buyer shall each file an IRS Form 8594, with its federal income tax return for the tax year in which the Closing occurs.

**1.8 Closing.** The closing of the sale of the Transferred Assets (the "*Closing*") shall take place simultaneously with the signing of this Agreement (the "*Closing Date*"). Notwithstanding the foregoing, the parties agree that the Closing shall be deemed effective as of 12:01 a.m. on the Closing Date.

**(a) Buyer's Obligations at Closing.** Buyer shall deliver a wire transfer: (i) the Closing Payment to an account designated in writing by Seller on Seller letterhead; and (ii) the Escrow Amount to the Escrow Agent.

**(b) Seller's and Founder's Obligations at Closing.** At Closing, Seller shall execute and deliver or cause to be executed and/or delivered such bills of sale, endorsements, assignments and other documents as may be necessary in order to assign, convey, transfer and deliver to Buyer good and valid title to the Transferred Assets free of any Encumbrances, and Founder shall execute and deliver such Transactional Agreements as may be required pursuant to this Agreement. At Closing, the Seller shall deliver to Buyer the Transferred Assets, including without limitation copies of all source code and object code in a format acceptable to Buyer. Except as may be expressly agreed in writing pursuant to the Transitional Services Agreement, or other license agreement with Buyer or other Transactional Agreement, Seller shall not retain any copies of the source code and object code, including without limitation any version of the Software (including versions prior to the TDD) or any electronic copies thereof.

## **2. Representations and Warranties of Founder and Seller.**

Founder and Seller, jointly and severally, represent and warrant to Buyer as follows:

### **2.1 Corporate Existence, Records and Ownership.**

**(a)** Seller is a corporation duly organized and validly existing under the laws of the State of Washington. Seller is not required to be qualified, authorized, registered or licensed to do business as a foreign corporation in any other jurisdiction.

**(b)** Seller has delivered to Buyer accurate and complete copies of Seller's: (i) articles of incorporation, including all amendments thereto, as well as a proposed amendment in the form to be filed at or immediately following Closing; (ii) bylaws, including all amendments thereto; and (iii) minutes and other records of the meetings (including any actions taken by written consent) of Seller's Board of Directors



and shareholders, including without limitation approval by the Board of Directors and shareholders of this Agreement and the Transactions. Seller has never conducted any business under or otherwise used any fictitious name, assumed name, trade name or other name, other than "Vizrea Corporation" and "WebFives Corporation."

(c) The names and percentage ownership of each of the shareholders is set forth on Schedule 2.1, and other than such shareholders, no other person has any right to vote with respect to the Transactions. Other than as set forth on Schedule 2.1, there are no options, warrants, or other rights, agreements, arrangements, or commitments of any character to which Seller or any shareholder is a party or by which any such party is bound obligating the Seller or any shareholders to grant, issue, or sell any ownership interests or any other equity interest in Seller.

**2.2 Authority.** Seller and Founder each have the absolute and unrestricted right, power and authority to enter into and to perform their respective obligations under this Agreement and each of the other documents listed in Section 5 hereof or otherwise contemplated by this Agreement (the "**Transactional Agreements**") to which Seller and Founder is or may become a party; and the execution, delivery and performance by Seller of this Agreement and the Transactional Agreements to which it is or may become a party have been duly authorized by all necessary action on the part of Seller, and its Board of Directors and shareholders. This Agreement constitutes the legal, valid and binding obligation of Seller and Founder, enforceable against Seller and Founder in accordance with its terms. Upon the execution of each of the other Transactional Agreements at the Closing, each of such other Transactional Agreements to which Seller and Founder is a party shall constitute the legal, valid and binding obligation of Seller and Founder, and shall be enforceable against Seller and Founder in accordance with their respective terms.

### **2.3 Non-Contravention; Consents.**

(a) Neither the execution and delivery of this Agreement or any of the Transactional Agreements, nor the consummation of the Transactions, shall directly or indirectly (with or without notice or lapse of time): (i) result in a violation of, or give any governmental or regulatory authority, domestic or foreign (each a "**Governmental Body**") or other individual, corporation, partnership, association, trust, unincorporated organization, other entity or group ("**Person**") the right to challenge any of the Transactions or to exercise any remedy or obtain any relief under, any federal, state, foreign, or local law, statute, ordinance, rule, regulation, order, judgment, or decree (each a "**Legal Requirement**") to which the Founder, Seller, or any of Seller's assets, is subject; (ii) cause Buyer or any affiliate of Buyer to become subject to, or to become liable for the payment of, any Tax, other than Taxes Seller has agreed to pay pursuant to Section 1.6; (iii) result in a violation of any of the terms of, or give any Governmental Body the right to terminate or modify, any permit, license, approval, qualification or authorization issued by or under the authority of any Governmental Body or pursuant to any Legal Requirement ("**Governmental Authorization**") held by Seller; (iv) result in any breach of or constitute a default (or an event that with notice or lapse of time or both would become a default) under, or give to any other Person any rights of termination, amendment,

acceleration, or cancellation of, or require payment under, or result in the creation of an Encumbrance on any of Seller's assets pursuant to any material Contract, including the Assigned Seller IP Contracts, license, permit, franchise, or other instrument or obligation to which Seller is a party or by or to which Seller or any of its properties is bound or subject; or (v) result in the creation of an Encumbrance on any of the Transferred Assets.

(b) Other than the consent of Seller's Board of Directors and shareholders, Seller is not, nor shall it be, required to make any filing with or give any notice to, or to obtain any consent from, any Person or any Governmental Body in connection with the execution and delivery of this Agreement or any of the Transactional Agreements or the consummation of the Transactions.

**2.5 Title To Assets.** Except as disclosed pursuant to Section 2.8, Seller owns, and has good and valid title to, free and clear of any and all Encumbrances, all of the Transferred Assets and all rights of Seller under Contracts. The Transferred Assets constitute all of the properties, rights, title, interests and other tangible and intangible assets related to Seller IP and Seller IP Rights.

**2.6 Financial Statements; Liabilities.**

(a) Attached as Schedule 2.6 are true, correct and complete copies of (i) the unaudited, internal financial statements of the Seller for the years ended December 31, 2006 and December 31, 2005 and the related balance sheets and statements of income; and (ii) the unaudited, internal financial statements of the Seller as of and for the period ended September 30, 2007, including a balance sheet as of such date (the "*Latest Balance Sheet*") and a statement of income (collectively, the "*Financial Statements*"). Such Financial Statements present fairly, in all material respects, the financial position and results of operations of Seller as of their respective dates and for the respective periods covered thereby.

(b) Except for liabilities reflected in the Latest Balance Sheet and current liabilities incurred in the ordinary course of business, consistent with past practice (all of which are Excluded Liabilities), since the date of the Latest Balance Sheet, Seller has no Liabilities of any sort, whether absolute or contingent, due or to become due, known or unknown, asserted or unasserted that could reasonably be expected to have a material adverse affect on the Seller's business.

(c) Seller has never guaranteed or otherwise agreed to cause, insure or become liable for, and Seller has never pledged any of its assets to secure, the performance or payment of any obligation or other Liability of any other Person. Seller has not, at any time, made a general assignment for the benefit of creditors, filed, or had filed against it, any bankruptcy petition or similar filing, suffered the attachment or other judicial seizure of all or a substantial portion of its assets, or admitted in writing its inability to pay its debts as they become due.

**2.7 Real Property.** Seller does not own any real property or any interest in real property. The Seller leases real property only pursuant to those lease agreements

listed on Schedule 2.7, which are all month to month, and which shall not, in any event, be assumed by Buyer and is an Excluded Liability.

## 2.8 Seller IP.

(a) The subsections of Schedule 2.8(a) accurately provide the information listed below.

(i) Schedule 2.8(a)(i) identifies and describes each proprietary product or service developed, manufactured, marketed, or sold by Seller at any time since commencement of TDD, and any product or service currently under development by Seller;

(ii) Schedule 2.8(a)(ii) identifies and describes: (A) all Seller IP Rights that are registered, filed, or issued under the authority of, with or by any Governmental Body, including all patents, registered copyrights, registered mask works and registered trademarks and all applications for any of the foregoing ("**Registered IP**") in which Seller has or purports to have an ownership interest of any nature (whether exclusively, jointly with another Person or otherwise); (B) the jurisdiction in which such item of Registered IP has been registered or filed and the applicable registration or serial number; (C) any other Person that has an ownership interest in such item of Registered IP and the nature of such ownership interest; and (D) each product or service identified in Schedule 2.8(a)(i) that embodies, utilizes or is based upon or derived from (or, with respect to products and services under development, that is expected to embody, utilize or be based upon or derived from) such item of Registered IP;

(iii) Schedule 2.8(a)(iii) identifies and describes: (A) all Seller IP Rights or Seller IP licensed to Seller; (B) the corresponding Contracts pursuant to which such Seller IP Rights or Seller IP is licensed to Seller; (C) whether the license or licenses so granted to Seller are exclusive or nonexclusive; (D) whether the license or licenses so granted to Seller are with regard to any third party source code; and (E) whether the license or licenses so granted to Seller may be assigned to Buyer freely and fully without notice to or consent of the licensor (collectively, the "**In-Licenses**"); and

(iv) Schedule 2.8(a)(iv) identifies and describes: (A) each Contract pursuant to which any Person has been granted any license under or interest in any Seller IP Rights or Seller IP in which Seller has (or purports to have) an ownership interest or an exclusive right (collectively, the "**Out-Licenses**"); (B) the name of the licensee; (C) the product or service subject to the Out-License; (D) any on-going support obligations; and (E) and the related revenues generated from such Out-License.

(b) Seller has provided to Buyer a complete and accurate copy of each Contract related to Seller IP, including but not limited to each: (i) end user license agreement; (ii) development agreement; (iii) distributor or reseller agreement; (iv) agreement containing any assignment or license of intellectual property or any confidentiality provision; (v) consulting or independent contractor agreement containing any assignment or license of intellectual property or any confidentiality provision; or (vi)

confidentiality or nondisclosure agreement. Except for the disclosed Out-Licenses and In-Licenses, Seller is not bound by, and no Seller IP is subject to, any Contract containing any covenant or other provision that in any way limits or restricts the ability of Seller to use, exploit, assert, or enforce any Seller IP Rights anywhere in the world.

(c) Seller exclusively owns all right, title and interest to and in the Seller IP (other than the In-Licenses) free and clear of any Encumbrances (other than nonexclusive licenses Out-Licenses). Without limiting the generality of the foregoing:

(i) all material documents and instruments necessary to perfect the rights of Seller in the Seller IP have been validly executed, delivered and filed in a timely manner with the appropriate Governmental Body, provided, however, that Seller has not made any filings related to copyrights or trademarks with any Governmental Body;

(ii) each Person who is or was an employee or independent contractor of Seller and who is or was involved in the creation or development of any Seller IP has signed a valid and enforceable agreement containing an irrevocable assignment of Seller IP Rights to Seller and confidentiality provisions protecting the Seller IP as a trade secret;

(iii) no current or former employee or independent contractor of Seller, nor any Person who is or was involved in the creation or development of any Seller IP, has any claim, right (whether or not currently exercisable) or interest to or in any Seller IP;

(iv) to the best of their knowledge, no Shareholder, employee or independent contractor of Seller, nor any Person who is or was involved in the creation or development of any Seller IP, is: (A) bound by or otherwise subject to any Contract restricting him or her from performing his or her duties for Seller; or (B) in breach of any Contract with any former employer or other Person concerning Seller IP Rights or confidentiality;

(v) no funding, facilities or personnel of any Governmental Body or other Person were used by Seller, directly or indirectly, to develop or create, in whole or in part, any Seller IP;

(vi) Seller has taken all reasonable steps to maintain the confidentiality of and otherwise protect and enforce its rights in all proprietary information held by Seller, or purported to be held by Seller, as a trade secret;

(vii) Seller has never assigned or otherwise transferred ownership of, or agreed to assign or otherwise transfer ownership of, any Seller IP Right to any other Person;

(viii) Seller is not now nor has ever been a member or promoter of, or a contributor to, any industry standards body or similar organization that could

require or obligate Seller to grant or offer to any other Person any license or right to any Seller IP; and

(ix) Seller owns or otherwise has, and immediately following the Closing Buyer shall have, all Seller IP and Seller IP Rights needed to conduct the business of Seller as currently conducted, other than those licenses that Buyer has requested that Seller terminate or not renew, which licenses are set forth on Schedule 2.8(c)(ix).

(d) All Seller IP Rights are valid and enforceable. Without limiting the generality of the foregoing:

(i) each U.S. patent application and U.S. patent in which Seller has or purports to have an ownership interest was filed within one year of the first printed publication, public use or offer for sale of each invention described in such U.S. patent application or U.S. patent;

(ii) to Seller's and Founder's knowledge, each foreign patent application and foreign patent in which Seller has or purports to have an ownership interest was filed, or claims priority to a patent application filed, before the time at which each invention described in such foreign patent application or foreign patent was first made available to the public;

(iii) no trademark (whether registered or unregistered) or trade name owned, used, or applied for by Seller conflicts or interferes with any trademark (whether registered or unregistered) or trade name owned, used or applied for by any other Person;

(iv) none of the goodwill associated with or inherent in any trademark (whether registered or unregistered) in which Seller has or purports to have an ownership interest has been impaired;

(v) except as disclosed on Schedule 2.8(d)(v), all Seller IP Rights that are Registered IP are and at all times have been in compliance with all Legal Requirements, and all filings, payments and other actions required to be made or taken to maintain such Seller IP Rights in full force and effect have been made by the applicable deadline;

(vi) except as disclosed on Schedule 2.8(d)(vi), no application for a patent or for a copyright or trademark registration or any other type of Registered IP filed by or on behalf of Seller has been abandoned, allowed to lapse or rejected;

(vii) Schedule 2.8(d)(vii) accurately identifies and describes each filing, payment, and action that should be made or taken on or before the date that is 120 days after the Closing in order to maintain each such item of Registered IP in full force and effect;

(viii) Seller has provided to Buyer complete and accurate copies of all applications, correspondence and other material documents related to each such item of Registered IP;

(ix) except as disclosed on Schedule 2.8(d)(ix), no action, suit, litigation, arbitration, proceeding (including any civil, criminal, administrative, investigative or appellate proceeding and any informal proceeding), prosecution, contest, hearing, inquiry, inquest, audit, examination or investigation commenced, brought, conducted or heard by or before, or otherwise involving, any Governmental Body or any arbitrator or arbitration panel ("*Proceeding*") and no interference, opposition, reissue or reexamination of any nature is or has been pending or, to the best of the knowledge of Seller and the Founder, threatened, in which the scope, validity or enforceability of any Seller IP Right is being, has been, or could reasonably be expected to be, contested or challenged; and

(x) there is no basis for a claim that any Seller IP Right is invalid or unenforceable.

(e) Neither the execution, delivery or performance of any of the Transactional Agreements nor the consummation of the Transactions shall, with or without notice or the lapse of time, result in or give any other Person the right or option to cause or declare: (i) a loss of, or Encumbrance on, any Seller IP or Seller IP Rights; (ii) a breach of any Contract listed or required to be listed on Schedule 2.8(a); (iii) the release, disclosure or delivery of any Transferred Assets by or to any escrow agent or other Person; or (iv) the grant, assignment or transfer to any other Person of any license or other right or interest under, to or in any of the Seller IP or Seller IP Rights. Each of the Assigned Seller IP Contracts is freely assignable to Buyer, without the consent of any third party, and Seller has provided any necessary notices to accomplish such assignments prior to Closing.

(f) No Person has infringed, misappropriated, or otherwise violated, and no Person is currently infringing, misappropriating or otherwise violating, any Seller IP Right or Seller IP. Seller has not sent any notice alleging that such infringement or violation has taken place.

(g) Seller has never infringed (directly, contributorily, by inducement or otherwise), misappropriated or otherwise violated any intellectual property right of any other Person. Without limiting the generality of the foregoing:

(i) No product, information or service ever manufactured, produced, distributed, published, used, provided or sold by or on behalf of Seller, and no Seller IP ever owned, used or developed by Seller, has ever infringed, misappropriated or otherwise violated any intellectual property right of any other Person;

(ii) no infringement, misappropriation or similar claim or Proceeding is pending or has been threatened against Seller or against any other Person

who may be entitled to be indemnified, defended, held harmless or reimbursed by Seller with respect to such claim or Proceeding;

(iii) Seller has never received any notice or other communication (in writing or otherwise) relating to any actual, alleged or suspected infringement, misappropriation or violation of any intellectual property right of another Person;

(iv) Except as disclosed on Schedule 2.8(g)(iv), Seller is not bound by any Contract to indemnify, defend, hold harmless or reimburse any other Person with respect to any intellectual property infringement, misappropriation or similar claim;

(v) Seller has never assumed, or agreed to discharge or otherwise take responsibility for, any existing or potential Liability of another Person for infringement, misappropriation or violation of any Seller IP Right; and

(vi) no claim or Proceeding involving any Seller IP or any Seller IP Right licensed to Seller is pending or, to Seller's and the Founder's knowledge, has been threatened, except for any such claim or Proceeding that, if adversely determined, would not adversely affect: (A) the use or exploitation of such Seller IP or Seller IP Right by Seller; or (B) the manufacturing, distribution or sale of any product or service being developed, offered, manufactured, distributed or sold by Seller.

Schedule 2.8(g) accurately identifies (and Seller has provided to Buyer a complete and accurate copy of) each letter or other written or electronic communication or correspondence that has been sent or otherwise delivered by or to Seller or any representative of Seller regarding any actual, alleged or suspected infringement or misappropriation by Seller of any intellectual property right of any Person, and provides a brief description of the current status of the matter referred to in such letter, communication or correspondence.

(h) None of Seller's Software: (i) contains any bug, defect or error that materially adversely affects the use, functionality or performance of such Seller Software or any product or system containing or used in conjunction with such Software; or (ii) fails to comply with any applicable warranty or other contractual commitment relating to the use, functionality or performance of such Software or any product or system containing or used in conjunction with such Software. Schedule 2.8(h) provides a complete and accurate list of all known bugs, defects and errors in each version and component of the Software.

(i) The Software does not contain any "back door," "drop dead device," "time bomb," "Trojan horse," "virus," or "worm" (as such terms are commonly understood in the software industry) or any other code designed or intended to have, or capable of performing, any of the following functions: (i) disrupting, disabling, harming or otherwise impeding in any manner the operation of, or providing unauthorized access

to, a computer system or network or other device on which such code is stored or installed; or (ii) damaging or destroying any data or file without the user's consent.

(j) Except as disclosed on Schedule 2.8(j), Seller warrants that the Seller IP is not, and when delivered to Buyer shall not be, in whole or in part, governed by an Excluded License. An "*Excluded License*" is any license that requires, as a condition of use, modification and/or distribution of software subject to the Excluded License, that such software and/or other software combined and/or distributed with such software be (i) disclosed or distributed in source code form; (ii) licensed for the purpose of making derivative works; or (iii) redistributable at no charge. No third party code has been incorporated into the Seller IP, other than third party code which is subject to the In-Licenses disclosed on Schedule 2.8(a). Seller warrants that the all versions of the Software do not contain, run, rely on, or otherwise use in any way whatsoever any Sun Microsystems Java Technology. "*Sun Microsystems Java Technology*" means any Java language or Java platform technology owned, developed or licensed by Sun Microsystems, Inc. ("*Sun*"), including without limitation, any version of (i) the Sun Java Development Kit, (ii) the Sun Java Runtime Environment, (iii) the Sun Java Virtual Machine, (iv) any Sun class library files, or (v) technology derived (whether by Sun or any other party) from the foregoing.

(k) The source code of the Software has not been delivered, licensed or made available to any escrow agent or other Person, nor does Seller have any duty or obligation (whether present, contingent or otherwise) to deliver, license or make available the source code for any Seller Software to any escrow agent or other Person. No event has occurred, and no circumstance or condition exists, that (with or without notice or lapse of time) shall, or could reasonably be expected to, result in the delivery, license or disclosure of any source code for any Seller Software to any other Person.

(l) Except as disclosed in Schedule 2.8(l), Seller has not incorporated any code, modules, utilities, or libraries that are covered in whole or in part by a license that requires that Seller give attribution for its use of such code, modules, utilities, or libraries.

(m) Seller is in compliance with all applicable laws, rules, and regulations governing the collection and use of personal information and such collection and use is in accordance with Seller's privacy policy as published (now or in the past) on its website and any other privacy policies presented to customers or other individuals. Neither the execution nor delivery of this Agreement, nor the performance of Seller's obligations hereunder, will violate any such applicable law, rule, or regulation or any of Seller's privacy policies.

## 2.9 Assigned Seller IP Contracts.

(a) Each of the Assigned Seller IP Contracts is in full force and effect as of the date of this Agreement. Seller has delivered to Buyer accurate and complete copies of all Assigned Seller IP Contracts, including all amendments thereto.



(b) Except as disclosed on Schedule 2.9(b), Seller and Founder represent and warrant that: (i) no Person has violated or breached, or declared or committed any default under, any Assigned Seller IP Contract; (ii) no event has occurred, and no circumstance or condition exists, that might (with or without notice or lapse of time) (A) result in a violation or breach of any of the provisions of any Assigned Seller IP Contract, (B) give any Person the right to declare a default or exercise any remedy under any Assigned Seller IP Contract, (C) give any Person the right to accelerate the maturity or performance of any Assigned Seller IP Contract, or (D) give any Person the right to cancel, terminate or modify any Assigned Seller IP Contract; (iii) Seller has not received any notice or other communication (in writing or otherwise) regarding any actual, alleged, or potential violation or breach of, or default under, any Assigned Seller IP Contract; and (iv) Seller has not waived any right under any Assigned Seller IP Contract.

(c) Seller and the Founder have no knowledge of any basis upon which any party to any Assigned Seller IP Contract may object to (i) the assignment to Buyer of any right under any Assigned Seller IP Contract, or (ii) the delegation to or performance by Buyer of any obligation under such Assigned Seller IP Contract.

**2.10 Compliance with Legal Requirements.** To the best of their knowledge, Seller is, and has since its formation been, in compliance in all material respects with each Legal Requirement that is applicable to it or to the conduct of its business or the ownership or use of any of its assets. Seller has not received, at any time, any communication from any Governmental Body or any other Person regarding any actual, alleged, possible or potential violation of, or failure to comply with, any Legal Requirement.

**2.11 Absence of Litigation.** There is no claim, action, suit, litigation, Proceeding, arbitration, or investigation of any kind, at law or in equity (including actions or Proceedings seeking injunctive relief), pending or, to the knowledge of Seller and Founder, threatened against Seller or any properties or rights of Seller, or relating to this Agreement or the Transactions, and Seller is not subject to any continuing order of, consent decree, settlement agreement, or other similar written agreement with, or continuing investigation by, any Governmental Body, or any judgment, order, writ, injunction, decree, or award of any Governmental Body or arbitrator.

**2.12 Tax Matters.**

(a) Seller has timely filed (or caused to be filed) all federal, state, local, and foreign Tax returns, reports, elections, and information statements ("**Returns**"), including excise tax Returns, required to be filed by it, which Returns are true, correct, and complete in all material respects. All Taxes required to be paid (whether or not shown on any Return) have been paid. Seller has provided Buyer true and correct copies of all Returns and all correspondence with applicable taxing authorities regarding such Returns.

(b) No deficiencies or adjustments for any Tax have been claimed, proposed, assessed, or threatened in writing. No claim has ever been made by an

authority in a jurisdiction where Seller does not file Returns that Seller is or may be subject to taxation by that jurisdiction. Seller has not entered into any agreements, waivers, or other arrangements in respect of the statute of limitations in respect of its Taxes or Returns. Seller has no interest in any joint ventures, partnerships, limited liability companies, or other business entities (within the meaning of Treasury Regulation Section 301.7701-3).

(c) There are no liens for Taxes upon Seller's assets except for Taxes that are not yet due and payable. Seller has withheld all Taxes required to be withheld in respect of wages, salaries, and other payments to all employees and any Taxes required to be withheld from any other Person and has timely paid all such amounts withheld to the proper taxing authority.

(d) Seller is not and has not been a party to any Tax sharing or Tax allocation agreement, nor does it have, nor has it had, a "permanent establishment" (as defined in any applicable income tax treaty) in any country other than the United States.

(e) None of Seller's assets is property that is required to be treated as owned by any other Person pursuant to the "safe harbor lease" provisions of former Section 168(f)(8) of the Code and in effect immediately prior to the enactment of the Tax Reform Act of 1986 and none of Seller's assets is "tax exempt use property" within the meaning of Section 168(h) of the Code. None of Seller's assets secures any debt the interest on which is Tax exempt under Section 103 of the Code. Seller is liable for no Taxes under the provisions of Treas. Reg. Section 1.1502-6 (or any similar provision of state, local, or foreign law) as a transferee or successor, by contract, or otherwise.

(f) Seller has provided to Buyer correct and complete copies of all federal, state and foreign Tax Returns, examination reports and statements of deficiencies assessed against or agreed to by Seller since December 31, 2003.

### **2.13 Employees; Benefit Plans.**

(a) Seller does not have any written contract of employment or other employment agreement with any of its employees that is not terminable at will by Seller without notice or the payment of severance or other amounts, except for such severance payments that shall be paid in full by Seller and are Excluded Liabilities. Seller is not a party to any pending, or to Seller's and Founder's knowledge, threatened, labor dispute. To Seller's and Founder's knowledge, Seller has not been the subject of any organizing drive. Seller has complied with all applicable federal, state, and local laws, ordinances, rules and regulations and requirements relating to the employment of labor, including but not limited to the provisions thereof relating to wages, hours, collective bargaining, layoffs, plant closings, payment of Social Security, unemployment, withholding and similar employment related Taxes, and ensuring equality of opportunity for employment and advancement of minorities, women, and other legally protected groups. There are no claims pending, or to Seller's and Founder's knowledge, threatened to be brought, in any court or administrative agency by or on behalf of any former or current Seller employee

or government agency for compensation, commissions, pending severance benefits, vacation time, vacation pay or pension benefits, or any other claim pending from or on behalf of any current or former employee or government agency or any other person arising out of Seller's status as employer, whether in the form of claims for employment discrimination, harassment, unfair labor practices, grievances, wrongful discharge or otherwise.

(b) Except as disclosed on Schedule 2.13(b), Seller has no and has never had a plan, program, policy, practice, Contract or other arrangement providing for compensation, severance, termination pay, deferred compensation, performance awards, stock interest awards, 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 the Employee Retirement Income Security Act of 1974, as amended ("*ERISA*") (whether or not ERISA is applicable to such plan)(collectively, "*Plans*"), that is or has been maintained, contributed to, or required to be contributed to, by Seller for the benefit of any Seller employee or contractor, or with respect to which Seller has or may have any Liability or obligation.

**2.14 Sale of Products.** Other than the licenses and distributions of the Seller IP pursuant to the Out-Licenses disclosed in Schedule 2.8(a), Seller has never sold, licensed or distributed any Seller IP to any Person.

**2.15 Sufficiency of Transferred Assets.** Except as disclosed on Schedule 2.15, subject to transfer or migration of the Software from the Data Center and/or other tangible assets of Seller, the Transferred Assets, together with such employees as Buyer may need to run Seller's business, should, to the best of Seller's and Founder's knowledge, be sufficient for Buyer to conduct the business of Seller following the Closing in a manner substantially similar to the manner in which the Seller's business was run by Seller immediately prior to the Closing.

**2.16 Brokers.** Seller has not become obligated to pay, and has not taken any action that might result in any Person claiming to be entitled to receive, any brokerage commission, finder's fee or similar commission or fee in connection with any of the Transactions.

**2.17 Disclosure.** Neither the representations or warranties made by Seller and Founder in this Agreement, nor the disclosure schedules attached hereto, nor any document, written information, statement, certificate or Exhibit prepared and furnished or to be prepared and furnished by Seller pursuant to this Agreement, when taken together, contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements or facts contained herein or therein not misleading in light of the circumstances under which they were furnished.

**2.18 Reliance.** Seller and the Founder make the foregoing representations and warranties with the knowledge and expectation that Buyer is placing reliance thereon.

### 3. Representations and Warranties of Buyer.

Buyer represents and warrants, to and for the benefit of Seller as follows:

**3.1 Authority; Binding Nature of Agreements.** Buyer has the absolute and unrestricted right, power and authority to enter into and perform its obligations under this Agreement and the Transactional Agreements to which it is a party, and the execution and delivery of this Agreement and the Transactional Agreements to which it is a party by Buyer have been duly authorized by all necessary action on the part of Buyer. This Agreement and the Transactional Agreements to which it is a party constitute the legal, valid and binding obligation of Buyer, enforceable against it in accordance with their respective terms.

**3.2 Non-Contravention.** Neither the execution and delivery of any of the Transactional Agreements, nor the consummation or performance of any of the Transactions, shall directly or indirectly (with or without notice or lapse of time) contravene, conflict with or result in a violation of Buyer's Articles of Incorporation or Bylaws, or give any Governmental Body or other Person the right to challenge any of the Transactions or to exercise any remedy or obtain any relief under any Legal Requirement to which Buyer is subject.

**3.3 Brokers.** Buyer has not become obligated to pay, and has not taken any action that might result in any Person claiming to be entitled to receive, any brokerage commission, finder's fee or similar commission or fee in connection with any of the Transactions.

### 4. Covenants.

**4.1 Change of Name.** Following the Closing Date, Seller shall not use the name "WebFives," or any names or titles confusingly similar to such name except in connection with governmental filings and references to past work history. Within one week following Closing, Seller will amend its articles of incorporation to change its name to a name reasonably acceptable to Buyer and shall provide Buyer with a copy of its amended certificate of formation. Following the Closing, Buyer shall have the right to use the name "WebFives" and derivations thereof.

**4.2 Publicity.** Neither Seller, nor any of its shareholders (including Founder), directors, officers, employees or agents, shall issue or make, or allow to have issued or made, any press release or public announcement to any third party concerning this Agreement or the Transactions without Buyer's prior, written approval (which may be withheld in Buyer's reasonable discretion). Without limitation to the foregoing, in no event shall Seller nor any of its shareholders (including Founder), directors, officers, employees or agents disclose to any third party any of the specific terms and conditions of this Agreement, including without limitation the Purchase Price.

**4.3 Further Assurances.** Each party hereto shall execute and/or cause to be delivered to each other party hereto such instruments and other documents, and shall take

such other actions, as such other party may reasonably request (prior to, at or after the Closing) for the purpose of carrying out or evidencing any of the Transactions.

**4.4 Future Employment.** Certain members of Seller's workforce may be offered the opportunity to commence an employment relationship with Buyer or a subsidiary of Buyer, under terms and conditions acceptable to Buyer. Nothing contained in this Agreement may be considered as requiring Buyer or a subsidiary of Buyer to continue any specific plan or benefit, nor to confer upon any individual, employee, independent contractor, beneficiary, dependent, legal representative, or collective bargaining agent of such individual any right or remedy of any nature or kind whatsoever under or by reason of this Agreement, including any right to employment or to continued employment for any specified period, at any specified location, under any specified job category, or with any specified terms, or any right to severance, except as specifically provided for in Section 1.5 above and in any offer letter or other agreement of employment approved by Buyer. Seller will make any and all severance payments owed to members of its workforce that are required under the terms of Seller's pre-existing employment agreements and is strictly and solely responsible for such payments. Seller will release each of its employees who are offered employment by Buyer from any non-competition covenants or other agreements that would impede such employees' ability to work for Buyer. Seller will use commercially reasonable efforts to assist Buyer or a subsidiary of Buyer in connection with its recruitment efforts.

**5. Conditions Precedent.** The following conditions have been completed by Seller prior hereto or are being completed concurrently herewith (or have been waived by Buyer, in whole or in part, in writing):

**5.1 Employment Offers.** Buyer (or its designated affiliate) shall have received from each of the Post-Closing Employees: (a) a fully executed offer letter accepting Buyer's (or its designated affiliate's) offer of employment; (b) an employee agreement containing terms established by Buyer, including non-disclosure and non-competition covenants; and (c) any such other agreements as are customarily executed by new employees of Buyer in form and content satisfactory to Buyer. None of the Post-Closing Employees shall have expressed any intent to, or taken any action to, rescind, terminate, modify or dishonor such agreements. Further, Buyer shall have all required authorizations for employment of the Post-Closing Employees by Buyer, including without limitation all documentation required by the Immigration Reform and Control Act. Each such employee shall have resigned from employment with Seller.

**5.2 Assignment of Transferred Assets.** Seller shall have executed and delivered: (i) a Bill of Sale, substantially in the form attached hereto as Exhibit B, (ii) an Assignment of Copyrights and Trademarks, substantially in the form attached hereto as Exhibit C, (iii) an Assignment and Assumption of Assigned Seller IP Contracts, substantially in the form attached hereto as Exhibit D, and (iv) an Patent Assignments and Declarations, substantially in the form attached hereto as Exhibit E.

**5.3 Transitional Services Agreement.** Seller shall have entered into a Transitional Services Agreement with Buyer, substantially in the form attached hereto as

Exhibit F, related to the transitional support services for the Software and post-Closing obligations related thereto following the Closing.

**5.4 Noncompetition Agreement.** Founder shall have entered into a noncompetition agreement, substantially in the form attached hereto as Exhibit G.

**5.5 Escrow Agreement.** Seller and Escrow Agent shall have executed and delivered the Escrow Agreement.

## **6. Indemnification.**

**6.1 Indemnification of Buyer.** Seller and Founder shall jointly and severally indemnify and hold Buyer, its subsidiaries, and their respective directors, officers, employees, and agents (each a "**Buyer Party**" and collectively, the "**Buyer Parties**") harmless from any and all claims, demands, losses, costs, expenses (including reasonable attorneys' fees and expenses), obligations, liabilities, and/or damages (collectively, "**Claims**") that any Buyer Party may suffer or incur arising out of or in connection with (i) any breach, or any claim (including claims by parties other than Buyer) that if true, would constitute a breach, by Seller or Founder of any representation or warranty of Seller or Founder contained in this Agreement or any of the Transactional Agreements; (ii) the failure, partial or total, of Founder or Seller to perform any agreement or covenant required by this Agreement or the Transactional Agreements (including without limitation the Transitional Services Agreement) to be performed by it or them; (iii) the Excluded Assets and Excluded Liabilities; (iv) any federal, state, local, or foreign Tax Liability, or asserted Tax Liability of Seller; (v) any Liability under any fraudulent transfer or bulk sales law or act; (vi) any liability relating to or arising out of the ownership or operation of Seller prior to Closing; or (vii) any Liability to employees, consultants, or Plans of Seller.

**6.2 Notice.** Any Buyer Party entitled to receive indemnification under this Section 6 (the "**Indemnified Party**") agrees to give prompt written notice to the party or parties required to provide such indemnification (the "**Indemnifying Parties**") upon the occurrence or assertion of any indemnifiable Claim or the commencement of any action in respect of which such a Claim may reasonably be expected to occur (a "**Loss Claim**"), but the Indemnified Party's failure to give such notice shall not affect the obligations of the Indemnifying Party under this Section 6 except to the extent that the Indemnifying Party is materially prejudiced thereby and shall not affect the Indemnifying Party's obligations or liabilities otherwise than under this Section 6. Such written notice shall set forth a reference to the event or events forming the basis of such Loss Claim and the estimated amount involved, unless such amount is uncertain or contingent, in which event the Indemnified Party shall give a later written notice when the amount becomes fixed.

**6.3 Defense of Claims.** Buyer may elect to assume and control the defense of any Loss Claim, including the employment of counsel reasonably satisfactory to Buyer and the payment of expenses related thereto, as long as the Loss Claim does not seek to impose any Liability or obligation on the Seller or Founder other than for money damages. If Buyer elects to assume and control the defense of a Loss Claim, then (i)

Buyer may not settle any such Loss Claim for money damages without Seller's and Founder's consent, not to be unreasonably withheld; (ii) Seller and Founder may employ separate counsel and participate in the defense thereof, but shall be responsible for the fees and expenses of such counsel; (iii) Seller and Founder shall provide full cooperation to Buyer to assist Buyer in defending the Loss Claim; and (iv) Buyer shall pay all fees and expenses of its own counsel in connection with the defense of the Loss Claim. If Buyer does not assume the defense of the Loss Claim, the Seller and Founder shall assume and control the defense of the Loss Claim; provided that the Sellers and Founder may not settle any such Loss Claim without the consent of Buyer, not to be unreasonably withheld.

**6.4 Survival of Representations and Warranties; Remedies.** All representations and warranties made in or pursuant to this Agreement shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby and continue for a period of one (1) year from the Closing Date; provided, however, that (a) the representations and warranties contained in Sections 2.2, 2.5 and 3.1 shall survive indefinitely, (b) the representations and warranties contained in Sections 2.12 and 2.13 shall survive for a period equal to all applicable statute of limitations regarding Claims made with respect to such subject matter, (c) any Claim arising out of Seller's or Founder's (i) fraud or (ii) willful and material misrepresentation shall survive indefinitely, and (d) any Claim for indemnity under this Section 6 shall survive the time at which it would otherwise terminate and shall continue until final disposition of such Claim so long as the Claim for indemnification shall have been commenced prior to such time as it would have otherwise expired and such Claim or Proceeding is pending and is being maintained in good faith. Each party agrees that no other party to this Agreement shall be under any duty, express or implied, to make any investigation of any representation or warranty made by any other party to this Agreement, and that no failure to so investigate shall be considered negligent or unreasonable. All remedies under this Agreement shall be cumulative and not exclusive.

**6.5 Limitations.** Notwithstanding any other provision in this Article 6, the Buyer Parties will not be entitled to indemnification under this Article 6 to the extent that the aggregate Loss Claims exceed the Escrow Amount. The foregoing limitation, however, shall not apply to fraud, willful misconduct or material misrepresentation of Seller or Founder.

## **7. Miscellaneous Provisions.**

**7.1 Notices.** Any notice or other communication required or permitted to be delivered to any party under this Agreement shall be in writing and shall be deemed properly delivered, given and received when delivered (by hand, by registered mail, by courier or express delivery service or by facsimile) to the address or facsimile telephone number set forth beneath the name of such party below (or to such other address or facsimile telephone number as such party shall have specified in a written notice given to the other parties hereto):

if to any of the Founder or Seller:

WebFives Corporation  
2001 6<sup>th</sup> Avenue, Suite 1600  
Seattle, WA 98121  
Attention: Mike Toutonghi

with a copy to:

McNaul Ebel Nawrot & Helgren PLLC  
600 University Street, Suite 2700  
Seattle, WA 98101  
Attention: William Carleton  
Facsimile: (206) 624-5128

if to the Buyer:

Microsoft Corporation  
One Microsoft Way  
Redmond, WA 98052-6399  
Attention: Deputy General Counsel, Finance and  
Operations  
Facsimile: (425) 936-7329

with a copy to :

Cairncross & Hempelmann, P.S.  
524 Second Ave., Suite 500  
Seattle, Washington 98104  
Attention: Robert Seidel / Elizabeth Chambers  
Facsimile: (206) 587-2308

**7.2 Counterparts.** This Agreement may be executed in several counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one agreement.

**7.3 Governing Law; Venue; Attorneys Fees.** This Agreement shall be construed in accordance with, and governed in all respects by, the internal laws of the State of Washington (without giving effect to principles of conflicts of laws). Each party hereby consents and agrees that the federal or state courts of the State of Washington (located in Seattle, Washington) shall have jurisdiction to hear, determine, and enforce any claims or disputes arising out of or related to the provisions of this Agreement. If court proceedings are brought to enforce or interpret any provision of this Agreement, the substantially prevailing party shall be entitled to an award of reasonable and necessary expenses of litigation, including without limitation attorneys' fees.



**7.4 Successors and Assigns; Parties in Interest.** Neither this Agreement nor any of the rights, interests or obligations under this Agreement shall be assigned or delegated by any party, without the prior written consent of the other parties; except that Buyer may assign its rights (but not its obligations) under this Agreement to any direct or indirect subsidiary of Buyer. This Agreement is not intended to confer any rights or benefits to any Person other than the parties to this Agreement.

**7.5 Waiver.** Except as otherwise provided in this Agreement, any failure of any of the parties to comply with any obligation, representation, warranty, covenant, agreement or condition herein may be waived by the party entitled to the benefits thereof, but such waiver or failure to insist upon strict compliance with such obligation, representation, warranty, covenant, agreement or condition shall not operate as a waiver of, or estoppel with respect to, any subsequent or other failure.

**7.6 Amendments.** This Agreement may not be amended other than by means of a written instrument duly executed and delivered by Buyer, Seller, and Founder.

**7.7 Severability.** Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction. If the final judgment of a court of competent jurisdiction declares that any term or provision hereof is invalid or unenforceable, the parties hereto agree that the court making such determination shall have the power to limit the term or provision, to delete specific words or phrases, or to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision, and this Agreement shall be enforceable as so modified. In the event such court does not exercise the power granted to it in the prior sentence, the parties hereto agree to replace such invalid or unenforceable term or provision with a valid and enforceable term or provision that shall achieve, to the extent possible, the economic, business and other purposes of such invalid or unenforceable term.

**7.8 Expenses.** Each of the parties to this Agreement will bear its own costs and expenses incurred by such party in connection with this Agreement and the Transactions.

**7.9 Entire Agreement.** The Transactional Agreements set forth the entire understanding of the parties relating to the subject matter thereof and supersede all prior agreements and understandings among or between any of the parties relating to the subject matter thereof.

**7.10 Knowledge Definition.** The term “knowledge” (including any derivation thereof such as “know” or “knowing”) with respect to the Seller shall mean the knowledge of the Company’s officers, directors and Founder, and that Seller and Founder have reviewed the specific representation and warranty and the related Disclosure Schedule to which such knowledge statement is made, and, in so doing, have exercised

reasonable due diligence (due diligence for this purpose meaning that Seller or the Founder have made inquiry of such employees, independent contractors and outside adviser(s) familiar with the subject matter of such representations and warranties to confirm the accuracy thereof), and based upon Seller's or Founder's actual knowledge and such reasonable due diligence, Seller and Founder are not aware of any inaccuracies in such specific representation and warranty and related Disclosure Schedule with respect to which such knowledge statement is made.

*[Remainder of page intentionally left blank.]*

The parties to this Agreement have caused this Agreement to be executed and delivered as of the date above first written.

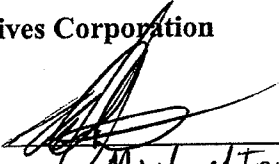
**BUYER:**

**Microsoft Corporation**

By: \_\_\_\_\_  
Name: Alex Gounares  
Its: Corporate Vice President


**SELLER:**

**WebFives Corporation**

By:   
Name: Michael Toutonghi  
Its: CEO

**FOUNDER:**

**Mike Toutonghi**

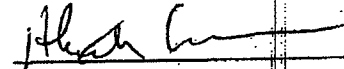
  
\_\_\_\_\_  
Mike Toutonghi, individually

*[Signature page to Asset Purchase Agreement]*

The parties to this Agreement have caused this Agreement to be executed and delivered as of the date above first written.

**BUYER:**

**Microsoft Corporation**

By:   
Name: Alex Gounares  
Its: Corporate Vice President

**SELLER:**

**WebFives Corporation**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

**FOUNDER:**

**Mike Toutonghi**

\_\_\_\_\_  
Mike Toutonghi, individually

*[Signature page to Asset Purchase Agreement]*

## ASSIGNMENT OF COPYRIGHTS AND TRADEMARKS

This Assignment of Copyrights and Trademarks (the "*Assignment*"), dated November 6, 2007, is made by WebFives Corporation, a Washington corporation ("*Assignor*") in favor of Microsoft Corporation, a Washington corporation ("*Assignee*").

A. Pursuant to the Asset Purchase Agreement, dated of even date herewith, by and between Assignee, Assignor, and other parties thereto ("*Purchase Agreement*"), Assignee acquired certain assets of Assignor;

B. Assignor has created and is the owner of certain unregistered works of authorship, including without limitation works of authorship for the Software, as defined in the Purchase Agreement (the "*Copyrights*"), and Assignor is the owner of and has adopted, used and/or is using the registered trademarks "WebFives," "VIZREA," "STREAMLINING YOUR DIGITAL WORLD," "VIZREA SNAP," "VIZREA REACH," "VIZREA TOUCH", and "CRYSTAL PLAY" (collectively, the "*Marks*"); and

C. Pursuant to and in furtherance of the Purchase Agreement, Assignor desires to assign, and Assignee desires to acquire, all right, title, and interest in and to the Copyrights and Marks.

Therefore, in consideration of the premises and covenants hereinafter set forth, and for the portion of the consideration to be received by Assignor in connection with the Purchase Agreement and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

1. **Assignment.** Assignor hereby assigns to Assignee all right, title, and interest in and to the Copyrights and to the Marks (together with the goodwill of the business associated with the Marks), free and clear of all liens, claims and encumbrances.

2. **Further Assurances.** Assignor agrees that no rights in the Copyrights or Marks are retained by Assignor. Assignor covenants and agrees to take all actions and cooperate as is necessary to protect the ability to trademark the Marks and the copyrightability of the Copyrights and further agrees that it shall execute such other and further assignments and documents as the Assignee may reasonably request to carry out, give effect to or to evidence this Assignment.

3. **Successors and Assigns.** This Assignment and all of its terms shall inure to the benefit of the Assignee, its successors and assigns, and shall bind the Assignor and its successors and assigns.

4. **Governing Law.** This Assignment shall be construed in accordance with, and governed in all respects by, the internal laws of the State of Washington (without giving effect to principles of conflicts of laws).

5. **Conflicts.** This Assignment is entered into in connection with and pursuant to the Purchase Agreement and shall, to the extent possible, be construed to be consistent therewith. In

the event of any conflict between the terms hereof and of the Purchase Agreement, the terms of the Purchase Agreement shall control.

{00581630.DOC;3}

**TRADEMARK**  
**REEL: 003677 FRAME: 0783**

The Assignor has caused this Assignment to be executed and delivered as of the date above first written.

**WEBFIVES CORPORATION**

By: 

Name: \_\_\_\_\_

Its: \_\_\_\_\_

*Michael Tortorella*

*CEO*

*[Signature page to Assignment of Copyrights and Trademarks]*