

TRADEMARK ASSIGNMENT

Electronic Version v1.1
 Stylesheet Version v1.1

SUBMISSION TYPE:	NEW ASSIGNMENT		
NATURE OF CONVEYANCE:	ASSIGNS THE ENTIRE INTEREST AND THE GOODWILL		
CONVEYING PARTY DATA			
Name	Formerly	Execution Date	Entity Type
Avaki Corporation		04/14/2005	CORPORATION: DELAWARE
RECEIVING PARTY DATA			
Name:	Sybase, Inc.		
Street Address:	One Sybase Drive		
City:	Dublin		
State/Country:	CALIFORNIA		
Postal Code:	94568		
Entity Type:	CORPORATION: DELAWARE		
PROPERTY NUMBERS Total: 1			
Property Type	Number	Word Mark	
Serial Number:	78546203	EII PLUS	
CORRESPONDENCE DATA			
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ATTORNEY DOCKET NUMBER:	02164-35		
NAME OF SUBMITTER:	Amy M. Kwan		
Signature:	/Amy M. Kwan/		
Date:	01/12/2006		

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Total Attachments: 65

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EXECUTION COPY

ASSET PURCHASE AGREEMENT

Between

AVAKI CORPORATION

and

SYBASE, INC.

Dated as of April 14, 2005

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ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT, dated as of April 14, 2005 (as hereafter amended, modified or supplemented, this "**Agreement**"), between Avaki Corporation, a corporation organized and existing under the laws of Delaware (the "**Company**") and Sybase, Inc., a corporation organized and existing under the laws of Delaware ("**Purchaser**").

WITNESSETH:

WHEREAS, the Company is engaged in the business of designing, developing, marketing, selling, distributing and otherwise disposing of, and supporting, enterprise information integration software, including Avaki EII Plus, the Avaki Data Server, Avaki Studio, Avaki's data grid technology and Avaki's compute grid technology and other related products, throughout the world to streamline integration of data from many distributed sources while providing standardized access to integrated views of data through a single data layer (the "**Business**"); and

WHEREAS, concurrent with the execution of this Agreement, the Company has obtained the Requisite Stockholder Approvals (as hereinafter defined); and

WHEREAS, the Company desires to sell to Purchaser, and Purchaser desires to purchase from the Company, certain assets relating to the Business, and in connection therewith Purchaser is willing to assume certain liabilities of the Company relating thereto, all upon the terms and subject to the conditions set forth herein;

NOW, THEREFORE, in consideration of the premises and the mutual agreements and covenants hereinafter set forth, and intending to be legally bound hereby, Purchaser and the Company hereby agree as follows:

ARTICLE I

DEFINITIONS

Section 1.1. Certain Defined Terms. Unless the context otherwise requires, the following terms, when used in this Agreement, shall have the respective meanings specified below:

"**Accounts Payable Certificate**" shall have the meaning set forth in Section 2.7.

"**Action**" shall mean any claim, action, suit, arbitration, inquiry, proceeding or investigation by or before any Governmental Authority.

"**Affiliate**" shall mean, with respect to any specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such specified Person.

“**Agreement**” or “**this Agreement**” shall have the meaning specified in the preamble to this Agreement.

“**Allocation Schedule**” shall have the meaning specified in Section 2.3(b).

“**Ancillary Agreements**” shall mean the Bill of Sale, the Assumption Agreement, the Assignment of Intellectual Property, the Escrow Agreement and any certificate or other document delivered pursuant to this Agreement or the transactions contemplated hereby.

“**Assets**” shall have the meaning specified in Section 2.1(a).

“**Assigned Contracts**” shall have the meaning specified in Section 2.1(a).

“**Assigned Permits**” shall have the meaning specified in Section 2.1(a).

“**Assumption Agreement**” shall mean the Assumption Agreement to be executed by Purchaser and the Company on the Closing Date substantially in the form of Exhibit A.

“**Assignment of Intellectual Property**” shall mean the Assignment of Intellectual Property to be executed by Purchaser and the Company on the Closing Date substantially in the form of Exhibit B.

“**Assumed Liabilities**” shall have the meaning specified in Section 2.2(a).

“**Bill of Sale**” shall mean the Bill of Sale and Assignment to be executed by the Company on the Closing Date substantially in the form of Exhibit C.

“**Business**” shall have the meaning specified in the recitals to this Agreement.

“**Business Day**” shall mean any day that is not a Saturday, a Sunday or other day on which banks are required or authorized by Law to be closed in the City of San Francisco, California.

“**Claim Notice**” shall have the meaning specified in Section 9.3(a).

“**Closing**” shall have the meaning specified in Section 2.4.

“**Closing Date**” shall have the meaning specified in Section 2.4.

“**Code**” shall have the meaning specified in Section 3.14(x).

“**Company**” shall have the meaning specified in the preamble to this Agreement.

“**Company Capital Stock**” shall have the meaning specified in Section 3.2.

“**Company Common Stock**” shall have the meaning specified in Section 3.2.

“Company Intellectual Property” shall have the meaning specified in Section 3.14(d).

“Company-Licensed IP” shall mean Company Intellectual Property that is not Company-Owned Intellectual Property.

“Company-Owned Intellectual Property” shall mean all Intellectual Property owned by the Company.

“Company Preferred Stock” shall have the meaning specified in Section 3.2.

“Company Products” shall have the meaning specified in Section 3.14(a).

“Company Registered Intellectual Property Rights” shall have the meaning specified in Section 3.14(b).

“Company Source Code” shall mean, collectively, any software source code, any material portion or aspect of software source code, or any proprietary information or algorithm contained in or relating to any software source code, of any Company Intellectual Property or any Company Product.

“ComputeGrid Products” shall have the meaning specified in Section 3.14(dd).

“ComputeGrid Service Call” shall mean a maintenance or warranty service call made by a customer under any Assigned Contract to Purchaser or its Affiliates in connection with the ComputeGrid Products.

“ComputeGrid Service Costs” shall mean the costs of any ComputeGrid Service Call, including the reasonable costs (which costs shall include, without limitation, all actual labor costs incurred by Purchaser or its Affiliates, which shall be calculated at a rate of \$150 per person per hour) to Purchaser or its Affiliates of (1) receiving and processing any ComputeGrid Service Call and (2) resolving any such ComputeGrid Service Call in a manner that is satisfactory to Purchaser.

“ComputeGrid Service Threshold” shall mean twelve (12) ComputeGrid Service Calls; *provided, however*, that for purposes of establishing whether a particular call constitutes a ComputeGrid Service Call for purposes of this definition, such call must relate to a new and discrete maintenance or warranty issue and must not be in follow-up or otherwise related to any prior ComputeGrid Service Call.

“Confidentiality Agreement” shall mean the Nondisclosure Agreement dated as of March 4, 2005 between the Company and Purchaser.

“Contaminant” shall have the meaning specified in Section 3.14(bb).

“contemplated to be conducted” shall mean as contemplated to be conducted by the Company as set forth in the Roadmap.

“Control” (including the terms **“controlled by”** and **“under common control with”**), with respect to the relationship between or among two or more Persons, shall mean the possession, directly or indirectly or as trustee, personal representative or executor, of the power to direct or cause the direction of the affairs or management of a Person, whether through the ownership of voting securities, as trustee, personal representative or executor, by Contract or otherwise, including, without limitation, the ownership, directly or indirectly, of securities having the power to elect a majority of the board of directors or similar body governing the affairs of such Person.

“Contract” shall mean any written or oral contract, agreement, plan, arrangement, undertaking, commitment or understanding of any nature, including, without limitation, licenses, sublicenses, leases, subleases, commitments, sales and purchase orders, invoices, franchises, notes, bonds, mortgages and indentures.

“Copyrights” shall mean all copyrights, copyrights registrations, and applications therefore and all other rights corresponding thereto throughout the world.

“DataGrid Products” shall have the meaning specified in Section 3.14(dd).

“Disabling Code” shall have the meaning specified in Section 3.14(bb).

“Disclosure Schedule” shall mean the Disclosure Schedule attached hereto, dated as of the date hereof, and forming a part of this Agreement.

“Encumbrance” shall mean any security interest, pledge, mortgage, lien (including, without limitation, tax liens), charge, encumbrance, adverse claim, preferential arrangement, or restriction of any kind, including, without limitation, any restriction on the use, voting, transfer, receipt of income or other exercise of any attributes of ownership.

“End User Agreement” shall mean customer agreements entered into in the ordinary course of business that provide users the non-exclusive non-transferable right to use a Company Product (in the case of Company Products that include software, such agreement providing only an object code license to such software and, in some cases, possible access to source code through a source code escrow arrangement) or non-exclusive right to receive services of the Company, but provides no rights to distribute Company Products or make any modifications thereto.

“Environmental Laws” shall mean any applicable Law or Governmental Order, in each case relating to (i) the protection, investigation or restoration of the environment, health and safety or natural resources, (ii) the handling, use, presence, disposal, release or threatened release of any Hazardous Material, or (iii) noise, odor, wetlands, pollution, contamination or injury or threat of injury to persons or property, as in effect on or prior to the Closing Date.

“EOL Notice” shall have the meaning specified in Section 5.13.

“Equipment” shall have the meaning specified in Section 2.1(a).

“Escrow Agent” shall mean US Bank National Association.

“Escrow Agreement” shall have the meaning specified in Section 2.9.

“Escrow Amount” shall mean

“Escrow Fund” shall mean the Escrow Amount deposited with the Escrow Agent as such sum may be increased or decreased as provided in the Escrow Agreement and in Article IX.

“Escrow Period” shall have the meaning specified in Section 9.2(a).

“Excluded Assets” shall have the meaning specified in Section 2.1(b).

“Excluded Liabilities” shall have the meaning specified in Section 2.2(b).

“Financial Statements” shall have the meaning specified in Section 3.7(a).

“Governmental Authority” shall mean any national, federal, state, municipal or local or other government, governmental, regulatory or administrative authority, agency or commission or any court, tribunal, or judicial or arbitral body.

“Governmental Order” shall mean any order, writ, judgment, injunction, decree, stipulation, determination, ruling or award entered by or with any Governmental Authority.

“Hazardous Materials” shall mean any hazardous substance, the use, transportation or disposition of which is regulated by Law or by any Governmental Authority, including, without limitation, any petroleum product or by-product, material containing asbestos, lead or polychlorinated biphenyls, radioactive material or radon.

“Indebtedness” shall mean, with respect to any Person, all liabilities, indebtedness or obligations of any kind or nature, contingent or otherwise, including (a) all indebtedness for borrowed money or for the deferred purchase price of property or services, (b) any other indebtedness that is evidenced by a note, bond, debenture, letter of credit or similar instrument or facility, (c) all obligations under financing and operating leases, and (d) all Indebtedness referred to in clauses (a) through (c) above secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) any Encumbrance on property (including, without limitation, accounts and Contract rights) owned by such Person, even though such Person has not assumed or become liable for the payment of such Indebtedness.

“Indemnified Party” shall have the meaning specified in Section 9.3(a).

"Indemnifying Party" shall have the meaning specified in Section 9.3(a).

"Intellectual Property" shall mean, collectively, Technology and Intellectual Property Rights.

"Intellectual Property Rights" shall mean any and all rights in, arising out of, or associated with the following: (i) Patents; (ii) Copyrights; (iii) Trade Secrets; (iv) Trademarks; (v) Internet Properties; and (v) any similar, corresponding, or equivalent rights to any of the foregoing anywhere in the world.

"Internet Properties" shall mean all universal resource locators, World Wide Web addresses, sites, and domain names and all applications and registrations therefore.

"IRC" shall mean the Internal Revenue Code of 1986, as amended through the date hereof.

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

"Key Employees" shall have the meaning set forth in Section 6.1.

"knowledge" with respect to the Company shall mean the actual knowledge of the executive officers of the Company and the constructive knowledge that such executive officers would reasonably be expected to have following due inquiry with respect to such subject matter. Any such individual will be deemed to have actual knowledge of a particular fact, circumstance, event or other matter if (A) such individual had actual knowledge of such fact, circumstance, event or other matter, (B) such fact, circumstance, event or other matter is reflected in one or more documents (whether written or electronic, including e-mails sent to or by such individual) (1) in, or that have been in, such individual's possession, including personal files, or (2) that would reasonably be expected to be reviewed by an individual having the duties and responsibilities of such individual in the customary performance of such duties and responsibilities, or (C) such knowledge could have been obtained from reasonable inquiry of the Persons reporting to such individual charged with administrative or operational responsibility for such matters for such individual.

"Law" shall mean any national, federal, state, municipal or local or other statute, law, ordinance, regulation, rule, code, Governmental Order, or other requirement or rule of law.

"Liabilities" shall mean any and all debts, liabilities, obligations and Indebtedness, whether accrued or fixed, absolute or contingent, matured or unmatured or determined or determinable, and whether or not required to be presented on a balance sheet prepared in accordance with U.S. GAAP, including, without limitation, those arising under any Law, Action or Governmental Order, those arising under any Contract and any off-balance sheet liabilities.

"Loss" shall have the meaning specified in Section 9.2(a).

“Loss Threshold” shall have the meaning specified in Section 9.4.

“Material Adverse Effect” shall mean any event, circumstance, change in, or effect on, the Business, the Assets or the Assumed Liabilities that, individually or in the aggregate with any other events, circumstances, changes in, or effects on, the Business, the Assets or the Assumed Liabilities (i) is, or could reasonably be expected to be, materially adverse to the Business, the Assets or the Assumed Liabilities (including, without limitation, contingent Liabilities), or (ii) could, or could reasonably be expected to, materially adversely affect the ability of Purchaser to operate or conduct the Business, or operate, conduct, utilize or exploit the Assets as currently conducted or currently contemplated to be conducted, but excluding events, circumstances, changes or effects resulting from or arising out of the announcement of the execution of this Agreement and events, circumstances, changes or effects caused by the taking of any action required by this Agreement, *provided* that such actions are taken in compliance with Section 5.1.

“Material Contracts” shall have the meaning specified in Section 3.13(a).

“Open Source Materials” shall have the meaning specified in Section 3.14(x).

“Patents” shall mean all United States and foreign patents and utility models and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations, and continuations-in-part thereof, and equivalent or similar rights anywhere in the world in inventions and discoveries, including invention disclosures.

“Permits” shall have the meaning specified in Section 3.12(a).

“Person” shall mean any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity, as well as any syndicate or group that would be deemed to be a person under Section 13(d)(3) of the Securities Exchange Act of 1934, as amended.

“Plans” shall mean (i) all employee benefit plans (as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (“**ERISA**”)) and all bonus, retention, stock option, profits or membership interest or option, stock purchase, restricted stock, incentive, deferred compensation, retiree medical or life insurance, supplemental retirement, severance or other benefit plans, programs, policies, practices or arrangements, and all employment, consulting, termination, retention, severance or other Contracts, whether legally enforceable or not, to which the Company is a party, with respect to which the Company has any liability or obligation or which are maintained, contributed to or sponsored by the Company for the benefit of any current or former employee, consultant, officer, member or director of the Company, including benefit plans, programs, policies, practices or arrangements for the benefit of current or former employees, consultants, officers, members or directors of the Company who perform services outside the United States, (ii) each employee benefit plan for which the Company could incur liability under Section 4069 of ERISA in the event such plan has been or were to be terminated, (iii) any plan in respect of which the Company could incur liability under Section 4212(c) of ERISA and (iv) any

Contracts between the Company and any employee of or consultant to the Company including, without limitation, any Contracts relating to a sale of the Company, the Assets or the Business.

"Post-Closing Tax Period" means any Tax period beginning after the Closing Date.

"Pre-Closing Tax Period" means any Tax period ending on or before the Closing Date.

"PTO" shall have the meaning specified in Section 3.14(b).

"Purchase Price" shall have the meaning specified in Section 2.3(a).

"Purchase Price Bank Account" shall mean a bank account in the United States to be designated by the Company in a written notice to Purchaser at least three (3) Business Days before the Closing.

"Purchaser" shall have the meaning specified in the preamble to this Agreement.

"Reference Balance Sheet" shall mean the unaudited balance sheet of the Company, dated as of March 31, 2005, a copy of which is set forth in Section 3.7(a) of the Disclosure Schedule.

"Reference Balance Sheet Date" shall mean March 31, 2005.

"Registered Intellectual Property Rights" shall mean all United States, international and foreign: (i) Patents, including applications therefor; (ii) registered Trademarks, applications to register Trademarks, including intent-to-use applications, or other registrations or applications related to Trademarks; (iii) Copyright registrations and applications to register Copyrights; and (iv) any other Intellectual Property that is the subject of an application, certificate, filing, registration or other document issued by, filed with, or recorded by, any private, state, government or other public legal authority at any time.

"Regulations" shall mean the Treasury Regulations (including Temporary Regulations) promulgated by the United States Department of Treasury with respect to the IRC or other federal tax statutes.

"Release Date" shall have the meaning specified in Section 9.5.

"Requisite Stockholder Approvals" shall have the meaning specified in Section 3.1(a).

"Required Consents" shall have the meaning specified in Section 5.4(b).

"Restricted Period" shall have the meaning specified in Section 5.10.

“Returns” shall mean all reports, estimates, declarations of estimated Tax, claims for refund, information statements and returns relating to, or required to be filed in connection with, any Taxes, including any schedule or attachment thereto, and including any amendment thereof.

“Roadmap” shall mean the product roadmap provided by the Company to Purchaser and attached hereto as Exhibit D.

“Securities Act” shall mean the Securities Act of 1933, as amended.

“Series A Preferred” shall have the meaning specified in Section 3.2.

“Series A-1 Preferred” shall have the meaning specified in Section 3.2.

“Series A-2 Preferred” shall have the meaning specified in Section 3.2.

“Series B Preferred” shall have the meaning specified in Section 3.2.

“Series B-1 Preferred” shall have the meaning specified in Section 3.2.

“Straddle Tax Period” means any Tax period beginning before or on, and ending after, the Closing Date.

“Subsidiary” shall mean, with respect to any Person, any other corporation, limited liability company, general or limited partnership, unincorporated association or other business entity of which (i) if a corporation, a majority of the total voting power of shares of stock or equity interests entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (ii) if a limited liability company, partnership, association or other business entity, a majority of the partnership or other similar ownership interest thereof is at the time owned or controlled, directly or indirectly, by any Person or one or more Subsidiaries of that Person or a combination thereof.

“Tax” means (i) any and all taxes (including estimated taxes), assessments, fees, levies, duties, tariffs, imposts and other charges of any kind (together with any and all interest, penalties, loss, damage, liability, expense, additions to tax and additional amounts or costs incurred or imposed with respect thereto) imposed by any government or taxing authority (a “Taxing Authority”), whether payable directly or by withholding and whether or not requiring the filing of a Return; (ii) taxes or other charges on or with respect to income, franchises, concessions, windfall or other profits, gross receipts, property, sales, use, capital gains, capital stock or shares, payroll, employment, occupation, severance, social security, government pension, health, capital, workers’ compensation, unemployment compensation, or net worth; (iii) taxes or other charges in the nature of excise, goods and services, withholding, ad valorem, stamp, transfer, value added or gains taxes; (iv) license, registration and documentation fees; (v) customs duties, tariffs and similar charges; and (vi) any liability for the payment of the foregoing as a result of being a member of a combined,

consolidated, unitary or affiliated group, a predecessor or successor corporation, or a party to a contractual obligation to indemnify any other Person.

“**Tax Arbitrator**” shall have the meaning specified in Section 7.4(d).

“**Tax Contest**” shall have the meaning specified in Section 7.4(c).

“**Tax Loss**” shall have the meaning specified in Section 7.4(a).

“**Technology**” means any and all of the following tangible or intangible items or things, in any format: (i) computer software and code, including assemblers, applets, compilers, source code, object code, data (including image and sound data), design tools, and user interfaces, including documentation, annotations, or comments, and including all related algorithms, data and data structures; (ii) information, invention disclosures, know-how, show-how, techniques, algorithms, routines, works of authorship, processes, devices, prototypes, test methodologies, hardware development tools, materials that document design or design processes (including failed designs), or that document research or testing (both design, processes and results); (iii) databases, data collections and libraries; (iv) any content (including textual, visual, or graphics content); and (v) any media on which any of the foregoing is recorded, and any other tangible embodiments or copies of any of the foregoing.

“**Third Party Claims**” shall have the meaning specified in Section 9.3(d).

“**Trademarks**” shall mean all of the following: trade names, logos, common law trademarks, and service marks, trademark, and service mark registrations and applications therefore (including intent to use applications) and all goodwill associated therewith throughout the world.

“**Trade Secrets**” means all worldwide trade secret right and other rights in know-how, show-how, technical data, and any other proprietary and confidential information.

“**U.S. GAAP**” shall mean United States generally accepted accounting principles and practices in effect from time to time applied consistently throughout the periods involved.

“**UVA Assignment Agreements**” shall have the meaning specified in Section 5.14.

“**WARN**” shall have the meaning specified in Section 3.16(h).

ARTICLE II

PURCHASE AND SALE

Section 2.1. Assets to Be Sold.

(a) On the terms and subject to the conditions of this Agreement, the Company shall, on the Closing Date, sell, assign, transfer, convey and deliver to Purchaser or cause to be sold, assigned, transferred, conveyed and delivered to Purchaser, and Purchaser shall purchase from the Company, on the Closing Date, all the Company's right, title and interest in and to the following assets (the assets to be purchased by Purchaser being referred to as the "Assets"):

- (i) the Business as a going concern and all goodwill related thereto;
- (ii) the Company-Owned Intellectual Property;
- (iii) the computer equipment set forth on Schedule 2.1(a)(iii) hereto (the "Equipment");
- (iv) all rights of the Company under all Contracts set forth on Schedule 2.1(a)(iv), and under all other Contracts pursuant to which Company-Licensed IP is licensed to the Company (collectively, the "Assigned Contracts");
- (v) all municipal, state, federal and foreign franchises, permits, licenses, agreements, waivers and authorizations held or used by the Company in connection with, or required for, the operation of the Assets as currently conducted or currently proposed to be conducted (the "Assigned Permits");
- (vi) all claims, causes of action, choses in action, rights of recovery and rights of set-off of any kind (including rights to insurance proceeds and rights under and pursuant to all express and implied warranties, representations and guarantees made by suppliers of products, materials or equipment, or components thereof) pertaining to or arising out of the Company-Owned Intellectual Property, the Equipment, the Assigned Contracts and the Assigned Permits, and otherwise with respect to the Business;
- (vii) copies of all lists of customers, suppliers, vendors, distributors and sales prospects, and other mailing or contact lists;
- (viii) all labels, packaging materials, promotional materials, point-of-purchase displays, sales literature, advertising, brochures, user manuals, graphics and artwork (in each case, in paper and electronic format), and UPC codes (or, in each case, the applicable portions thereof) to the extent they relate to the Assets; and

(ix) copies of all shipping, purchasing, sales and similar records, correspondence, invoices, documents and files (in each case in paper or electronic format) in the Company's care, custody, or control reasonably relating to the Business, the Assets or the Assumed Liabilities at the Closing Date, other than organization documents, minute and stock record books and the corporate seal of the Company.

(b) The Company shall retain, and Purchaser shall not acquire, any assets other than the Assets (the assets to be retained by the Company being referred to as the "**Excluded Assets**"). The Excluded Assets include the Company's cash, bank accounts and accounts receivable.

Section 2.2. Assumption and Exclusion of Liabilities.

(a) On the terms and subject to the conditions of this Agreement, Purchaser shall, on the Closing Date, assume and shall pay, perform and discharge when due, (i) all obligations under the Assigned Contracts arising from and after the Closing and (ii) to the extent not Excluded Liabilities, all Liabilities arising out of the operation of the Business from and after the Closing (the "**Assumed Liabilities**").

(b) The Company shall retain, and Purchaser shall not assume, any Liabilities other than the Assumed Liabilities (the Liabilities to be retained by the Company being referred to as the "**Excluded Liabilities**"), which shall include, but not be limited to:

- (i) all Liabilities relating to or arising out of the Excluded Assets;
- (ii) all accounts payable and accrued expenses of the Company;
- (iii) all Liabilities arising out of the operation of the Business prior to the Closing Date;
- (iv) all Liabilities to the extent arising from or as a result of the conduct of any business of the Company other than the Business, including any action, suit, claim or proceeding related thereto, regardless of when filed;
- (v) all Contracts other than Assigned Contracts;
- (vi) all Liabilities relating to real property related to the Business, whether owned or leased by the Company as tenant;
- (vii) all Liabilities related to Indebtedness;
- (viii) all Liabilities arising under or relating to any Plan;
- (ix) all Liabilities arising out of or relating to the employment of or the termination of employees prior to the Closing Date, or the termination of employees by the

Company following the Closing Date (including pursuant to Section 6.1 of this Agreement), or for any change of control payments or severance obligations incurred by the Company to any employees of the Company;

(x) all Liabilities under any Assigned Contract arising prior to Closing, including, without limitation, Liabilities arising out of any breach of any Assigned Contract prior to the Closing;

(xi) all Liabilities for Taxes incurred in any Pre-Closing Tax Period; and

(xii) all Liabilities in connection with any brokerage, finder's or other fee or commission in connection with the transactions contemplated by this Agreement or the Ancillary Agreements based upon arrangements made by or on behalf of the Company, including any fees or commissions set forth on Section 3.21 of the Disclosure Schedule.

Section 2.3. **Purchase Price; Allocation of Purchase Price.**

(a) The purchase price for the Assets shall be : (the "**Purchase Price**").

(b) Within a reasonable period after the Closing, Purchaser shall provide to the Company copies of a schedule allocating the sum of the Purchase Price and the Assumed Liabilities (within the meaning of Section 1060 of the IRC) paid by Purchaser among the Assets and the covenant set forth in Section 5.10 (the "**Allocation Schedule**"). Each of the parties hereto shall not, and shall not permit any of its Affiliates to, take a position (except as required pursuant to a final determination within the meaning of Section 1313 of the IRC) on any Return, or before any Taxing Authority or in any judicial proceeding to the extent Tax issues are raised, that is in any way inconsistent with the allocation of the consideration among the assets determined in accordance with the Allocation Schedule, including any amendments thereto. The parties shall cooperate in preparing, executing and timely filing all Returns and reports (including without limitation Form 8594) relating to the purchase and sale of the Assets. All such Returns and reports shall be prepared in a manner that is consistent with the Allocation Schedule, including any amendments thereto.

Section 2.4. **Closing.** Subject to the terms and conditions of this Agreement, the sale and purchase of the Assets and the assumption of the Assumed Liabilities contemplated by this Agreement shall take place at a closing (the "**Closing**") to be held at the offices of O'Melveny & Myers LLP, 275 Battery Street, Suite 2600, San Francisco, California at 10:00 A.M. Pacific time on the first (1st) Business Day following satisfaction or waiver of all other conditions to the obligations of the parties set forth in Article VIII (other than those conditions that by their terms are to be satisfied at Closing), or at such other place or at such other time or on such other date as the Company and Purchaser may mutually agree upon in writing (the day on which the Closing takes place being the "**Closing Date**").

Section 2.5. **Closing Deliveries by the Company.** At the Closing, the Company shall deliver or cause to be delivered to Purchaser:

- (a) the Bill of Sale;
- (b) an executed counterpart of the Assumption Agreement;
- (c) the Assignment of Intellectual Property;
- (d) a receipt for the Purchase Price less the Escrow Amount ;
- (e) the opinions, certificates and other documents required to be delivered pursuant to Section 8.2; and
- (f) such other deeds, endorsements, consents and other instruments, in form and substance satisfactory to Purchaser, as may be requested by Purchaser to transfer the Assets to Purchaser or evidence such transfer on the public records.

Section 2.6. Closing Deliveries by Purchaser.

- (a) At the Closing, Purchaser shall deliver to the Company:
 - (i) the Purchase Price, less the Escrow Amount by wire transfer in immediately available funds to the Purchase Price Bank Account;
 - (ii) an executed counterpart of the Assumption Agreement; and
 - (iii) the certificates and other documents required to be delivered pursuant to Section 8.1.
- (b) At the Closing, Purchaser shall deliver to the Escrow Agent, in accordance with the Escrow Agreement, the Escrow Amount by wire transfer in immediately available funds to the accounts designated therefor in the Escrow Agreement.

Section 2.7. **Accounts Payable.** One (1) Business Day prior to the Closing, the Company shall deliver to Purchaser a certificate setting forth, as of that date, the accounts payable and accrued expenses of the Company related to the Business, which certificate shall include the name of each party to whom payment is owed and the amount owed to each such party (the "**Accounts Payable Certificate**").

Section 2.8. **Payment of Accrued Vacation.** Immediately following the Closing, the Company shall pay all accrued vacation payable to each current employee of the Company whose employment with the Company is terminated as of the Closing Date (regardless of whether or not such employee accepts an offer of employment with Purchaser).

Section 2.9. **Escrow.** Prior to the Closing, the Company and Purchaser shall enter into an Escrow Agreement with the Escrow Agent substantially in the form of Exhibit E, subject to any administrative changes as may be required by the Escrow Agent (the "**Escrow Agreement**").

Pursuant to the terms of the Escrow Agreement, Purchaser shall deposit the Escrow Amount in an account to be managed and paid out by the Escrow Agent in accordance with the terms of the Escrow Agreement.

ARTICLE III
REPRESENTATIONS AND
WARRANTIES OF THE COMPANY

Concurrently with the execution and delivery of this Agreement, the Company is delivering to Purchaser the Disclosure Schedule numbered to correspond to the Sections contained in this Article III. Any disclosure of information in any Section of the Disclosure Schedule shall be deemed a disclosure of such information in any other Section where it is readily apparent from the substance of such disclosure, without referring to any agreement or other document discussed therein, that such disclosure is applicable to such other Section. As an inducement to Purchaser to enter into this Agreement, except as set forth in the Disclosure Schedule, the Company hereby represents and warrants to Purchaser that:

Section 3.1. Organization, Authority and Qualification.

(a) The Company is a corporation duly organized, validly existing and in good standing under the Laws of the State of Delaware and has all necessary corporate power and authority to enter into this Agreement and the Ancillary Agreements, to carry out its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the Ancillary Agreements by the Company, the performance by the Company of its obligations hereunder and thereunder and the consummation by the Company of the transactions contemplated hereby and thereby have been duly authorized by all requisite action on the part of the Company. The approval by the holders of a majority of the outstanding shares of Company Capital Stock voting together as a single class and two-thirds of the holders of the Company Preferred Stock voting together as a single class (the "**Requisite Stockholder Approvals**") are the only approvals of the Company's stockholders that are necessary to approve and adopt this Agreement and the transactions contemplated hereby under the Laws of the State of Delaware and the certificate of incorporation and bylaws of the Company. The Board of Directors of the Company has unanimously approved this Agreement and the transactions contemplated hereby. This Agreement has been, and upon their execution the Ancillary Agreements will be, duly executed and delivered by the Company, and (assuming due authorization, execution and delivery by Purchaser) this Agreement constitutes, and upon their execution the Ancillary Agreements will constitute, legal, valid and binding obligations of the Company enforceable against the Company in accordance with their respective terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar Laws relating to the enforcement of creditors' rights generally and by general principles of equity.

(b) The Company is duly licensed or qualified to do business and is in good standing in each jurisdiction in which the properties owned or leased by it or the operation of its business makes such licensing or qualification necessary, except where the failure to be so qualified or licensed and in good standing (to the extent applicable) would not, individually or in the aggregate, have a Material Adverse Effect.

Section 3.2. **Capitalization.** The authorized capital stock of the Company consists of (a) 15,000,000 shares of common stock, par value \$0.001 per share (the "**Company Common Stock**") of which 48,818 shares are issued and outstanding, (b) 4,348,550 shares of Series A convertible preferred stock, par value \$0.001 per share (the "**Series A Preferred**") of which 4,310,848 shares are issued and outstanding, (c) 206,313 shares of Series A-1 convertible preferred stock, par value \$0.001 per share (the "**Series A-1 Preferred**") of which 206,313 shares are issued and outstanding, (d) 4,348,550 shares of Series A-2 convertible preferred stock, par value \$0.001 per share (the "**Series A-2 Preferred**") of which no shares are issued and outstanding, (e) 7,230,005 shares of Series B convertible preferred stock, par value \$0.001 per share (the "**Series B Preferred**") of which 7,230,005 shares are issued and outstanding, (f) 7,230,005 shares Series B-1 convertible preferred stock, par value \$0.001 per share (the "**Series B-1 Preferred**" of which no shares are issued and outstanding, and together with the Series A Preferred, the Series A-1 Preferred, the Series A-2 Preferred and the Series B Preferred, the "**Company Preferred Stock**", and together with the Company Common Stock, the "**Company Capital Stock**"). Section 3.2 of the Disclosure Schedule sets forth any options, warrants or other convertible securities issued by the Company and exercisable for or convertible into shares of Company Capital Stock. Section 3.2 of the Disclosure Schedules sets forth all the record and beneficial holders of all the outstanding shares of Company Capital Stock as of the date of this Agreement, and the number of shares held by each such Person. The shares of Company Capital Stock set forth in this Section 3.2 are the only voting securities of the Company issued and outstanding.

Section 3.3. **Subsidiaries.** The Company does not have, and has never had, any Subsidiaries or any "affiliated" companies (within the meaning of Rule 145 promulgated under the Securities Act) 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, partnership, association, joint venture or other business entity.

Section 3.4. **Books and Records.** The minute books of the Company contain accurate records of all meetings and accurately reflect in all material respects all other actions taken by the stockholders, Board of Directors and all committees of the Board of Directors of the Company. Complete and accurate copies of all such minute books (including complete and accurate copies of the certificate of incorporation and bylaws or similar organizational documents of the Company, as amended through and in full force and effect as of the date hereof) and of the stock register of the Company have been provided by the Company to Purchaser.

Section 3.5. **No Conflict.** Assuming that all consents, approvals, authorizations and other actions described in Section 3.6 have been obtained and all filings and notifications listed in

Section 3.6 of the Disclosure Schedule have been made, the execution, delivery and performance of this Agreement and the Ancillary Agreements to which it is a party by the Company do not and will not require any consent, approval, authorization or other order of, action by, filing with or notification to, any Governmental Authority.

(a) violate, conflict with or result in the breach of any provision of the certificate of incorporation or the laws of the Company, (b) conflict with or violate (or cause an event which could, individually or in the aggregate, reasonably be expected have a Material Adverse Effect as a result of) any Law or Governmental Order applicable to the Company or any of its assets, properties or businesses, including, without limitation, the Assets and the Business, or (c) conflict with, result in any breach of, constitute a default (or event which with the giving of notice or lapse of time, or both, would become a default) under, require any consent under, or give to others any rights of termination, amendment, acceleration, suspension, revocation or cancellation of, or result in the creation of any Encumbrance on any of the Assets) pursuant to, any Contract or Permit to which the Company is a party or by which any of such assets or properties is bound or affected, including the Assigned Contracts and the Assigned Permits.

Section 3.6. **Governmental Consents and Approvals.** The execution, delivery and performance of this Agreement and each Ancillary Agreement to which it is a party by the Company do not and will not require any consent, approval, authorization or other order of, action by, filing with or notification to, any Governmental Authority.

Section 3.7. Financial Information; Internal Controls.

(a) True and complete copies of (a) the unaudited balance sheet of the Company for the fiscal year ended as of December 31, 2004, and the related unaudited statements of operations, changes in stockholders' equity and cash flows of the Company, and (b) the unaudited balance sheet of the Company for the three (3) month period ended as of March 31, 2005, and the related unaudited statements of operations, changes in stockholders' equity and cash flows of the Company (collectively, the "**Financial Statements**") have been delivered by the Company to Purchaser and are included in Section 3.7(a)(i) of the Disclosure Schedule. Except as disclosed in Section 3.7(a) of the Disclosure Schedule, the Financial Statements and the Reference Balance Sheet (i) were prepared in accordance with the books of account and other financial records of the Company, (ii) present fairly the financial condition and results of operations of the Company as of the dates thereof or for the periods covered thereby, (iii) have been prepared in accordance with U.S. GAAP applied on a basis consistent with the past practices of the Company and throughout the periods involved, and (iv) include all adjustments (consisting only of normal recurring accruals) that are necessary for a fair presentation of the financial condition of the Company and the results of the operations of the Company as of the dates thereof for the periods covered thereby. The reserves that are set forth and reflected on the Reference Balance Sheet are adequate and have been established in accordance with U.S. GAAP. Section 3.7(a)(ii) of the Disclosure Schedule lists, as of the date of the Reference Balance Sheet, all advance payments received by the Company. Proper amounts of deferred revenue appear on the Reference Balance Sheet determined in accordance with U.S. GAAP.

(b) The Company has established and maintains, adheres to and enforces a system of internal accounting controls which are effective in providing assurance regarding the reliability of

financial reporting and the preparation of financial statements in accordance with U.S. GAAP (including the Financial Statements), including policies and procedures that (i) require the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the Company, (ii) provide assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with U.S. GAAP, and that receipts and expenditures of the Company are being made only in accordance with appropriate authorizations of management and the Board of Directors of the Company and (iii) provide assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the assets of the Company. Neither the Company (including any employee thereof) nor the Company's independent auditors has identified or been made aware of (i) any significant deficiency or material weakness in the system of internal accounting controls utilized by the Company, (ii) 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 or (iii) any claim or allegation regarding any of the foregoing.

Section 3.8. **No Undisclosed Liabilities.** There are no Liabilities of the Company or the Business other than Liabilities (i) reflected or reserved against on the Reference Balance Sheet, (ii) disclosed in Section 3.8 of the Disclosure Schedule or (iii) incurred since the date of this Agreement in the ordinary course of business, consistent with past practice and which are incurred in compliance with the covenants set forth in this Agreement. Reserves are reflected on the Reference Balance Sheet against all Liabilities of the Company, other than Liabilities relating to the Excluded Assets and Excluded Liabilities, in amounts that have been established on a basis consistent with the past practices of the Company and in accordance with U.S. GAAP.

Section 3.9. **Conduct in the Ordinary Course; Absence of Certain Changes, Events and Conditions.**

(a) Since the Reference Balance Sheet Date, the Business has been conducted in the ordinary course and consistent with past practice.

(b) As amplification and not limitation of the foregoing, except as disclosed in Section 3.9(b) of the Disclosure Schedule, since the Reference Balance Sheet Date, the Company has not:

(i) permitted or allowed any of the Assets to be subjected to any Encumbrance, other than Permitted Encumbrances and Encumbrances that will be released at or prior to the Closing;

(ii) written down or written up (or failed to write down or write up in accordance with U.S. GAAP consistent with past practice) the value of any Assets or revalued any of the Assets other than in the ordinary course of business consistent with past practice and in accordance with U.S. GAAP;

(iii) settled or compromised any claim with respect to Taxes or assessment, prepared any Return in a manner inconsistent with past practice, created any Liability for Taxes other than in the ordinary course of business or filed any amended Return or claim for refund of Taxes with respect to income, operations or property;

(iv) amended, terminated, cancelled or compromised any material claims or waived any other rights of substantial value relating to the Assets;

(v) sold, transferred, leased, subleased, licensed or otherwise disposed of any properties or assets, real, personal or mixed, that would otherwise be included in the Assets if they were held by the Company as of the Closing Date;

(vi) (1) transferred, assigned or licensed to any Person or otherwise extended, amended or modified any rights to the Company-Owned Intellectual Property, or entered into grants to transfer or license to any Person future rights to the Company-Owned Intellectual Property, other than pursuant to End User Agreements consistent with past practice; (2) purchased or in-licensed any Intellectual Property or executed any Contract with respect to the Intellectual Property Rights of any Person other than ordinary course "shrink-wrap" software license agreements for internal operations consistent with past practice; (3) entered into any Contract with respect to the development of any Intellectual Property Rights with a third party, or (4) changed any prices or royalties set or charged by the Company to its customers or licensees or in pricing or royalties set or charged by Persons who have licensed Intellectual Property Right to the Company;

(vii) merged with, entered into a consolidation with or acquired an equity interest of in any Person or acquired a substantial portion of the assets or business of any Person or any division or line of business thereof, or otherwise acquired any material assets other than in the ordinary course of the Business consistent with past practice;

(viii) made any material changes in the customary methods of operations of the Company or the Business, including, without limitation, practices and policies relating to marketing, selling and pricing;

(ix) made any express or deemed election with respect to Taxes;

(x) failed to pay any creditor any amount owed to such creditor when due, delayed or postponed the payment of accounts payable or other Liabilities of the Business other than in the ordinary course of business consistent with past practice or requested that any vendor or service provider hold or delay any invoices or billing statements;

(xi) (A) granted any increase, or announced any increase, in the wages, salaries, compensation, bonuses, incentives, pension or other benefits payable by the Company to any Key Employees, including, without limitation, any increase or change pursuant to any Plan, or (B) established or increased or promised to increase any benefits under any Plan with respect to Key

employees, in either case except as required by Law and involving ordinary increases consistent with the past practice;

(xii) entered into any agreement, arrangement or transaction with any of its directors, officers, employees or stockholders (or with any relative, beneficiary, spouse or Affiliate or such Persons) other than at-will offer letters with newly hired employees consistent with past practice;

(xiii) allowed any Permit that would constitute an Assigned Permit if in place on the Closing Date to lapse or terminate;

(xiv) failed to maintain the Assets in good repair and operating condition, ordinary wear and tear excepted;

(xv) suffered any casualty loss or damage with respect to any of the Assets which in the aggregate have a replacement cost of more than \$5,000, whether or not such losses or damage shall have been covered by insurance;

(xvi) entered into, amended, modified or consented to the termination of any Material Contract or its rights thereunder;

(xvii) waived the benefits of, agreed to modify in any manner, terminate, release any Person from or knowingly fail to enforce the confidentiality or nondisclosure provisions of any Contract relating to the Company-Owned Intellectual Property;

(xviii) commenced or settled any litigation (whether or not commenced prior to the date of this Agreement) relating to the Assets, the Assumed Liabilities or the Business;

(xix) suffered any Material Adverse Effect;

(xx) agreed, whether in writing or otherwise, to take any of the actions specified in this Section 3.9(b) or granted any options to purchase, rights of first refusal, rights of first offer or any other similar rights with respect to any of the actions specified in this Section 3.9(b), except as expressly contemplated by this Agreement and the Ancillary Agreements; or

(xxi) received any notice (1) of any claim or potential claim of ownership by any Person other than Company of the Intellectual Property owned or developed by or created by the Company; (2) of any direct, indirect, or contributory infringement or misappropriation of any Intellectual Property of any Person (or of unfair competition or trade practices); or (3) of an offer to license any third party or other Intellectual Property Rights in the context of the possible need to do so to avoid infringement.

Section 3.10. **Litigation.** Section 3.10 of the Disclosure Schedule sets forth (with respect to an Action disclosed therein, sets forth the parties, nature of the proceeding, date and method commenced, amount of damages or other relief sought and, if applicable, paid or granted), all actions by or against the Company pending before any Governmental Authority (or, to the knowledge of the Company, threatened to be brought by or before any Governmental Authority). None of the matters disclosed in Section 3.10 of the Disclosure Schedule has had or could, individually or in the aggregate, reasonably be expected have a Material Adverse Effect or could affect the legality, validity or enforceability of this Agreement or any Ancillary Agreement or the consummation of the transactions contemplated hereby or thereby. Neither the Company nor any of the Assets or the Business, is subject to any material Governmental Order (nor, to the knowledge of the Company, are there any such material Governmental Orders threatened to be imposed by any Governmental Authority).

Section 3.11. Compliance with Laws.

(a) The Company has conducted and continues to conduct the Business and operated and continues to operate the Assets in all material respects in accordance with all Laws and Governmental Orders (including Environmental Laws) applicable to the Company, the Assets or the Business, and the Company is not in material violation of any such Law or Governmental Order.

(b) Section 3.11(b) of the Disclosure Schedule sets forth a brief description of each Governmental Order applicable to the Company, the Assets or the Business, and no such Governmental Order has had or could, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

Section 3.12. Permits and Licenses; Environmental Matters.

(a) Section 3.12(a) of the Disclosure Schedule sets forth an accurate and complete list of all permits, licenses, authorizations, certificates, exemptions and approvals of Governmental Authorities (collectively, "**Permits**") held by the Company. The Permits set forth on Section 3.12(a) of the Disclosure Schedule include all the material Permits necessary or proper for the current use and operation of the Assets and the conduct of the Business, and all such material Permits are in full force and effect. The Company is in compliance in all material respects with the material Permits and the requirements thereof.

Section 3.13. Material Contracts.

(a) Section 3.13(a) of the Disclosure Schedule lists, as of the date of this Agreement, each of the following Contracts to which the Company is a party or by which any of the Assets or the Business are bound or that otherwise relate to the Assets or the Business (such Contracts, together with all agreements relating to Intellectual Property set forth in Section 3.14 of the Disclosure Schedule, being "**Material Contracts**");

(i) each Contract for the furnishing of services by or to the Company related to the Assets and which involves annual payments in excess of \$25,000;

(ii) any Contract in which it has granted or received most favored customer pricing provisions, rights of first refusal, rights of first negotiation, or similar rights with respect to any product, service, Technology, or Intellectual Property Right that is now or hereafter owned by it, provided to it, or provided by it, or the Business;

(iii) all employment or consulting Contracts with any officer, director, employee, independent contractor or consultant (excluding offer letters for at-will employees in substantially the form(s) of offer letter made available to Purchaser pursuant to Section 3.13(b));

(iv) any Contract providing for the development of any Technology or Intellectual Property Rights by or for (or for the benefit or use of) it;

(v) all Contracts relating to Indebtedness;

(vi) all Contracts with any Governmental Authority;

(vii) all Contracts that limit or purport to limit the ability of the Company or the Business to compete in any line of business or with any Person or in any geographic area or during any period of time or otherwise granting any exclusive rights, including any exclusivity with respect to any product, service, market, industry, field of use, or geographic territory;

(viii) all Contracts or Plans 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;

(ix) any Contract providing for indemnification by the Company, or any representation, warranty or guaranty by any of them, other than any written Contract entered into in connection with the sale or license of the products of the Business in the ordinary course of business on the Company's standard form;

(x) any Contract currently in force relating to the disposition or acquisition of assets that would constitute Assets not in the ordinary course of business;

(xi) any joint marketing, development, strategic alliance, joint venture or similar Contract under which the Company has obligations to jointly market any product, technology or service, or any Contract pursuant to which the Company has obligations to jointly develop any Intellectual Property that will not be owned, in whole, by the Company;

(xii) any Contract under which it has any obligation, or in the future may have an obligation, to provide Company Source Code to any third party for any product or technology;

(xiii) any Contract under which it is a licensor of Intellectual Property

Rights;

(xiv) any Contract under which the Company is a licensee of Intellectual Property Rights of any other Person (other than nonexclusive object code licenses of software that is generally available to the public that are not used in connection with the Assets);

(xv) any settlement agreement under which the Company has any ongoing obligations;

(xvi) any Contract (A) that requires ongoing payment of royalties or periodic fees by the Company, or (B) that is material to the Business, the Company Intellectual Property or any Company Products. All Company Intellectual Property that is not exclusively owned by the Company is set forth in Section 3.13(a)(xvi) of the Disclosure Schedule. All Company Intellectual Property which is not exclusively owned by the Company that is embedded in or provided to customers with Company Products is identified in Section 3.13(a)(xvi) of the Disclosure Schedule, on a Company Product-by-Company Product basis, identifying the Company Product with which it is associated;

(xvii) any application hosting, application management, application usage, website hosting, or data sharing, data feed, information exchange, fee sharing, lead or customer referral, co-branding, framing, service, order or transaction processing or similar Contract relating to any aspect or element of any of the Internet Properties of the Company, or any other Internet Property or use of the public internet, or the extranet or internet of any Person;

(xviii) any Contract with any distributor, reseller, dealer, sales representative or any other similar Contracts;

(xix) any Contract pursuant to which the Company has acquired a business or entity, or material portion of the assets of a business or entity, whether by way of merger, consolidation, purchase of stock, purchase of assets, exclusive license or otherwise;

(xx) any Contract under which the Company (A) is committed to provide products or services at a later date at a fixed price, or (B) has provided products or services, but which have not yet been accepted thereunder;

(xxi) all Contracts between or among the Company, on the one hand, and any of its Affiliates on the other hand; and

(xxii) all other Contracts, whether or not made in the ordinary course of the Business, which are material to the Company or the conduct of the Business as currently conducted or currently contemplated to be conducted, or the absence of which could, individually or in the aggregate, reasonably be expected have a Material Adverse Effect.

(b) The Company has provided or made available to Purchaser a true and complete copy of each Material Contract, in each case as amended to date, and all forms of offer letters. Each Assigned Contract: (i) is legal, valid and binding on the respective parties thereto and is in full force and effect, (ii) is freely and fully assignable to Purchaser without penalty or other adverse consequences, and (iii) upon consummation of the transactions contemplated by this Agreement and the Ancillary Agreements, except to the extent that any consents set forth in Section 3.5 of the Disclosure Schedule are not obtained, shall continue in full force and effect without penalty or other adverse consequence. The Company is not in breach of, or default under, any Assigned Contract. To the knowledge of the Company, no other party to any Assigned Contract is in breach thereof or default thereunder. The Company has not received notice from any party to an Assigned Contract indicating such Person's intent to terminate an Assigned Contract or to renegotiate the terms of any Assigned Contract.

(c) There is no Contract granting any Person any preferential right to purchase, other than in the ordinary course of the Business consistent with past practice, any of the Assets.

Section 3.14. Intellectual Property.

(a) Section 3.14(a) of the Disclosure Schedule contains a complete and accurate list (by name and version number) of all products, software or service offerings of the Company that have been licensed, sold, distributed or otherwise disposed of by the Company preceding the date hereof or which the Company has any obligation or liability or which the Company intends to license, sell, distribute or otherwise dispose of in the future, including any products or service offerings under development (collectively, the "**Company Products**").

(b) Section 3.14(b) of the Disclosure Schedule lists all Registered Intellectual Property Rights owned by, filed in the name of, or applied for, by the Company (the "**Company Registered Intellectual Property Rights**") and lists any proceedings or actions before any court, tribunal (including the United States Patent and Trademark Office (the "**PTO**") or equivalent authority anywhere in the world) related to any Company Registered Intellectual Property Rights or Company Intellectual Property.

(c) Each Company Registered Intellectual Property Right is valid and subsisting. All necessary documents and certificates in connection with such Company Registered Intellectual Property Rights have been filed with the relevant patent, copyright, trademark or other authorities in the United States and foreign jurisdictions, for the purposes of perfecting, prosecuting and maintaining such Registered Intellectual Property Rights. There are no actions that must be taken by the Company within 180 days of the date of this Agreement, including the payment of any registration, maintenance or renewal fees or the filing of any responses to PTO office actions, documents, applications or certificates for the purposes of obtaining, maintaining, perfecting or preserving or renewing any Registered Intellectual Property Rights. The Company has not claimed "small business status," or other special status in the application for or registration of any Registered Intellectual Property Rights.

(d) The Company (i) owns and has independently developed or (ii) has the valid right or license to all Intellectual Property used in or necessary for the conduct of the Business as currently conducted or contemplated to be conducted, including without limitation the design, development, use (including intended uses), branding, advertising, manufacture, promotion, marketing, maintenance, support, license, distribution, import, and sale of Company Products (collectively, "**Company Intellectual Property**").

(e) Section 3.14(e) of the Disclosure Schedule sets forth any Intellectual Property acquired by the Company pursuant to an exclusive license or assignment to the Company. In each case in which the Company has acquired, through an exclusive license or assignment, any Intellectual Property from any Person, the Company has sufficient rights to irrevocably transfer all rights in and to all such Intellectual Property (including all associated Intellectual Property Rights and the right to seek past and future damages with respect thereto) to the Company. The Company has recorded each such assignment or exclusive license of Registered Intellectual Property Right assigned thereto with the relevant Governmental Authority in accordance with applicable laws and regulations in each jurisdiction in which such assignment is required to be recorded.

(f) The Company has no knowledge of any facts or circumstances that would render any Company Intellectual Property invalid or unenforceable.

(g) All Company-Owned Intellectual Property will be fully transferable, alienable or licensable by the Purchaser without restriction and without payment of any kind to any third party and is owned exclusively by the Company. Except as set forth in Section 3.14(g) of the Disclosure Schedule, all Company-Licensed IP licensed to the Company will be fully licensable by Purchaser without restriction and without payment of any kind to any third party.

(h) Each item of Company-Owned Intellectual Property is free and clear of any Encumbrances or licenses, except for the Company's End User Agreements. The rights, licenses and interests of the Company in and to all Company-Licensed IP are free and clear of all Encumbrances and licenses, other than End User Agreements. The Company has provided to Purchaser a true and complete copy of all End User Agreements entered into by the Company.

(i) The Company is the exclusive owner of all Company Intellectual Property, except for Company-Licensed IP. Without limiting the generality of the foregoing, (i) the Company is the exclusive owner of all material Trademarks used in connection with the operation or conduct of the Business as currently conducted or currently contemplated to be conducted, including the design, development, use (including intended uses), branding, advertising, manufacture, promotion, marketing, maintenance, support, license, distribution, import, and sale of Company Products by the Company, and (ii) the Company owns exclusively all Copyrighted works that are included or incorporated into Company Products or which the Company otherwise purports to own.

(j) The Company has not (i) transferred ownership of, or entered into any Contract under which it has, or may have, the obligation to transfer any ownership of, or granted any exclusive license of or right to use or distribute (or entered into any Contract under which it has, or

may have, the obligation to grant any exclusive license or right to use or distribute), or authorized the retention of any exclusive rights to use, or joint ownership of, any Intellectual Property that is or was Company Intellectual Property, to any other Person, (ii) permitted the Company's rights in such Company Intellectual Property to lapse or enter the public domain, (iii) entered into any Contract under which it has granted any covenant not to sue or any asset of or right to exploit any Company Intellectual Property, or (iv) entered into any Contract under which it has granted any Person the right to bring a lawsuit for infringement or misappropriation of any Company Intellectual Property.

(k) All Company Intellectual Property was written and created solely by either (i) employees of the Company or (ii) by third party subcontractors, and in each case such employee or third party subcontractor has validly and irrevocably assigned all of their rights, including Intellectual Property Rights therein, to the Company, and no third party owns or has any rights to any of Company Intellectual Property. The Company has provided to Purchaser true and correct copy of the forms for such assignments.

(l) Section 3.14(l) of the Disclosure Schedule lists all Contracts to which the Company is a party with respect to any Company-Licensed IP. All such Contracts are in full force and effect and neither the Company nor any other party to such Contract is in breach of or failed to perform under any of the foregoing Contracts. Immediately following the Closing Date, Purchaser will be entitled to exercise all of Company's rights under such Contracts to the same extent the Company would have been able to had the transactions contemplated by this Agreement not occurred and without being required to pay any additional amounts or consideration in excess of what Company would have been required to pay had such transactions contemplated hereby not occurred.

(m) No Person who has provided or licensed any Intellectual Property to the Company has ownership rights or license rights to improvements, enhancements or other modifications or derivatives made by or for the Company in such Intellectual Property.

(n) The Company has the right to use, pursuant to valid licenses, all software development tools, library functions, compilers and all other third-party software that are used or necessary to create, modify, compile, operate, maintain or support any software that is used in the Business as currently conducted by the Company or as currently contemplated to be conducted thereby, each of which is set forth on Section 3.14(n) of the Disclosure Schedule.

(o) No government, military or quasi-governmental funding, resources or facilities of a university, college, other educational institution or research center or funding from third parties was used in the development of any Company Intellectual Property. To the knowledge of the Company, no current or former employee, consultant or independent contractor of the Company, who was involved in, or who contributed to, the creation or development of any Company Intellectual Property, has performed services for the government, university, college, or other educational institution or research center, or any other entity or person during a period of time during

which such employee, consultant or independent contractor was also performing services for the Company.

(p) The operation of the Business as previously conducted, currently conducted and currently contemplated to be conducted, including the design, development, use (including uses intended by the Company), branding, advertising, manufacture, promotion, marketing, maintenance, support, license, distribution, import, and sale of Company Products, has not, does not and will not (including when conducted by Purchaser), directly, indirectly or contributorily infringe or misappropriate any Intellectual Property 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. The Company has not received notice from any Person claiming that the operation of the Business as previously conducted, currently conducted or currently contemplated to be conducted including any design, development, use (including intended uses), branding, advertising, manufacture, promotion, marketing, maintenance, support, license, distribution, import, and sale of any Company Product, directly, indirectly or contributorily infringes or misappropriates any Intellectual Property of any Person or constitutes unfair competition or trade practices under the laws of any jurisdiction (nor does the Company have knowledge of any basis therefor). There is no pending or threatened claim or litigation contesting the validity, ownership or right of the Company to exercise any Intellectual Property Right or to operate the Business as previously conducted, currently conducted or currently contemplated to be conducted, including the design, development, use (including intended uses), branding, advertising, manufacture, promotion, marketing, maintenance, support, license, distribution, import, and sale of Company Products, nor is there a legitimate basis for any such claim. The Company has not received any opinion of counsel that any third party Patent directly or indirectly applies to the operation of the Business as previously conducted, currently conducted or currently contemplated to be conducted, including with respect to any Company Product, nor has the Company received any notice of infringement of any third party Intellectual Property Rights or offer to license any third party or other Intellectual Property Rights in the context of any possible need to do so to avoid infringement.

(q) No Company Intellectual Property or Company Product is subject to any proceeding or outstanding Governmental Order or Law that restricts in any manner the design, development, use (including uses intended by the Company), branding, advertising, manufacture, promotion, marketing, maintenance, support, license, distribution, import, and sale thereof by the Company or that may be reasonably expected to adversely affect the validity, use or enforceability of such Company Intellectual Property. The operation of the Business as previously conducted, currently conducted and currently contemplated to be conducted, including any design, development, use (including uses intended by the Company), branding, advertising, manufacture, promotion, marketing, maintenance, support, license, distribution, import, and sale of any Company Product, has not, does not and would not violate any applicable Government Order or Law.

(r) Section 3.14(r) of the Disclosure Schedule lists all Contracts between the Company and any other Person wherein or whereby the Company has agreed to, or assumed, any obligation or duty to warrant, indemnify, reimburse, hold harmless, guaranty or otherwise assume or

incur any obligation or liability or provide a right of rescission with respect to the infringement or misappropriation by the Company or such other Person of the Intellectual Property of any Person other than the Company.

(s) To the knowledge of the Company, there are no Contracts between the Company and any other Person with respect to Company Intellectual Property under which there is any dispute regarding the scope of such Contract, or performance under such Contract, including with respect to any payments to be made or received by the Company thereunder.

(t) The Company has not brought any action, suit or proceeding for infringement of Company Intellectual Property or breach of any Contract involving Intellectual Property against any third party. To the Company's knowledge, no Person is infringing or misappropriating any Company Intellectual Property.

(u) The Company has protected the Company's rights in confidential information and trade secrets owned thereby, or which was provided by any other Person thereto. The Company has and enforces a policy requiring each director, officer, management, technical and professional employee and consultant thereof to execute a proprietary rights and confidentiality agreement substantially in the form set forth in Section 3.14(u) of the Disclosure Schedule and all current and former directors, officers, managements, technical and professional employees and consultants of the Company who have created or modified any of Company Intellectual Property have executed such an agreement to maintain in confidence all confidential or proprietary information acquired by them in the course of their employment and assigning all of such directors', officers', management, technical and professional employees' and consultants' rights in and to such Intellectual Property to the Company. Copies of all such agreements have been delivered to Purchaser's counsel.

(v) Neither this Agreement nor the transactions contemplated by this Agreement, including the assignment to Purchaser, by operation of law or otherwise, of any Contracts to which the Company is a party, will result in (i) any third party being granted rights or access to, or the placement in or release from escrow, of any Company Intellectual Property (including source code for any software used in the Business or contained in any Company Product), (ii) Purchaser granting to any third party any right, title or interest to or with respect to any Intellectual Property owned by, or licensed to, Purchaser pursuant to any Contract to which the Company is a party or by which it is bound, (iii) Purchaser being bound by, or subject to, any non-compete or other restriction on the operation or scope of its business, (iv) Purchaser being obligated to pay any royalties or other amounts to any third party in excess of those payable by Purchaser, prior to the Closing pursuant to any Contract to which the Company is a party or by which it is bound, or (v) any breach, violation, modification, cancellation, termination, suspension, forfeiture or other impairment of rights under any Contract to which Company is a party.

(w) The Company owns and possesses source code for all software owned by the Company and owns or has valid licenses and possesses source code for all products owned, distributed and presently maintained and supported by Company, including but not limited to any

Company Products. The Company has taken all actions customary in the software industry to document the software portions of Company Products or of other Company Intellectual Property and its operation, such that such software, including the source code and documentation, have been written in a clear and professional manner so that they may be understood, modified, maintained, built and released in an efficient manner by reasonably competent programmers.

(x) **“Open Source Materials”** means any software, library, utility, tool or other computer or program code (collectively, **“Code”**) that is licensed or distributed as **“free software,”** **“freeware,”** **“open source software”** or under any terms or conditions that impose any requirement that any software using, linked with, incorporating, distributed with, based on, derived from or accessing the Code: (i) be made available or distributed in source code form; (ii) be licensed for the purpose of making derivative works; (iii) be licensed under terms that allow reverse engineering, reverse assembly or disassembly of any kind; or (iv) be redistributable at no charge. Open Source Materials include without limitation any Code licensed or distributed under any of the following licenses or distribution models or similar licenses or distribution models: the GNU General Public License (GPL), GNU Lesser General Public License or GNU Library 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). Section 3.14(x) of the Disclosure Schedule lists all Open Source Materials used by the Company 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 embedded, linked (including dynamic linking), modified and/or distributed by the Company and whether and the extent to which each of the Open Source Materials was used to develop, distribute or design Company Products to link with (including dynamic linking at runtime) or access in any way (whether by calls, execution branching, interprocess control or other technique of any kind whatsoever) any Open Source Materials. Except as set forth in Section 3.14(x) of the Disclosure Schedule, the Company has not (a) incorporated Open Source Materials into, or combined Open Source Materials with, any Intellectual Property or any Company Products, (b) distributed Open Source Materials in conjunction with any Intellectual Property or Company Products, or (c) used Open Source Materials that create, or purport to create, obligations for the Company with respect to Intellectual Property or Company Products or grant, or purport to grant, to any third party, any rights or immunities under Intellectual Property (including, but not limited to, using any Open Source Materials that require, as a condition of use, modification and/or distribution of such Open Source Materials that other software incorporated into, derived from or distributed with such Open Source Materials be (i) made available or distributed in source code form; (ii) licensed for the purpose of making derivative works; (iii) licensed under terms that allow reverse engineering, reverse assembly or disassembly of any kind; or (iv) redistributable at no charge.). No Company Product or Company Intellectual Property is subject to the terms of license of any such Open Source Materials. The Company has not used Code that includes the Linux kernel version 2.4 or any later version.

(y) All Company Products conform in all material respects to applicable contractual commitments, express and implied warranties, product specifications and product

documentation and to any representations provided to customers. The Company has no liability (and, to the knowledge of the Company, there is no legitimate basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim or demand against the Company giving rise to any material liability relating to the foregoing Contracts) for replacement or repair thereof or other damages in connection therewith in excess of any reserves therefor reflected on the Reference Balance Sheet.

(z) The Company has not collected any personally identifiable information from any third parties. The Company has complied with all applicable Laws and its internal privacy policies relating to (i) the privacy of users of its products and services and all Internet Properties owned, maintained or operated by the Company, and (ii) the collection, storage and transfer of any personally identifiable information collected by the Company or by third parties having authorized access to the records of the Company. The execution, delivery and performance of this Agreement shall comply with all applicable laws relating to privacy and with the Company's privacy policies. Copies of all current and prior privacy policies of the Company, including the privacy policies included in the Company's Internet Properties, are attached as Section 3.14(z) of the Disclosure Schedule. Each such privacy policy and all materials distributed or marketed by the Company have at all times made all disclosures to users or customers 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.

(aa) Except as set forth on Section 3.14(aa) of the Disclosure Schedule, neither the Company nor any other Person acting, respectively, on their behalf has disclosed, delivered or licensed to any Person, agreed to disclose, deliver or license to any Person, or permitted the disclosure or delivery to any escrow agent or other Person of, any Company Source Code. No event has occurred, and no circumstance or condition exists, that (with or without notice or lapse of time, or both) will, or would reasonably be expected to, result in the disclosure or delivery by the Company or any Person acting, respectively, on their behalf to any Person of any Company Source Code. Section 3.14(aa) of the Disclosure Schedule identifies each Contract pursuant to which the Company has deposited, or is or may be required to deposit, with an escrow-holder or any other Person, any Company Source Code, and describes whether the execution of this Agreement or any of the other transactions contemplated by this Agreement, in and of itself, would reasonably be expected to result in the release from escrow of any Company Source Code.

(bb) Company Products are free of any disabling codes or instructions (a "Disabling Code"), and any virus or other intentionally created, undocumented contaminant (a "Contaminant"), that may, or may be used to, provide unauthorized access, or unauthorized modifications or deletions, or otherwise damage or disable Company Products (or systems which they interact or interoperate with such Company Products) or that may result in damage to any of the foregoing. The components obtained from third party suppliers are free of any Disabling Codes or Contaminants that may, or may be used to, access, modify, delete, damage or disable any of Company Products (or systems which they interact or interoperate with such Company Products) or that might result in damage thereto. The Company has taken reasonable steps and implemented

reasonable procedures (based on standard industry practices) to ensure that its information technology systems utilized by the Company in the operation of the Business are free from Disabling Codes and Contaminants. The Company has in place appropriate disaster recovery plans, procedures and facilities and has taken all reasonable steps to safeguard its information technology systems utilized by the Company in the operation of the Business and to restrict unauthorized access thereto.

(cc) Except for the support and maintenance obligations expressly set forth in Section 3.14(cc) of the Disclosure Schedule, the Company has no obligations to any third party to support, maintain, fix, update, upgrade, replace, port, translate, localize, enhance, create new versions of, or evolve any Company Products existing as of Closing.

(dd) No Intellectual Property incorporated or embodied in any version of the Company Products sold, marketed or otherwise disposed of under the mark "Avaki 2.6 ComputeGrid" (or any predecessor thereof) (the "**ComputeGrid Products**") is, in whole or in part, incorporated or embodied in any version of the Company Product sold, marketed or otherwise disposed of under the mark "DataGrid" (the "**DataGrid Products**"). During the entire period within which the DataGrid Products were designed, developed or tested, the Company has used commercially reasonable efforts to implement and enforce procedures with its employees, contractors and development partners to ensure that no Intellectual Property incorporated or embodied in any ComputeGrid Products, would be, in whole or in part, incorporated or embodied in any DataGrid Products.

(ee) Section 3.14(ee) of the Disclosure Schedule contains a list of all industry standards bodies or similar organizations that could require or obligate the Company to grant or offer to any other Person any license or right to any Company Intellectual Property that the Company is now or ever was a member or promoter of, or a contributor to, or otherwise participated in. The Company has delivered to Purchaser complete and accurate copies of all Contracts, policies and rules to which the Company is a party or by which the Company is bound relating to Intellectual Property of each standards body or similar organization identified in the Disclosure Schedule. For each such standards body to which the Company is now or ever was a member, Section 3.14(ee) lists the Company Intellectual Property contributed to such standards body and describes any rights and limitations imposed by such standards body on any such Company Intellectual Property.

Section 3.15. Assets.

(a) The Company owns, leases or has the legal right to use all the tangible Assets, with respect to Assigned Contract rights, is a party to and enjoys the right to the benefits of all Assigned Contracts. The Company has good and marketable title to, or, in the case of leased or subleased Assets, valid and subsisting leasehold interests in, all the tangible Assets, free and clear of all Encumbrances.

(b) The Assets (other than the Excluded Assets) constitute all the properties, assets and rights (i) forming a part of the Business, (ii) used, held for use or intended to be used in

the Business, and (iii) necessary to conduct the Business as currently conducted or currently contemplated to be conducted. At all times since the Reference Balance Sheet Date, the Company has caused the Assets to be maintained in accordance with good business practice, and all the Assets are in good operating condition and repair (normal wear and tear excepted) and are suitable for the purposes for which they are used and intended.

(c) The Company has the complete and unrestricted power and unqualified right to sell, assign, transfer, convey and deliver the Assets to Purchaser without penalty or other adverse consequences. Following the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements and the execution of the instruments of transfer contemplated by this Agreement and the Ancillary Agreements, Purchaser will own, with good, valid and marketable title, or lease, under valid and subsisting leases, or otherwise acquire the interests of the Company in the Assets, free and clear of any Encumbrances (other than any Encumbrances created by Purchaser), and without incurring any penalty or other adverse consequence, including, without limitation, any increase in rentals, royalties, or license or other fees imposed as a result of, or arising from, the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements.

Section 3.16. **Employee Benefit Matters.**

(a) **Schedule.** Section 3.16(a) of the Disclosure Schedule contains a complete and accurate list of all Plans. The Company does not have any plan or commitment to establish any new Plan, to modify any Plan (except to the extent required by law or to conform any such Plan to the requirements of any applicable law, in each case as previously disclosed to Purchaser in writing, or as required by this Agreement), or to adopt or enter into any new Plan.

(b) **Plan Compliance.** (i) the Company has performed in all material respects all obligations required to be performed by it under, is not in default or violation of, and has no knowledge of any default or violation by any other party to each Plan, and each Plan has been established and maintained in all material respects in accordance with its terms and in compliance with all applicable laws, statutes, orders, rules and regulations, including but not limited to ERISA or the IRC; (ii) each Plan intended to qualify under Section 401(a) of the IRC and each trust intended to qualify under Section 501(a) of the IRC has either received a favorable determination, opinion, notification or advisory letter from the IRS with respect to each such Plan as to its qualified status under the IRC, including all amendments to the IRC effected by the Tax Reform Act of 1986 and subsequent legislation, or has remaining a period of time under applicable Treasury Regulations or IRS pronouncements in which to apply for such a letter and make any amendments necessary to obtain a favorable determination as to the qualified status of each such Plan; (iii) no "prohibited transaction," within the meaning of Section 4975 of the IRC or Sections 406 and 407 of ERISA, and not otherwise exempt under Section 4975 of the IRC or Section 408 of ERISA (or any administrative class exemption issued thereunder), has occurred with respect to any Plan; (iv) there are no actions, suits or claims pending, or, to the knowledge of the Company, threatened or reasonably anticipated (other than routine claims for benefits) against any Plan or against the assets of any Plan; (v) each Plan can be terminated or otherwise discontinued prior to Closing without material liability to the

Purchaser; (vi) there are no audits, inquiries or proceedings pending or, to the knowledge of the Company or any of its Affiliates, threatened by the IRS or Department of Labor with respect to any Plan; and (vii) neither the Company nor any of its Affiliates is subject to any penalty or tax with respect to any Plan under Section 502(i) of ERISA or Sections 4975 through 4980 of the IRC.

(c) Pension Plan. Neither the Company nor any of its Affiliates has ever maintained, established, sponsored, participated in, or contributed to, any "employee pension benefit plan," within the meaning of Section 3(2) of ERISA that is subject to Title IV of ERISA or Section 412 of the IRC.

(d) Collectively Bargained, Multiemployer and Multiple Employer Plans. At no time has the Company or any of its Affiliates contributed to or been obligated to contribute to any "multiemployer plan," as defined in Section 3(37) of ERISA. Neither the Company, nor any of its Affiliates 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 IRC.

(e) No Post-Employment Obligations. No Plan provides, or reflects or represents any liability to provide retiree health to any person for any reason, except as may be required by Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, or other applicable statute, and the Company has never represented, promised or contracted (whether in oral or written form) to any current or former employee, director, or consultant (either individually or as a group) or any other person that any individual would be provided with retiree health, except to the extent required by statute.

(f) Health Care Compliance. Neither the Company nor any of its Affiliates has, prior to the Closing Date and in any material respect, violated any of the health care continuation requirements of Consolidated Omnibus Budget Reconciliation Act of 1985, the requirements of the Family Medical Leave Act, the requirements of the Health Insurance Portability and Accountability Act of 1996, the requirements of the Women's Health and Cancer Rights Act of 1998, the requirements of the Newborns' and Mothers' Health Protection Act of 1996, or any amendment to each such act, or any similar provisions of state law applicable to its current and former employees.

(g) International Plans. Each Plan established for the benefit of employees outside of the United States has been established, maintained and administered in compliance with its terms and conditions and with the requirements prescribed by any and all statutory or regulatory laws that are applicable to such Plan. Furthermore, no such Plan has unfunded liabilities.

(h) Warn Act Liabilities. The Company is in compliance with the requirements of the Workers Adjustment and Retraining Notification Act ("WARN") or any similar state or local law. Within the past sixty (60) days, 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

(i) **Parachute Payments.** No payment or benefit which will or may be made by the Company or any of its Affiliates with respect to any current employee or consultant or any other "disqualified individual" (as defined in IRC Section 280G and the regulations thereunder) will be characterized as a "parachute payment," within the meaning of Section 280G(b)(2) of the IRC.

Section 3.17. **Labor Matters.** (a) the Company is not a party to any collective bargaining agreement or other labor union Contract applicable to persons employed by the Company, and currently there are no organizational campaigns, petitions or other unionization activities seeking recognition of a collective bargaining unit which could affect the Company or the Business; (b) there are no controversies, strikes, slowdowns or work stoppages pending or, to the knowledge of the Company, threatened between the Company, on the one hand, and any of its employees on the other hand, and the Company has not experienced any such controversy, strike, slowdown or work stoppage within the past three years; (c) the Company has not materially breached or otherwise failed to comply with the provisions of any collective bargaining or union Contract and there are no grievances outstanding against the Company under any such Contract; (d) there are no unfair labor practice complaints pending against the Company before the National Labor Relations Board or any other Governmental Authority or any current union representation questions involving employees of the Company; (e) the Company is currently in compliance with all applicable Laws relating to the employment of labor, including those related to wages, hours, collective bargaining and the payment and withholding of taxes and other sums as required by the appropriate Governmental Authority and have withheld and paid to the appropriate Governmental Authority or are holding for payment not yet due to such Governmental Authority all amounts required to be withheld from employees and are not liable for any arrears of wages, taxes, penalties or other sums for failure to comply with any of the foregoing; (f) there is no claim with respect to payment of wages, salary or overtime pay that has been asserted or is now pending or threatened before any Governmental Authority with respect to any Persons currently or formerly employed by the Company; (g) there is no charge or proceeding with respect to a violation of any occupational safety or health standards that has been asserted or is now pending or threatened with respect to the Company; and (h) there is no charge of discrimination in employment or employment practices, for any reason, including, without limitation, age, gender, race, religion or other legally protected category, which has been asserted or is now pending or threatened before the United States Equal Employment Opportunity Commission, or any other Governmental Authority in any jurisdiction in which the Company has employed or currently employs any Person.

Section 3.18. **Employees.** Section 3.18 of the Disclosure Schedule lists the name, the place of employment, the current annual salary rates, bonuses, retention, deferred or contingent compensation, pension, accrued vacation, "golden parachute" and other like benefits paid or payable (in cash or otherwise) in 2003, 2004 and thereafter (as applicable) and a description of the position and job function of each current employee, officer, director, consultant or agent of the Company.

Section 3.19. Taxes.

(a) All Returns required to be filed in connection with the Business have been timely filed. All Taxes required to be paid (whether or not shown to be due on such Returns), the non-payment of which would result in an Encumbrance on any Asset, have been timely paid. All such Returns are true, correct and complete in all material respects.

(b) There is no material Action, investigation, audit or examination proposed in writing or currently ongoing in connection with the Business in respect of any Tax. No deficiencies for any Taxes have been proposed, asserted or assessed in writing in connection with the Business. The Company is not currently the beneficiary of any extension of time within which to pay any Tax, the non-payment of which would result in an Encumbrance on any Asset, or to file any Return with respect to such Taxes. The Company has not waived any statute of limitations in respect of Taxes, the non-payment of which would result in an Encumbrance on any Asset, or agreed to any extension of time with respect to a Tax assessment or deficiency, the non-payment of which would result in an Encumbrance on any Asset. No claim has ever been made by a Governmental Authority in a jurisdiction where the Company does not file Returns that the Company is or may be subject to taxation by that jurisdiction.

(c) All Taxes required to have been withheld in connection with the Business have been withheld and paid over to the proper Governmental Authority.

(d) There are no material Encumbrances for Taxes upon any of the Assets (other than for Taxes not yet due and payable).

Section 3.20. Full Disclosure.

(a) The Company is not aware of any facts pertaining to the Company, the Assets, the Assumed Liabilities or the Business which could, individually or in the aggregate, reasonably be expected have a Material Adverse Effect and which have not been disclosed in this Agreement, the Disclosure Schedule or the Financial Statements.

(b) No representation or warranty of the Company in this Agreement, nor any statement or certificate furnished or to be furnished to Purchaser pursuant to this Agreement, or in connection with the transactions contemplated by this Agreement, contains or will contain any untrue statement of a material fact, or omits or will omit to state a material fact necessary to make the statements contained herein or therein not misleading.

Section 3.21. **Brokers.** Except as set forth in Section 3.21 of the Disclosure Schedule, no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the transactions contemplated by this Agreement or the Ancillary Agreements based upon arrangements made by or on behalf of the Company.

Section 3.22. **No Liquidation, Insolvency, Winding-Up.**

(a) As of the date of this Agreement, no judgment, order or decree has been made, or petition presented, or resolution passed for the winding-up or liquidation of the Company, and there is not outstanding:

(i) any petition or judgment, order or decree for the winding up of the Company;

(ii) any appointment of a receiver over the whole or part of the undertaking of assets of the Company;

(iii) any petition or order for administration of the Company;

(iv) any voluntary arrangement between the Company and any of its creditors;

(v) any assignment for the benefit of the Company's creditors or similar creditor arrangement or remedy;

(vi) any voluntary petition, involuntary petition or order for relief with respect to the Company under the Bankruptcy Code, 11 U.S.C. section 101, et. seq.;

(vii) any distress or execution or other process levied in respect of the Company which remains undischarged; and

(viii) any unfulfilled or unsatisfied judgment or court order against the Company.

(b) There are no circumstances which would entitle any Person to present a petition for the winding-up or administration of the Company or to appoint a receiver over the whole or any part of the assets of the Company.

(c) The Company has not been deemed unable to pay its debts as they come due within the meaning of applicable law.

(d) The operations of the Company have not been terminated.

Section 3.23. **Solvency.** Immediately after giving effect to the transactions contemplated by this Agreement, the Company shall be able to pay its debts as they become due in the ordinary course of business consistent with past practice and shall own assets having a present fair saleable value greater than its stated Liabilities and identified contingent Liabilities. Immediately after giving effect to the transactions contemplated by this Agreement, the Company shall have adequate capital to carry on its business. The Company has not incurred, does not intend to incur, and does not

reasonably believe it will incur debts beyond its ability to pay as such debts mature or become due. No transfer of property is being made and no obligation is being incurred in connection with the transactions contemplated by this Agreement, with the intent to hinder, delay or defraud either present or future creditors of the Company.

Section 3.24. **Roadmap.** In connection with the Purchaser's investigation of the Company, the Company prepared and delivered to Purchaser the Roadmap. The Company represents and warrants that the Roadmap was prepared in good faith.

ARTICLE IV

REPRESENTATIONS AND WARRANTIES OF PURCHASER

As an inducement to the Company to enter into this Agreement, Purchaser hereby represents and warrants to the Company as follows:

Section 4.1. **Organization and Authority of Purchaser.** Purchaser is a corporation duly organized, validly existing and in good standing under the Laws of the State of Delaware and has all necessary corporate power and authority to enter into this Agreement and the Ancillary Agreements, to carry out its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the Ancillary Agreements by Purchaser, the performance by Purchaser of its obligations hereunder and thereunder and the consummation by Purchaser of the transactions contemplated hereby and thereby have been duly authorized by all requisite action on the part of Purchaser. This Agreement has been, and upon their execution the Ancillary Agreements will be, duly executed and delivered by Purchaser, and (assuming due authorization, execution and delivery by the Company) this Agreement constitutes, and upon their execution the Ancillary Agreements will constitute, legal, valid and binding obligations of Purchaser, enforceable against Purchaser in accordance with their respective terms.

Section 4.2. **No Conflict.** Assuming the making and obtaining of all filings, notifications, consents, approvals, authorizations and other actions referred to in Section 4.3, except as may result from any facts or circumstances relating solely to the Company, the execution, delivery and performance of this Agreement and the Ancillary Agreements by Purchaser, do not and will not (a) violate, conflict with or result in the breach of any provision of the certificate of incorporation or by-laws (or other organizational documents) of Purchaser, (b) conflict with or violate any Law or Governmental Order applicable to Purchaser or (c) conflict with, or result in any breach of, constitute a default (or event which with the giving of notice or lapse of time, or both, would become a default) under, require any consent under, or give to others any rights of termination, amendment, acceleration, suspension, revocation or cancellation of, or result in the creation of any Encumbrance on any of the assets or properties of Purchaser pursuant to, any Contract to which Purchaser is a party or by which any of such assets or properties is bound or affected, which could, individually or

in the aggregate, reasonably be expected have a material adverse effect on the ability of Purchaser to consummate the transactions contemplated by this Agreement or by the Ancillary Agreements.

Section 4.3. **Governmental Consents and Approvals.** The execution, delivery and performance of this Agreement and each Ancillary Agreement to which it is a party by Purchaser do not and will not require any consent, approval, authorization or other order of, action by, filing with, or notification to, any Governmental Authority, except as described in a writing given to the Company by Purchaser on the date of this Agreement.

Section 4.4. **Availability of Funds.** Purchaser currently has access to sufficient funds in cash or cash equivalents and will at the Closing have sufficient immediately available funds, in cash, to pay the Purchase Price.

ARTICLE V

ADDITIONAL AGREEMENTS

Section 5.1. Conduct of Business Prior to the Closing.

(a) The Company covenants and agrees that between the date hereof and the Closing, the Company will conduct the Business in the ordinary course and consistent with past practice. Without limiting the generality of the foregoing, the Company shall (i) continue its pricing and purchasing policies in accordance with past practice; (ii) use its commercially reasonable efforts to (A) preserve intact its business organization and the business organization of the Business, (B) keep available to Purchaser the services of the Key Employees, and (C) preserve its current relationships with its customers, suppliers and other persons with which it has significant business relationships; and (iii) not engage in any practice, take any action, fail to take any action or enter into any transaction which could cause any representation or warranty of the Company to be untrue or result in a breach of any covenant made by the Company in this Agreement.

(b) The Company covenants and agrees that, prior to the Closing, without the prior written consent of Purchaser, the Company will not do any of the things enumerated in Section 3.9(b).

Section 5.2. **Access to Information.** From the date hereof until the Closing, upon reasonable notice, the Company shall and shall cause each of its officers, directors, employees, agents, accountants and counsel to: (i) afford the officers, employees and authorized agents, accountants, counsel and representatives of Purchaser reasonable access, during normal business hours, to the offices, properties, plants, other facilities, books and records of the Company and to those officers, directors, employees, agents, accountants and counsel of the Company who have any knowledge relating to the Assets, the Assumed Liabilities or the Business and (ii) furnish to the officers, employees and authorized agents, accountants, counsel and representatives of Purchaser

such additional financial and operating data and other information regarding the Assets, the Assumed Liabilities and the Business as Purchaser may from time to time reasonably request.

Section 5.3. Confidentiality.

(a) The parties acknowledge that the Company and Purchaser have previously executed the Confidentiality Agreement with respect to the transactions contemplated hereby. The Confidentiality Agreement shall continue in full force and effect, and survive the execution and delivery of this Agreement, the Closing and the consummation of the transactions contemplated by this Agreement and/or the termination of this Agreement; provided that the Confidentiality Agreement shall terminate with respect to Purchaser's obligations to maintain the confidentiality of all Confidential Information (as defined in the Confidentiality Agreement) relating to the Assets or the Business.

(b) The Company recognizes that by reason of its ownership of the Business and the Assets, it and its Affiliates have acquired confidential information and trade secrets concerning the Business the use or disclosure of which could cause Purchaser or its Affiliates substantial loss and damages that could not be readily calculated and for which no remedy at law would be adequate. Accordingly, the Company covenants and agrees with Purchaser that the Company and its Affiliates will not at any time, except in performance of the Company's obligations to Purchaser or with the prior written consent of Purchaser, directly or indirectly, disclose any proprietary, secret or confidential information relating to the Business and the Assets that any such Person may learn or has learned by reason of its ownership of the Business and the Assets, unless (i) such information becomes known to the public generally through no fault of the Company or of its Affiliates or (ii) disclosure is required in the opinion of its independent counsel, by applicable Law. The parties hereto agree that the covenant contained in this Section 5.3(b) imposes a reasonable restraint on the Company, its Affiliates and its employees.

Section 5.4. Regulatory and Other Authorizations; Notices and Consents.

(a) The parties to this Agreement shall use all reasonable efforts to obtain all authorizations, consents, orders and approvals of all Governmental Authorities and officials that may be or become necessary for its execution and delivery of, and the performance of its obligations pursuant to, this Agreement and the Ancillary Agreements and will cooperate fully in promptly seeking to obtain all such authorizations, consents, orders and approvals.

(b) The Company shall give promptly such notices to third parties and use its commercially reasonable efforts to obtain such third party consents and estoppel certificates as Purchaser may in its sole and absolute discretion deem necessary or desirable in connection with the transactions contemplated by this Agreement and the Ancillary Agreements, including, without limitation, all third party consents set forth in Section 5.4(b) of the Disclosure Schedule (the "Required Consents").

(c) Purchaser shall cooperate and use all reasonable efforts to assist the Company in giving such notices and obtaining such consents and estoppel certificates; *provided, however*, that Purchaser shall have no obligation to give any guarantee or other consideration of any nature in connection with any such notice, consent or estoppel certificate or to consent to any change in the terms of any Assigned Contract which Purchaser in its sole and absolute discretion may deem adverse to the interests of Purchaser, the Assets, the Assumed Liabilities or the Business.

(d) The Company does not know of any reason why all the consents, approvals and authorizations necessary for the consummation of the transactions contemplated hereby will not be received.

(e) The Company and Purchaser agree that, in the event any consent, approval or authorization necessary or desirable to preserve for Purchaser any right or benefit under any Assigned Contract is not obtained prior to the Closing, the Company will, subsequent to the Closing, cooperate with Purchaser in attempting to obtain such consent, approval or authorization as promptly thereafter as practicable. If such consent, approval or authorization cannot be obtained, the Company will use its commercially reasonable efforts to provide Purchaser with the rights and benefits of the affected Contract for the term of such Contract, and, if the Company provides such rights and benefits, Purchaser shall assume the obligations and burdens thereunder.

(f) To the extent the Company discovers, after the Closing, any additional Contract that relates to the Assets which Contract was not disclosed to Purchaser prior to the Closing and was not an Assigned Contract, the Company shall promptly notify Purchaser of the existence of any such Contract and provide a copy of such Contract to Purchaser. Upon Purchaser's request, the Company shall use all reasonable efforts to assign any such Contracts to Purchaser as promptly as practicable after Purchaser's request. Nothing in this Section 5.4(f) shall limit Purchaser's ability to seek indemnification relating to any such Contracts pursuant to Article IX of this Agreement.

(g) Notwithstanding the foregoing or any other provision of this Agreement to the contrary, in no event shall Purchaser be obligated to (i) agree or proffer to divest or hold separate, or enter into any licensing or similar arrangement with respect to, the Assets or any assets (whether tangible or intangible) or any portion of any business of Purchaser, or (ii) litigate any suit, claim, action, investigation or proceeding, whether judicial or administrative, (A) challenging or seeking to restrain or prohibit the consummation of the Closing or the transactions contemplated by this Agreement; (B) seeking to prohibit or limit in any respect, or place any conditions on, the ownership or operation by Purchaser or any of its Affiliates of any portion of the Assets or any product of the Business, or to require any such Person to dispose of, license (whether pursuant to an exclusive or nonexclusive license) or hold separate any portion of the Assets or any product of the Business; or (C) seeking to prohibit Purchaser or any of its Affiliates from operating the Assets in substantially the same manner as operated prior to the date of this Agreement.

Section 5.5. **Notice of Developments.** Prior to the Closing, the Company shall promptly notify Purchaser in writing of (a) all events, circumstances, facts and occurrences arising subsequent

to the date of this Agreement which would cause the condition set forth in Section 8.2(a) not to be fulfilled, and (b) all other material developments affecting the Assets, Assumed Liabilities or the Business.

Section 5.6. **No Solicitation or Negotiation.** The Company agrees that between the date of this Agreement and the earlier of the Closing and the termination of this Agreement, neither the Company nor any of its Affiliates, officers, directors, representatives or agents will (a) solicit, initiate, consider, encourage or accept any other proposals or offers from any Person (i) relating to any acquisition or purchase of all or any portion of the Assets, the Company Capital Stock, or equity interests of the Company, (ii) to enter into any business combination with respect to the Business, or with the Company, or (iii) to enter into any other extraordinary business transaction involving the Company or otherwise relating to the Business or the Assets, or (b) participate in any discussions, conversations, negotiations or other communications regarding, or furnish to any other Person any information with respect to, or otherwise cooperate in any way, assist or participate in, facilitate or encourage any effort or attempt by any other Person to seek to do any of the foregoing. The Company shall immediately cease and cause to be terminated all existing discussions, conversations, negotiations and other communications with any Persons conducted heretofore with respect to any of the foregoing. The Company shall notify Purchaser promptly if any such proposal or offer, or any inquiry or other contact with any Person with respect thereto, is made and shall, in any such notice to Purchaser, indicate in reasonable detail the identity of the Person making such proposal, offer, inquiry or contact and the terms and conditions of such proposal, offer, inquiry or other contact. The Company agrees not to, without the prior written consent of Purchaser, release any Person from, or waive any provision of, any confidentiality or standstill agreement to which the Company is a party.

Section 5.7. Use of Intellectual Property; Corporate Name.

(a) Immediately after the Closing, the Company will file an amendment to its certificate of incorporation changing its corporate name from "Avaki Corporation" to another name, which name shall not include the word "Avaki."

(b) From and after the Closing, the Company shall not use any of the Company Intellectual Property, including any Trademark or corporate name, provided, that the Company may use the word "Avaki" solely for purposes of clarifying in correspondence what the Company's former name was.

Section 5.8. Excluded Liabilities.

(a) The Company will pay and discharge in full all accounts payable outstanding as of the Closing Date prior to any winding up or liquidation of the Company, and in any event no later than sixty (60) calendar days following the Closing Date.

(b) The Company will pay and discharge, or reserve sufficient assets to pay and discharge, all Excluded Liabilities as and when the same become due and payable and in any event

prior to any dividend or distribution of any type to its equity holders or in connection with any liquidation of the Company.

Section 5.9. **Solvency.** The Company shall deliver a certificate, signed by the Chief Executive Officer and the Treasurer of the Company and in form and substance reasonably satisfactory to Purchaser, to the effect that immediately after the Closing, the Company will be solvent.

Section 5.10. **Non-Competition**

(a) In partial consideration of the payment of the Purchase Price, as set forth in Section 2.3, the Company and Purchaser agree that for a period of two (2) years after the Closing (the "**Restricted Period**"), the Company shall not engage, directly or indirectly, in any business anywhere in the world that produces, markets, sells or supports products or services of the kind produced, marketed, sold, serviced or supported by the Business as of the Closing Date or, without the prior written consent of Purchaser, directly or indirectly, own an interest in, manage, operate, join, control, lend money or render financial or other assistance to or participate in or be connected with, as a partner, stockholder, consultant or otherwise, any Person that competes with the Business as it is conducted as of the Closing Date; *provided, however*, that, for the purposes of this Section 5.10, ownership of securities having no more than one percent (1%) of the outstanding voting power of any competitor which are listed on any national securities exchange or traded actively in the national over-the-counter market shall not be deemed to be in violation of this Section 5.10 so long as the Person owning such securities has no other connection or relationship with such competitor.

(b) As a separate and independent covenant, the Company agrees with Purchaser that, for a period of two (2) years following the Closing, the Company will not in any way, directly or indirectly, for the purpose of conducting or engaging in any business that produces or supplies products or services of the kind produced or supplied by the Business as of the Closing Date, call upon, solicit, advise or otherwise do, or attempt to do, business with any customers of the Business with whom the Business had any dealings prior to the Closing Date, or take away or interfere or attempt to interfere with any custom, trade, business or patronage of the Business, interfere with or attempt to interfere with any officers, employees, representatives or agents of the Business, induce or attempt to induce any of them to leave the employ of Purchaser or any of its Affiliates or violate the terms of their Contracts, or any employment arrangements, with Purchaser, or, without the prior written consent of Purchaser, directly or indirectly, solicit to hire, hire or employ, whether as an employee, director, contractor, consultant or otherwise any officers, employees, representatives or agents of the Business, unless such Person's employment is terminated by Purchaser or its applicable subsidiary; *provided, however*, that this Section 5.10(b) shall not prohibit general solicitations of or advertisements for employment by the Company that are not generally directed at any officers, employees, representatives or agents of the Business, so long as the Company does not hire any such Person who responds to any such general solicitation or advertisement.

(c) The Restricted Period shall be extended by the length of any period during which the Company is in breach of the terms of this Section 5.10.

(d) The Company acknowledges that the covenants of the Company set forth in this Section 5.10 are an essential element of this Agreement and that, but for the agreement of the Company to comply with these covenants, Purchaser would not have entered into this Agreement. The Company acknowledges that this Section 5.10 constitutes an independent covenant and shall not be affected by performance or nonperformance of any other provision of this Agreement by Purchaser. The Company has independently consulted with its counsel and after such consultation agrees that the covenants set forth in this Section 5.10 are reasonable and proper. If, at the time of enforcement of any provision of this Section 5.10, a court shall hold that the duration, scope or area restrictions stated herein are unreasonable under the circumstances then existing, Purchaser and the Company hereby agree that the maximum duration, scope or area reasonable under such circumstances shall be substituted for the stated duration, scope or area and that the court shall be allowed to revise the restrictions contained herein to cover the maximum period, scope and area permitted by Law. The Company also hereby agrees that money damages would not be an adequate remedy for any breach of this Section 5.10. Therefore, in the event of a breach or threatened breach of this Section 5.10, Purchaser or its successors or assigns may, in addition to other rights and remedies existing in their favor, obtain from any court of competent jurisdiction specific performance or injunctive or other equitable relief in order to enforce or prevent any violations of the provisions hereof (without posting a bond or other security).

Section 5.11. **Further Action.** Each of the parties hereto shall use all reasonable efforts to take, or cause to be taken, all appropriate action, do or cause to be done all things necessary, proper or advisable under applicable Laws, and execute and deliver such documents and other papers, as may be required to carry out the provisions of this Agreement and consummate and make effective the transactions contemplated by this Agreement.

Section 5.12. **Bulk Sales.** All the parties hereto hereby agree to waive the requirement, if any, that the other parties comply with any bulk transfer law which may be applicable to the transactions contemplated by this Agreement; *provided, however*, that the Company shall indemnify, defend, protect and hold harmless Purchaser and each other Indemnified Party from and against, and shall reimburse Purchaser and each other Indemnified Party for any and all Losses incurred by Purchaser or the applicable Indemnified Party in respect of, any claim or Liabilities arising from or related to the same.

Section 5.13. **End of Life.** Prior to the Closing Date, the Company shall send a written notice (the "EOL Notice") to each customer, reseller, OEM, distributor or other licensee of ComputeGrid Products stating that the Company is ending the life of the ComputeGrid Products and will cease its support of, and will no longer sell, distribute or otherwise provide, directly or indirectly, ComputeGrid Products, or any updates, upgrades, modifications, new versions, ports, or translations thereof, as of, for each such Person, the date on which the Company's obligation to provide support to such Person, pursuant to an executed agreement between the Company and such

Person, terminates. The Company shall also post an EOL Notice on its corporate website and on each of its other websites relating to the ComputeGrid Products. Such EOL Notices shall comply with any formal end-of-life policy that the Company may have and any other obligations that the Company may have to any third parties, including under any Contracts between the Company and third parties. To the extent any Contract between the Company and a third party requires the Company to take measures other than sending an EOL Notice as described above in order for the Company to terminate its obligations to support, sell, distribute or otherwise dispose of, directly or indirectly, ComputeGrid Products, or any updates, upgrades, modifications, new versions, ports, or translations thereof, as of, for each such Person, the date on which the Company's obligation to provide support to such Person, pursuant to an executed agreement between the Company and such Person, terminates, the Company shall, prior to the Closing Date, provide Purchaser with written notice of such requirements and, upon receiving the consent of Purchaser, complete such measures.

ARTICLE VI

EMPLOYEE MATTERS

Section 6.1. Employees.

(a) Prior to the Closing, Purchaser will make an offer of employment to the employees listed on Section 6.1 of the Disclosure Schedule (the "Key Employees"). The Company shall assist Purchaser in any manner reasonably requested by Purchaser in encouraging such Key Employees to accept the offer of employment by Purchaser, and (ii) the Company shall assist Purchaser with its efforts to enter into an offer letter and an invention assignment agreement and other applicable agreements in form provided by Purchaser as soon as practicable after the date hereof and in any event prior to the Closing Date. With respect to matters described in this Section 6.1, the Company will consult with Purchaser (and will consider the good faith advice of Purchaser) prior to sending any notices or other communication materials to the Key Employees that may adversely affect Purchaser's attempt to retain such employees.

(b) The Company shall obtain from each individual employed by the Company as of the date hereof, prior to such individual's termination by the Company, a release in form and substance reasonably satisfactory to Purchaser.

(c) Except as required by applicable Law, as of the Closing Date the Key Employees who accept Purchaser's offer of employment shall cease to accrue further benefits under the Plans; *provided, however*, that the Company shall take such actions as may be necessary to, effective immediately prior to the Closing Date, cause each of such Key Employees to be fully vested in any benefits under any Plan that is a pension plan or program (including, without limitation, all Plans intended to include a Code Section 401(k) arrangement (each, a "401(k) Plan")) accrued to such Key Employee as of the Closing Date.

(d) Effective as of no later than the day immediately preceding the Closing Date, the Company shall terminate any and all 401(k) Plans (unless Purchaser provides written notice to the Company that such 401(k) plans shall not be terminated). Unless Purchaser provides such written notice to the Company, no later than five (5) Business Days prior to the Closing Date, the Company shall provide Purchaser with evidence that such 401(k) Plan(s) have been terminated (effective as of no later than the day immediately preceding the Closing Date) pursuant to resolutions of the Board of Directors of the Company. The form and substance of such resolutions shall be subject to review and approval of Purchaser. The Company also shall take such other actions in furtherance of terminating such 401(k) Plan(s) as Purchaser may reasonably require.

ARTICLE VII

TAX MATTERS

Section 7.1. Tax Covenants.

(a) All transfer, documentary, sales, use, stamp, registration and other such Taxes and fees (including any penalties and interest) incurred in connection with transactions contemplated by this Agreement (including any real property transfer Tax and any similar Tax) shall be borne and paid by Company, and Company will, at its own expense, file all necessary Returns and other documentation with respect to all such Taxes and fees, and, if required by applicable law, Purchaser will, and will cause its Affiliates to, join in the execution of any such Returns and other documentation.

(b) Neither the Company nor any of its Affiliates shall file any amended Returns or claims for refund without the prior written consent of Purchaser.

Section 7.2. **Return Preparation and Computation.** The Company shall prepare and file, or cause to be prepared and filed, with the appropriate Taxing Authorities, all Returns, and shall pay, or cause to be paid, when due, all Taxes, related to the Assets or the Company, for any Pre-Closing Tax Period. Purchaser shall prepare and file, or cause to be prepared and filed, with the appropriate Taxing Authorities, all Returns, and shall pay, or cause to be paid, when due, all Taxes related to the Assets, for any Post-Closing Tax Period and any Straddle Tax Period.

Section 7.3. **Cooperation on Tax Matters.** Purchaser and the Company agree to furnish or cause to be furnished to each other, upon request, as promptly as practicable, such information (including access to books and records) and assistance relating to the Company, the Business and the Assets as is reasonably necessary for the filing of any return (including any report required pursuant to Section 6043 of the IRC and all Treasury Regulations promulgated thereunder), for the preparation for any audit, and for the prosecution or defense of any claim, suit or proceeding relating to any proposed adjustment for any Pre-Closing Period. Purchaser and the Company agree to retain or cause to be retained all books and records pertinent to the Company, the Business and the Assets

until the applicable period for assessment under applicable law (giving effect to any and all extensions or waivers) has expired, and to abide by or cause the abidance with all record retention agreements entered into with any Taxing Authority. Purchaser agrees to give the Company reasonable notice prior to transferring, discarding or destroying any such books and records relating to Tax matters and, if the Company so requests, Purchaser shall allow the Company to take possession of such books and records. Purchaser and the Company shall cooperate with each other in the conduct of any audit or other proceedings involving the Company, the Business and the Assets for any Tax purposes and each shall execute and deliver such powers of attorney and other documents as are necessary to carry out the intent of this Section 7.3.

Section 7.4. Indemnification by the Company.

(a) Subject to the provisions of Section 9.4, the Company hereby indemnifies Purchaser against and agrees to hold it harmless from any (i) Tax of the Company relating to a Pre-Closing Tax Period, (ii) combined Tax of any member of an affiliated, consolidated, combined or unitary group of which the Company is or was a member on or prior to the Closing Date, and (iii) liabilities, costs, expenses (including, without limitation, reasonable expenses of investigation and attorneys' fees and expenses), arising out of or incident to the imposition, assessment or assertion of any such Tax, including those incurred in the contest in good faith in appropriate proceedings relating to the imposition, assessment or assertion of any such Tax, in each case incurred or suffered by Purchaser, any of its Affiliates or, effective upon the Closing, the Company (the sum of (i), (ii) and (iii) being referred to as a "Tax Loss").

(b) Any payment by the Company pursuant to this Section 7.4 shall be made not later than thirty (30) days after receipt by the Company of written notice from Purchaser stating that any Tax Loss has been paid by Purchaser, any of its Affiliates or, effective upon the Closing, the Company and the amount thereof and of the indemnity payment requested.

(c) If Purchaser receives notice of an audit, claim, dispute or controversy relating to Taxes (a "Tax Contest") with respect to which the Company may have an indemnification obligation under this Section 7.4, then Purchaser shall notify the Company in writing of such Tax Contest within twenty (20) days of receiving such notice; *provided, however*, that Purchaser's failure to provide such notice shall not release the Company from any indemnification obligation hereunder unless the Company's ability to contest such Tax Contest is materially adversely affected as a result of such failure to notify. The Company shall have the right to control the conduct and resolution of such Tax Contest; *provided, however*, that the Company may decline to participate in such Tax Contest. If the Company controls the conduct of such Tax Contest, the Company regularly shall advise Purchaser of the status of such Tax Contest and shall not resolve such Tax Contest without Purchaser's written consent, which consent shall not be unreasonably delayed, conditioned or withheld. If the Company declines to control such Tax Contest, then the Purchaser shall have the right to control the conduct of such Tax Contest; *provided, however*, that Purchaser shall regularly advise the Company of the status of such Tax Contest and shall not resolve such Tax Contest

without the Company's written consent, which consent shall not be unreasonably delayed, conditioned or withheld. Each party shall bear its own costs for participating in such Tax Contest.

(d) In the event of a dispute between the Company and Purchaser regarding the conduct or resolution of any Tax Contest or claim for indemnification under this Section 7.4, such dispute shall be referred to a nationally recognized accounting or law firm mutually acceptable to the Company and Purchaser ("**Tax Arbitrator**"). The decision of the Tax Arbitrator shall be final and binding, and its fees and costs shall be shared equally by the disputing parties. Each party shall bear its own costs for participating in such dispute resolution.

ARTICLE VIII

CONDITIONS TO CLOSING

Section 8.1. **Conditions to Obligations the Company.** The obligations of the Company to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment, at or prior to the Closing, of each of the following conditions:

(a) **Representations, Warranties and Covenants.** (i) The representations and warranties of Purchaser contained in this Agreement and in any certificate or other writing delivered by Purchaser pursuant hereto shall have been true and correct when made and shall be true and correct as of the Closing, with the same force and effect as if made as of the Closing Date, other than such representations and warranties that are made as of another date, which shall have been true and correct as of such date, except in each case where the failure to be so true and correct would not have a material adverse effect on the ability of Purchaser to consummate the transactions contemplated by this Agreement, (ii) all covenants and agreements contained in this Agreement to be complied with by Purchaser on or before the Closing shall have been complied with in all material respects, and (iii) the Company shall have received a certificate from Purchaser to such effect signed by a duly authorized officer thereof.

(b) **Company Stockholder Approval.** The Requisite Stockholder Approvals shall have been obtained.

(c) **No Proceeding or Litigation.** There shall not be pending any Action brought or threatened by any Governmental Authority challenging or seeking to restrain or prohibit the consummation of the Closing or the transactions contemplated by this Agreement, and no Governmental Order that could reasonably be expected to result, directly or indirectly, in any such effect shall be in effect.

(d) **Ancillary Agreements.** Purchaser shall have executed and delivered to the Company each of the Ancillary Agreements to which it is a party.

Section 8.2. **Conditions to Obligations of Purchaser.** The obligations of Purchaser to consummate the transactions contemplated by this Agreement shall be subject to the fulfillment, at or prior to the Closing, of each of the following conditions:

(a) **Representations, Warranties and Covenants of the Company.** (i) The representations and warranties of the Company contained in this Agreement and in any certificate or other writing delivered by the Company pursuant hereto that are qualified by Material Adverse Effect shall be true and correct in all respects at and as of the date of this Agreement and shall be true and correct in all respects at and as of the Closing as if made at and as of such time except for such representations and warranties that address matters only as of a particular date (which shall remain true and correct in all respects as of such date) and the representations and warranties of the Company contained in this Agreement and in any certificate or other writing delivered by the Company pursuant hereto that are not so qualified (disregarding each exception or qualification therein or thereto relating to materiality) shall be true and correct in all material respects at and as of the date of this Agreement and shall be true and correct in all material respects at and as of the Closing, as if made at and as of such time except for such representations and warranties that address matters only as of a particular date (which shall remain true and correct in all material respects as of such date), (ii) all covenants and agreements contained in this Agreement to be complied with by the Company on or before the Closing shall have been complied with in all material respects, (iii) Purchaser shall have received a certificate of the Company to such effect signed by the Chief Executive Officer and the Chief Financial Officer of the Company.

(b) **No Proceeding or Litigation.** There shall not be pending any Action brought or threatened by any Governmental Authority (i) challenging or seeking to restrain or prohibit the consummation of the Closing or the transactions contemplated by this Agreement; (ii) seeking to prohibit or limit in any respect, or place any conditions on, the ownership or operation by Purchaser or any of its Affiliates of any portion of the Business or the Assets or any product of the Business, or to require any such Person to dispose of, license (whether pursuant to an exclusive or nonexclusive license) or hold separate any portion of the Business or the Assets or any product of the Business; or (iii) seeking to (A) prohibit Purchaser or any of its Affiliates from effectively controlling the Business, or (B) prevent Purchaser from operating the Business in substantially the same manner as operated prior to the date of this Agreement. No Governmental Order that could reasonably be expected to result, directly or indirectly, in any of the effects referred to in clauses (i) through (iii) of this Section 8.2(b) shall be in effect.

(c) **Acceptance of Employment.** The Key Employees listed on Section 8.2(c) of the Disclosure Schedule shall have entered into an employment arrangement with Purchaser, in form and substance acceptable to Purchaser (including entering into Purchaser's standard form of confidentiality agreement and invention assignment agreement).

(d) **Legal Opinion.** Purchaser shall have received from Foley Hoag LLP an opinion, addressed to Purchaser and dated the Closing Date, substantially in the form of Exhibit F.

(e) **Consents and Approvals.** Purchaser and the Company shall have received, each in form and substance reasonably satisfactory to Purchaser, (i) all authorizations, consents, orders and approvals of all Governmental Authorities and officials that are necessary for the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements and (ii) all Required Consents.

(f) **Ancillary Agreements.** The Company shall have executed and delivered to Purchaser the Ancillary Agreements to which it is a party.

(g) **No Material Adverse Effect.** The Company shall not have suffered a Material Adverse Effect.

(h) **Instruments.** The Company shall have executed and delivered to Purchaser or filed in such form and substance as are reasonably acceptable to Purchaser all such deeds, endorsements, consents and other instruments as shall be necessary to vest in Purchaser good title, rights and interest to the Assets, including the assignment and conveyance instruments described in Section 2.4 hereof.

(i) **Solvency Certificate.** Purchaser shall have received a certificate, signed by the Chief Executive Officer and the Treasurer of the Company and in form and substance reasonably satisfactory to Purchaser, to the effect that immediately after the Closing, the Company will be solvent.

(j) **401(k) Plan.** Unless Purchaser has explicitly instructed otherwise pursuant to Section 6.1(d) hereof, Purchaser shall have received from the Company evidence reasonably satisfactory to Purchaser that all 401(k) Plans have been terminated pursuant to resolution of the Board of Directors of the Company (the form and substance of which shall have been subject to review and approval of Purchaser), effective as of no later than the day immediately preceding the Closing Date, and Purchaser shall have received from the Company evidence of the taking of any and all further actions as provided in Section 6.1(d) hereof.

(k) **End of Life.** The Company shall have sent out the EOL Notices and shall have complied with all of the other provisions set forth in Section 5.13.

ARTICLE IX

INDEMNIFICATION

Section 9.1. **Survival of Representations and Warranties.** The representations and warranties of the Company contained in this Agreement and the Ancillary Agreements, shall survive the Closing until the first anniversary thereof; *provided, however*, that in the event of fraud or willful breach of a representation or warranty, such representation or warranty shall survive indefinitely. Neither the period of survival nor the liability of the Company with respect to the Company's

representations and warranties shall be reduced by any investigation made at any time by or on behalf of Purchaser. If written notice of a claim has been given prior to the expiration of the applicable representations and warranties by Purchaser to the Company, then the relevant representations and warranties shall survive as to such claim until the claim has been finally resolved.

Section 9.2. Indemnification.

(a) Purchaser and its Affiliates, officers, directors, employees, agents, successors and assigns shall be indemnified and held harmless by the Company for any and all Liabilities, losses, damages, claims, costs and expenses, diminution in value, lost profits, interest, awards, judgments and penalties (including, without limitation, attorneys' and consultants' fees and expenses) suffered or incurred by them (including, without limitation, any Action brought or otherwise initiated by any of them) (a "Loss"), arising out of or resulting from:

(i) the breach of any representation or warranty made by the Company contained in this Agreement and the Ancillary Agreements;

(ii) the breach of any covenant or agreement by the Company contained in this Agreement or the Ancillary Agreements;

(iii) Liabilities arising from or related to any failure to comply with Laws relating to bulk transfers or bulk sales with respect to the transactions contemplated by this Agreement;

(iv) any ComputeGrid Service Costs incurred by Purchaser or its Affiliates arising out of any ComputeGrid Service Calls above the ComputeGrid Service Threshold;

(v) fraud or willful breach of a representation or warranty; and

(vi) the Excluded Liabilities.

During the period beginning on the Closing Date and ending on the first anniversary thereof (the "Escrow Period"), any payment of indemnification required to be made pursuant to Section 9.2(a) will be made out of any of the Escrow Fund then held by the Escrow Agent. To the extent that the amount of such payment exceeds the amount of the Escrow Fund, subject to Section 9.4, the balance of such payment shall be made by the Company. To the extent that the Company's undertakings set forth in this Section 9.2(a) may be unenforceable, the Company shall contribute the maximum amount that it is permitted to contribute under applicable Law to the payment and satisfaction of all Losses incurred by Purchaser.

(b) The Company and its Affiliates, officers, directors, employees, agents, successors and assigns shall be indemnified and held harmless by Purchaser for any and all Losses, arising out of or resulting from the Assumed Liabilities. To the extent that Purchaser's undertakings

set forth in this Section 9.2(b) may be unenforceable, the Company shall contribute the maximum amount that it is permitted to contribute under applicable Law to the payment and satisfaction of all Losses incurred by Purchaser.

Section 9.3. Procedure for Claims.

(a) A party entitled to indemnification pursuant to Section 9.2 (an "**Indemnified Party**") shall give the party required to provide such indemnification (the "**Indemnifying Party**") notice of any matter which an Indemnified Party has determined has given or could give rise to a right of indemnification under this Agreement (a "**Claim Notice**"), within thirty (30) days of such determination, stating the amount of the Loss, if known, and method of computation thereof, and containing a reference to the provisions of this Agreement in respect of which such right of indemnification is claimed or arises. Any failure to submit any such Claim Notice in a timely manner to the Indemnifying Party shall not relieve the Indemnifying Party of any liability hereunder, except to the extent the Indemnifying Party is actually materially prejudiced by such failure. Any Claim Notice seeking indemnification pursuant to Section 9.2(a), to the extent such claim would be satisfied out of the Escrow Fund, shall also be delivered to the Escrow Agent.

(b) If the Indemnifying Party, within ten (10) Business Days after receipt of the Claim Notice, does not give written notice to the Indemnified Party or parties (and, in the case of a claim for indemnification pursuant to Section 9.2(a), to the extent such claim would be satisfied out of the Escrow Fund, the Escrow Agent) announcing its intent to contest such claim, the claim shall be deemed accepted and the amount of the claim shall be deemed a valid claim, and the Indemnifying Party (or, in the case of a claim for indemnification pursuant to Section 9.2(a), to the extent such claim would be satisfied out of the Escrow Fund, the Escrow Agent, to the extent of the amount of the Escrow Fund, and then the Company) shall, within ten (10) Business Days after expiration of the prior notice period, deliver to the Indemnified Party the amount of the Losses with respect to the claim set forth in the Claim Notice. In the event, however, that the Indemnifying Party contests the assertion of a claim by giving written notice to the Indemnified Party within the ten (10)-Business Day period, then the parties shall act in good faith to reach agreement regarding such claim.

(c) If the Indemnifying Party and the Indemnified Party are unable to resolve a claim for indemnification to which an objection has been made within ten (10) days after delivery of the notice of such objection (as such period may be extended by mutual agreement between the Indemnifying Party and the Indemnified Party), either the Indemnifying Party or the Indemnified Party shall serve the other with a written demand for arbitration within twenty (20) days of the expiration of such ten (10)-day period, unless the amount of the Loss at issue is a Third Party Claim, in which event arbitration shall not be commenced until such amount is ascertained or the Indemnified Party and the Indemnifying Party agree to commence arbitration. Any such arbitration shall be held in Boston, Massachusetts and shall be conducted before a single arbitrator mutually agreeable to the Indemnified Party and the Indemnifying Party in accordance with the Commercial Arbitration Rules of the American Arbitration Association. In the event that within fifteen (15) days

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after submission of any dispute to arbitration the Indemnified Party and the Indemnifying Party cannot mutually agree on one arbitrator, the Indemnified Party and the Indemnifying Party shall each select one arbitrator, and the two arbitrators so selected shall select a third arbitrator. The decision of the arbitrator or, if applicable, the majority of the three arbitrators regarding any claim for indemnification to which an objection has been made shall be binding and conclusive. The decision of the arbitrator(s) 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. The parties agree to complete such arbitration as expeditiously as reasonably possible. To the extent the decision of the arbitrator(s) relates to a claims for indemnification by a Indemnified Party pursuant to Section 9.2(a), to the extent such claim would be satisfied out of the Escrow Fund, Purchaser shall send to the Escrow Agent, within two (2) Business Days of the decision of the arbitrator(s), notice of the amount of the Losses for which the relevant Indemnified Party is entitled to indemnification pursuant to such decision. The Indemnifying Party (or, in the case of a claim for indemnification pursuant to Section 9.2(a), to the extent such claim would be satisfied out of the Escrow Fund, the Escrow Agent, to the extent of the amount of the Escrow Fund, and then the Company) shall, within ten (10) Business Days after the decision of the arbitrator(s), deliver to the Indemnified Party the amount of the Losses with respect to the claim.

(d) The obligations and Liabilities of an Indemnifying Party under this Article IX with respect to Losses arising from claims of any third party which are subject to the indemnification provided for in this Article IX (“**Third Party Claims**”) shall be governed by and contingent upon the following additional terms and conditions: if an Indemnified Party shall receive notice of any Third Party Claim, the Indemnified Party shall give the Indemnifying Party notice of such Third Party Claim to the Indemnifying Party within thirty (30) days of the receipt by the Indemnified Party of such notice; *provided, however*, that the failure to provide such notice shall not release the Indemnifying Party from any of its obligations under this Article IX except to the extent the Indemnifying Party is actually materially prejudiced by such failure and shall not relieve the Indemnifying Party from any other obligation or liability that it may have to any Indemnified Party otherwise than under this Article IX. If the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party hereunder against any Losses that may result from such Third Party Claim, then the Indemnifying Party shall be entitled to assume and control the defense of such Third Party Claim at its expense and through counsel of its choice if it gives notice of its intention to do so to the Indemnified Party within five days of the receipt of such notice from the Indemnified Party; *provided, however*, that if (i) there exists or is reasonably likely to exist a conflict of interest that would make it inappropriate in the judgment of the Indemnified Party for the same counsel to represent both the Indemnified Party and the Indemnifying Party, or (ii) if there is a reasonable probability that such Third Party Claim may have a material adverse effect on the Indemnified Party other than as a result of money damages that are reasonably expected to be satisfied out of the funds then remaining in the Escrow Fund, then the Indemnified Party shall be entitled to participate in the defense of such Third Party Claim, at its sole cost and expense and through counsel of its own choice; and *provided further*, that (w) if such Third Party Claim involves a claim for an injunction against any business or operations of the Indemnified Party, (x) if such Third Party Claim involves a criminal proceeding, action, indictment, allegation or investigation,

such Third Party Claim involves any significant customer or supplier of Purchaser or any of its subsidiaries, or (z) if the appropriate court rules that the Indemnifying Party failed or is failing to prosecute or defend such Third Party Claim, then the Indemnified Party shall be entitled to maintain control of the defense of such Third Party Claim with counsel of its own choice (and the Indemnifying Party shall be entitled to participate in the defense of such Third Party Claim, at its cost and expense and through counsel of its own choice). In the event the Indemnifying Party exercises the right to undertake any such defense against any such Third Party Claim as provided above, the Indemnified Party shall cooperate with the Indemnifying Party in such defense and make available to the Indemnifying Party, at the Indemnifying Party's expense, all witnesses, pertinent records, materials and information in the Indemnified Party's possession or under the Indemnified Party's control relating thereto as is reasonably required by the Indemnifying Party. Similarly, in the event the Indemnified Party is, directly or indirectly, conducting the defense against any such Third Party Claim, the Indemnifying Party shall cooperate with the Indemnified Party in such defense and make available to the Indemnified Party, at the Indemnifying Party's expense, all such witnesses, records, materials and information in the Indemnifying Party's possession or under the Indemnifying Party's control relating thereto as is reasonably required by the Indemnified Party. No such Third Party Claim may be settled by the Indemnifying Party without the written consent of the Indemnified Party.

Section 9.4. **Limits on Indemnification.** The Purchaser Indemnified Parties shall not be entitled to recover for any Losses pursuant to Section 9.2(a)(i) or Section 9.2(a)(iv) until such time as the Losses in the aggregate to which the Purchaser Indemnified Parties are entitled to be indemnified hereunder exceed \$30,000 (the "**Loss Threshold**"), at which time the Purchaser Indemnified Parties shall be entitled to be indemnified against and compensated and reimbursed for all such Losses, including the amount of the Loss Threshold. In determining the amount of Losses for which the Purchaser Indemnified Parties are entitled to be indemnified by the Company pursuant to Section 9.2(a)(i) for a breach of any representation or warranty (but not for determining whether a breach of any representation or warranty has occurred), any materiality or "Material Adverse Effect" standard contained in the applicable representation or warranty shall be disregarded. Notwithstanding anything to the contrary contained in this Agreement, the maximum amount of indemnifiable Losses, including Tax Losses, that may be recovered by the Purchaser Indemnified Parties from the Company arising out of or resulting from the causes enumerated in Section 9.2(a)(i), Section 9.2(a)(ii), Section 9.2(a)(iii), Section 9.2(a)(iv) or Section 7.4 shall be the Escrow Amount. There shall be no limitation on the amount of Losses that may be recovered by the Company arising out of or resulting from the causes enumerated in Section 9.2(a)(v) or Section 9.2(a)(vi).

Section 9.5. **Distribution of Escrow Fund.** On the one-year anniversary of the Closing Date (the "**Release Date**"), the parties shall direct the Escrow Agent to release to the Company the remaining amount of the Escrow Fund less the aggregate amount of all Losses specified in any then unresolved good faith indemnification claims made by any Indemnified Party pursuant to Section 9.2(a). To the extent that on the Release Date any amount has been reserved and withheld from distribution from the Escrow Fund on such date on account of an unresolved claim for indemnification and, subsequent to the Release Date, such claim is resolved, the parties shall

immediately direct the Escrow Agent to (i) release to the applicable Indemnified Party the amount of Loss, if any, due in respect of such claim as finally determined, and (ii) release to the Company an amount equal to the excess, if any, remaining in the Escrow Fund after the payments, if any, pursuant to the foregoing clause (i).

Section 9.6. **Tax Matters.** Anything in this Article IX (except for the specific reference to Tax matters in Section 9.1 and except for the limitations contained in Section 9.4) to the contrary notwithstanding, the rights and obligations of the parties with respect to indemnification for any and all Tax matters, including Tax Losses, shall be governed by Article VII.

Section 9.7. **Exclusive Remedy.** The Indemnified Parties shall have no claim or cause of action, whether in contract, tort, under statute or otherwise, for damages arising out of or relating to this Agreement and the Ancillary Agreements and the representations, warranties, covenants and agreements contained herein and therein apart from the remedies set forth in this Article IX.

ARTICLE X

TERMINATION AND WAIVER

Section 10.1. **Termination.** This Agreement may be terminated at any time prior to the Closing:

(a) by Purchaser if, between the date hereof and the time scheduled for the Closing: (i) the Company suffers a Material Adverse Effect; or (ii) the Company makes a general assignment for the benefit of creditors, or any proceeding shall be instituted by or against the Company seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up or reorganization, arrangement, adjustment, protection, relief or composition of its debts under any Law relating to bankruptcy, insolvency or reorganization;

(b) by either the Company or Purchaser if the Closing shall not have occurred by May 14, 2005; *provided, however*, that the right to terminate this Agreement under this Section 10.1(b) shall not be available to any party whose action or failure to act has been the principal cause of or resulted in the failure of the Closing to occur on or before such date and such action or failure to act constitutes a breach of this Agreement;

(c) by either the Company or Purchaser in the event that any Governmental Authority shall have issued Governmental Order or taken any other action restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement and such Governmental Order or other action shall have become final and nonappealable;

(d) by the mutual written consent of the Company and Purchaser;

(e) by Purchaser, upon a breach of any representation, warranty, covenant or agreement on the part of the Company set forth in this Agreement, or if any representation or warranty of the Company shall have become untrue, in either case such that the conditions set forth in Section 8.2(a) would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become untrue; *provided*, that if such inaccuracy in the Company's representations and warranties or breach by the Company is curable by the Company through the exercise of its commercially reasonable efforts, then Purchaser may not terminate this Agreement under this Section 10.1(e) for thirty (30) days after delivery of written notice from Purchaser to the Company of such breach, so long as the Company continues to exercise commercially reasonable efforts to cure such breach (it being understood that Purchaser may not terminate this Agreement pursuant to this Section 10.1(e) if such breach by the Company is cured during such thirty (30) day period); or

(f) by the Company, upon a breach of any representation, warranty, covenant or agreement on the part of Purchaser set forth in this Agreement, or if any representation or warranty of Purchaser shall have become untrue, in either case such that the conditions set forth in Section 8.1(a) would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become untrue; *provided*, that if such inaccuracy in Purchaser's representations and warranties or breach by Purchaser is curable by Purchaser through the exercise of its commercially reasonable efforts, then the Company may not terminate this Agreement under this Section 10.1(f) for thirty (30) days after delivery of written notice from the Company to Purchaser of such breach, so long as Purchaser continues to exercise commercially reasonable efforts to cure such breach (it being understood that the Company may not terminate this Agreement pursuant to this Section 10.1(f) if such breach by Purchaser is cured during such thirty (30) day period).

Section 10.2. **Effect of Termination**. In the event of termination of this Agreement as provided in Section 10.1, this Agreement shall forthwith become void and there shall be no liability on the part of either party hereto except (i) as set forth in Section 5.3(a) and Article XI and (ii) that nothing herein shall relieve either party from liability for any breach of this Agreement.

Section 10.3. **Waiver**. Any party to this Agreement may (a) extend the time for the performance of any of the obligations or other acts of the other parties, (b) waive any inaccuracies in the representations and warranties of the other parties contained herein or in any document delivered by the other parties pursuant hereto, or (c) waive compliance with any of the agreements or conditions of the other parties contained herein. Any such extension or waiver shall be valid only if set forth in an instrument in writing signed by the party to be bound thereby. Any waiver of any term or condition shall not be construed as a waiver of any subsequent breach or a subsequent waiver of the same term or condition, or a waiver of any other term or condition, of this Agreement. The failure of any party to assert any of its rights hereunder shall not constitute a waiver of any of such rights.

ARTICLE XI

MISCELLANEOUS

Section 11.1. **Expenses.** Except as otherwise specified in this Agreement, all costs and expenses, including, without limitation, fees and disbursements of counsel, financial advisors and accountants, incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the party incurring such costs and expenses, whether or not the Closing shall have occurred.

Section 11.2. **Notices.** All notices, requests, demands, claims and other communications hereunder shall be in writing. Any notice, request, demand, claim or other communication shall be deemed duly given (a) five (5) Business Days after it is sent by registered or certified mail, return receipt requested, postage prepaid, (b) one (1) Business Day after it is sent for next Business Day delivery via a reputable nationwide overnight courier service or (c) on the date of written confirmation of transmission by facsimile, in each case to the intended recipient as set forth below:

if to Purchaser, to:

Sybase, Inc.
One, Sybase Drive
Dublin, California 94568
Attention: General Counsel
Facsimile: (925) 236-6823

with a copy (which shall not constitute effective notice) to:

O'Melveny & Myers LLP
275 Battery Street, Suite 2600
San Francisco, California 94111
Attention: Michael Dorf, Esq.
Facsimile: (415) 894-8701

if to the Company to:

Avaki Corporation
15 New England Executive Park
Burlington, Massachusetts 01803
Attention: (781) 272-8444
Facsimile: Stephen Cromwell

with a copy (which shall not constitute effective notice) to:

Foley Hoag LLP

Seaport World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
Attention: William R. Kolb, Esq.
Facsimile: (617) 832-7000

Any party may change its address for notices upon giving written notice of the change to the other party in the manner provided above.

Section 11.3. **Public Announcements.** The press release announcing the transactions contemplated by this Agreement shall be a joint release of Purchaser and the Company in the form heretofore agreed upon by the parties to this Agreement. Except as may be required by Law or New York Stock Exchange requirements, no party to this Agreement shall make, or cause to be made, any press release or public announcement in respect of this Agreement or the transactions contemplated hereby or otherwise communicate with any news media without the prior written consent of the other party, and the parties shall cooperate as to the timing and contents of any such press release or public announcement.

Section 11.4. Headings; Interpretation.

(a) The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning, construction or interpretation of this Agreement.

(b) Whenever the words “include”, “includes” or “including” are used in this Agreement they shall be deemed to be followed by the words “without limitation.”

(c) The words “hereof”, “herein” and “herewith” and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole and not to any particular provision of this Agreement, and article, section, paragraph, exhibit and schedule references are to the articles, sections, paragraphs, exhibits and schedules of this Agreement unless otherwise specified.

(d) The meaning assigned to each term defined herein shall be equally applicable to both the singular and the plural forms of such term, and words denoting any gender shall include all genders. Where a word or phrase is defined herein, each of its other grammatical forms shall have a corresponding meaning.

(e) A reference to any party to this Agreement or any other agreement or document shall include such party’s successors and permitted assigns.

(f) When a reference is made in this Agreement to Exhibits or Schedules, such reference shall be to Exhibits and Schedules to this Agreement unless otherwise indicated.

(g) When a reference is made in this Agreement to Articles or Sections, such reference shall be to Articles and Sections of this Agreement unless otherwise indicated.

(h) 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.

(i) The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Agreement.

Section 11.5. **Severability.** If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any Law or public policy, all other terms and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner in order that the transactions contemplated hereby are consummated as originally contemplated to the greatest extent possible.

Section 11.6. **Entire Agreement.** This Agreement, the Ancillary Agreements and the Confidentiality Agreement constitute the entire agreement of the parties hereto with respect to the subject matter hereof and supersede all prior agreements, representations, undertakings and understandings, both written and oral, between the parties with respect to the subject matter hereof.

Section 11.7. **Assignment.** This Agreement may not be assigned by operation of Law or otherwise without the express written consent of the parties hereto (which consent may be granted or withheld in the sole discretion of any party); *provided, however*, that Purchaser may assign this Agreement or its rights and obligations hereunder to Affiliate(s) of Purchaser without the consent of the Company.

Section 11.8. **No Third Party Beneficiaries.** This Agreement shall be binding upon and inure solely to the benefit of the parties hereto and their permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person, including, without limitation, any union or any employee or former employee of the Company, any legal or equitable right, benefit or remedy of any nature whatsoever, including, without limitation, any rights of employment for any specified period, under or by reason of this Agreement.

Section 11.9. **Amendment.** This Agreement may not be amended, modified or supplemented except (a) by an instrument in writing signed by, or on behalf of, the parties hereto or (b) by a waiver in accordance with Section 10.3.

Section 11.10. **Governing Law.** IN ALL RESPECTS, INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS AGREEMENT AND THE OBLIGATIONS OF EACH PARTY ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF CALIFORNIA APPLICABLE TO CONTRACTS EXECUTED IN AND TO BE PERFORMED ENTIRELY WITHIN SUCH STATE, WITHOUT REGARD TO THE PRINCIPLES THEREOF REGARDING CONFLICT OF LAWS.

Section 11.11. **Submission to Jurisdiction; Waiver of Jury Trial.**

(a) Each of the parties hereto irrevocably consents to the exclusive jurisdiction and venue of any court within Boston, Massachusetts, in connection with any matter based upon or arising out of this Agreement, the Acquisition Agreements or the matters contemplated herein or therein and waives and covenants not to assert or plead any objection which they might otherwise have to such jurisdiction or venue.

(b) To the extent not prohibited by applicable Law which cannot be waived, each of the parties hereto hereby waives any right to trial by jury in any forum in respect of any issue, action, claim, cause of action, suit (in contract, tort or otherwise), inquiry, proceeding or investigation arising out of or based upon this Agreement, the Acquisition Agreements or the subject matter hereof or thereof or in any way connected with or related or incidental to the transactions contemplated hereby or thereby.


Section 11.12. **Counterparts.** This Agreement may be executed in one or more counterparts, and by the different parties hereto in separate counterparts, each of which when executed shall be deemed to be an original but all of which taken together shall constitute one and the same agreement.

Section 11.13. **Specific Performance.** The parties hereto agree that irreparable damage would occur in the event any provision of this Agreement was not performed in accordance with the terms hereof and that the parties shall be entitled to specific performance of the terms hereof, in addition to any other remedy at Law or equity, without the necessity of demonstrating the inadequacy of money damages.

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IN WITNESS WHEREOF, the Company and Purchaser have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

AVAKI CORPORATION

By 
Name: Andre M. Boisvert
Title: President and Chairman of the Board of Directors

SYBASE, INC.

By _____
Name: Marty J. Beard
Title: Senior Vice President Corporate Development and Marketing

[ASSET PURCHASE AGREEMENT]

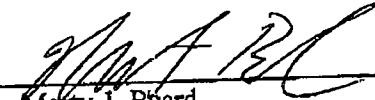
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AVAKI CORPORATION

By _____
Name: Andre M. Boisvert
Title: President and Chairman of the Board of Directors

SYBASE, INC.

By  _____
Name: Marty J. Beard
Title: Senior Vice President Corporate Development and Marketing

[ASSET PURCHASE AGREEMENT]