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Attorney Docket Number  
10082-003-999

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TO THE HONORABLE COMMISSIONER OF PATENTS AND TRADEMARKS  
Box Assignment  
Washington, DC 20231

Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):

DELLA.COM, INC.

10-25-00

Additional name(s) of conveying party(ies) attached? ☐ Yes ☒ No

3. Nature of conveyance:

☐ Assignment☒ Merger☐ Security Agreement☐ Change of Name☐ Other \_\_\_\_\_

Execution Date: April 24, 2000

2. Name and address of receiving party(ies):

Name: WEDCOM INC.

Address: 888 S. Figueroa Street, Suite 700  
Los Angeles, CA 90017

Country (if other than USA): \_\_\_\_\_

4. Application number(s) or patent number(s):

If this document is being filed together with a new application, the execution date of the application is: \_\_\_\_\_

A. Patent Application No.(s) 09/459,766,  
filed December 13, 1999

B. Patent No.(s) \_\_\_\_\_

Additional numbers attached? ☐ Yes ☒ No5. Name and address of party to whom correspondence  
concerning document should be mailed:PENNIE & EDMONDS LLP  
1155 Avenue of the Americas  
New York, NY 100366. Number of applications  
and patents involved: 17. Total fee (37 CFR 3.41): \$ 40.00  
Please charge to the deposit account listed in  
Section 8.8. Deposit account number:  
16-1150

## DO NOT USE THIS SPACE

9. Statement and signature.

*To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy  
is a true copy of the original document.*

Brett Lovejoy

42,813

Signature

October 25, 2000

Date

For: William S. Galliani (Reg. No. 33,885)  
Name of Person Signing Reg. No.

Total number of pages including cover sheet:

55

Mail documents to be recorded with required cover sheet information to:  
Commissioner of Patents & Trademarks, Box Assignment  
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CA1 - 256908.1

PATENT  
REEL: 011281 FRAME: 0374



**AGREEMENT  
AND PLAN OF MERGER AND REORGANIZATION**

**BETWEEN**

**WEDCOM INC.,**  
a Delaware corporation,

**AND**

**DELLA.COM, INC.,**  
a California corporation.

# AGREEMENT AND PLAN OF MERGER AND REORGANIZATION

**THIS AGREEMENT AND PLAN OF MERGER AND REORGANIZATION** (the "Agreement") is entered into as of April 24, 2000, by and between **WEDCOM INC.**, a Delaware corporation ("WC"), and **DELLA.COM, INC.**, a California corporation ("Della").

## RECITALS

**A.** WC and Della intend to effect a merger of Della with and into WC in accordance with this Agreement and the laws of the States of Delaware and California (the "Merger"). Upon consummation of the Merger, (i) Della will cease to exist, and WC will be the surviving entity and (ii) the shareholders, optionholders and warrant holders of Della will collectively own approximately fifty percent (50%) of the common stock of WC on a fully-diluted, as-converted basis.

**B.** This Agreement has been approved by the respective Boards of Directors of WC and Della, by the Della Shareholders (as defined in Section 1.2), who collectively are the owners of at least 99% of the outstanding Della Capital Stock (as defined in Section 1.1), and by a majority in interest of the stockholders of WC.

**C.** For accounting purposes, it is intended that the Merger be treated as a purchase.

## AGREEMENT

**NOW, THEREFORE,** in consideration of the foregoing recitals and the mutual promises, representations, warranties, covenants and agreements hereinafter set forth, and intending to be legally bound, the parties hereto agree as follows:

### 1. CERTAIN DEFINITIONS.

**1.1** "Della Capital Stock" means all Della Common Stock and Della Preferred Stock.

**1.2** "Della Shareholder" means any holder of record of Della Capital Stock immediately prior to the Effective Time.

**1.3** "GAAP" means generally accepted accounting principles.

**1.4** "Governmental Entity" means any court, administrative agency or commission or other governmental authority or instrumentality.

**1.5** Any reference to a party's "knowledge" means such party's actual knowledge after due and diligent inquiry of officers, directors and other employees of such party reasonably believed to have knowledge of such matters.

**1.6** "Material" means, with respect to any event, change, condition or effect affecting any entity or group of entities, any material event, change, condition or effect related to

the condition (financial or otherwise), properties, assets (including intangible assets), liabilities, business, operations, results of operations or prospects of such entity or group of entities.

**1.7** "Material Adverse Effect" means, with respect to any entity or group of entities, any event, change or effect that is materially adverse to the condition (financial or otherwise), properties, assets, liabilities, business, operations, results of operations or prospects of such entity and its subsidiaries, taken as a whole.

**1.8** A "Material Agreement" of a party means, with respect to such party, any material contract or agreement, whether written or oral, by which such party is bound.

**1.9** "WC Capital Stock" means all WC Common Stock and WC Preferred Stock.

**1.10** "WC Stockholder" means any holder of record of WC Capital Stock.

**1.11** "WebWisher" means WebWisher, Inc., a Delaware corporation.

## **2. DESCRIPTION OF TRANSACTION.**

**2.1 Merger of Della into WC** Upon the terms and subject to the conditions set forth in this Agreement, at the Effective Time (as defined in Section 2.3), Della shall be merged into WC and the separate existence of Della shall cease. WC shall be the surviving corporation in the Merger (the "Surviving Corporation").

**2.2 Effect of the Merger.** The Merger shall have the effects set forth in this Agreement and in the applicable provisions of the California Corporations Code (the "CCC") and the Delaware General Corporation Law (the "DGCL").

**2.3 Closing; Effective Time.** The closing of the transactions contemplated by this Agreement (the "Closing") are taking place contemporaneously with the execution and delivery of this Agreement, at the offices of Cooley Godward LLP, One Market Plaza, 20<sup>th</sup> Floor, San Francisco, California 94111, or at such other place as the parties hereto mutually agree, on April 24, 2000 (the "Closing Date"), after the satisfaction or waiver of each of the conditions set forth in Section 6. On the Closing Date, properly executed Articles of Merger and Certificate of Merger or similar documents conforming to the requirements of the CCC and the DGCL shall be filed with the Secretary of State of the States of California and Delaware, respectively. The Merger shall become effective at the time of filing the Articles of Merger and the Certificate of Merger or similar document in the States of California and Delaware, respectively, or at such later time as may be specified in such Articles of Merger or Certificate of Merger (the "Effective Time").

**2.4 Certificate of Incorporation and Bylaws; Directors and Officers.** The Certificate of Incorporation attached as Exhibit A, shall become the Certificate of Incorporation of the Surviving Corporation. The Bylaws of WC, attached as Exhibit B, shall become the Bylaws of the Surviving Corporation. The directors and the officers of the Surviving Corporation immediately after the Effective Time shall be the persons identified on Schedule 2.4. The Surviving Corporation shall enter into an indemnification agreement with

each person listed on Schedule 2.4 that had been employed by Della, in a form not materially different from the form agreement entered into by the existing directors and officers of WC.

**2.5 Investor Rights Agreement.** The Second Amended and Restated Investor Rights Agreement of WC, in the form attached hereto as Exhibit C, shall be executed by the parties listed on the signature pages thereto.

**2.6 Voting Agreement.** The Third Amended and Restated Voting Agreement of WC, in the form attached hereto as Exhibit D, shall be executed by the parties listed on the signature pages thereto.

**2.7 Conversion of Securities.** At the Effective Time, by virtue of the Merger, and without any further action on the part of WC, Della or any Della Shareholder or WC Stockholder:

(a) Each share of common stock, par value \$.001 per share, of Della ("Della Common Stock") then outstanding shall be converted into the right to receive 2.22592785 shares of common stock of the Surviving Corporation (the "Exchange Ratio"), provided that the number of shares to be received by each shareholder will be rounded up to the nearest whole share.

(b) Shares of any outstanding series of preferred stock of Della ("Della Preferred Stock") shall be converted into the right to receive an amount of a corresponding series of WC Preferred Stock as follows:

(i) Each share of Series A Preferred Stock of Della then outstanding shall be converted into the right to receive 2.22592785 shares of Series H Preferred Stock of WC, provided that the number of shares to be received by each shareholder will be rounded up to the nearest whole share.

(ii) Each share of Series B Preferred Stock of Della then outstanding shall be converted into the right to receive 2.22592785 shares of Series I Preferred Stock of WC, provided that the number of shares to be received by each shareholder will be rounded up to the nearest whole share.

(iii) Each share of Series C Preferred Stock of Della then outstanding shall be converted into the right to receive 2.22592785 shares of Series J Preferred Stock of WC, provided that the number of shares to be received by each shareholder will be rounded up to the nearest whole share.

(iv) Each share of Series D Preferred Stock of Della then outstanding shall be converted into the right to receive 2.22592785 shares of Series K Preferred Stock of WC, provided that the number of shares to be received by each shareholder will be rounded up to the nearest whole share.

(v) Each share of Series E Preferred Stock of Della then outstanding shall be converted into the right to receive 2.22592785 shares of Series L Preferred

Stock of WC, provided that the number of shares to be received by each shareholder will be rounded up to the nearest whole share.

## **2.8 Cancellation and Surrender of Certificates.**

(a) At the Closing, each certificate representing Della Capital Stock shall, by virtue of the Merger, be deemed for all purposes to evidence the right to receive WC Capital Stock according to the conversion ratios set forth in Section 2.7.

(b) Following the Effective Time, the Surviving Corporation shall deliver to each Della Shareholder a letter of transmittal.

(c) As soon as practicable following delivery by each Della Shareholder of such Della Shareholder's Della share certificate(s) along with a properly completed letter of transmittal in accordance with Section 2.8(b), WC will deliver to such Della Shareholder certificate(s) representing the applicable class, series and number of shares of WC Capital Stock to which such Della Shareholder is entitled according to Section 2.7.

## **2.9 Assumption of Della Options and Warrants.**

(a) **Options.** At the Effective Time, all rights with respect to Della Common Stock under each option that is then outstanding under Della's 1998 Equity Incentive Plan, as amended (each a "Della Option"), whether vested or unvested, shall be converted into and become rights with respect to WC Common Stock, and WC shall assume each such Della Option in accordance with the terms (as in effect as of the date of this Agreement) of the stock option plan under which it was issued and the stock option agreement by which it is evidenced. From and after the Effective Time, (i) each Della Option assumed by WC may be exercised solely for shares of WC Common Stock, (ii) the number of shares of WC Common Stock subject to each such Della Option shall be equal to the number of shares of Della Common Stock subject to such Della Option immediately prior to the Effective Time multiplied by the Exchange Ratio and rounding down to the nearest whole share, (iii) the per share exercise price under each such Della Option shall be adjusted by dividing the per share exercise price under such Della Option by the Exchange Ratio and rounding up to the nearest tenth of a cent and (iv) any restriction on the exercise of any such Della Option shall continue in full force and effect and the term, exercisability, vesting schedule and other provisions of such Della Option shall otherwise remain unchanged; *provided, however*, that each Della Option assumed by WC in accordance with this Section 2.9(a) shall, in accordance with its terms, be subject to further adjustment as appropriate to reflect any stock split, stock dividend, reverse stock split, reclassification, recapitalization or other similar transaction subsequent to the Effective Time. It is the intention of the parties that Della Options assumed by WC qualify following the Effective Time as incentive stock options as defined in Section 422 of the Code to the extent such Della Options qualified as incentive stock options immediately prior to the Effective Time. Promptly following the Effective Time, WC will issue to each holder of an assumed Della Option a document, certified and confirmed by an officer of WC, evidencing the foregoing assumption by WC and setting forth the number of shares of WC Common Stock subject to, and the per share exercise price under, such assumed Della Option.

**(b) Warrants.** At the Effective Time, all rights with respect to Della Common Stock or Della Preferred Stock under each outstanding warrant to purchase Della Capital Stock (each a “Della Warrant”), whether vested or unvested, shall be converted into and become rights with respect to WC Capital Stock, and WC shall assume each such Della Warrant in accordance with the terms of such Della Warrant. From and after the Effective Time, (i) each Della Warrant assumed by WC may be exercised solely for shares of WC Capital Stock, (ii) the number of shares of WC Capital Stock subject to each such Della Warrant shall be equal to the number of shares of Della Capital Stock subject to such Della Warrant immediately prior to the Effective Time multiplied by the Exchange Ratio and rounding to the nearest whole share, (iii) the per share exercise price under each such Della Warrant shall be adjusted by dividing the per share exercise price under such Della Warrant by the Exchange Ratio and rounding to the nearest tenth of a cent and (iv) any restriction on the exercise of any such Della Warrant shall continue in full force and effect and the term, exercisability, vesting schedule and other provisions of such Della Warrant shall otherwise remain unchanged; *provided, however*, that each Della Warrant assumed by WC in accordance with this Section 2.9(b) shall, in accordance with its terms, be subject to further adjustment as appropriate to reflect any stock split, stock dividend, reverse stock split, reclassification, recapitalization or other similar transaction subsequent to the Effective Time. Promptly following the Effective Time, WC will issue to each holder of an assumed Della Warrant a document, certified and confirmed by an officer of WC, evidencing the foregoing assumption of such Della Warrant by WC and setting forth the number and class of shares of WC Capital Stock subject to, and the per share exercise price under, such assumed Della Warrant.

**2.10 Tax Consequences.** The parties hereto intend that the Merger will constitute a tax free reorganization within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended (the “Code”).

**2.11 Exemption from Registration.** Assuming the accuracy of the representations contained in the Shareholder Representation Letters delivered by each Della Shareholder to WC, the shares of WC Capital Stock to be issued to the Della Shareholders in connection with the Merger will be issued in a transaction exempt from registration under the Securities Act of 1933, as amended (the “Securities Act”), by reason of Section 4(2) thereof.

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

### **3. REPRESENTATIONS AND WARRANTIES OF DELLA.**

Except as set forth on a disclosure schedule delivered by Della to WC at the Closing (the “Della Disclosure Schedule”), Della hereby represents and warrants to WC as of the date of this Agreement as follows:

**3.1 Organization, Good Standing and Qualification.** Della is a corporation duly organized, validly existing and in good standing under the laws of the State of California. WebWisher is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Each of Della and its subsidiary has all requisite corporate power and authority to own and operate its respective properties and assets, to execute and deliver this Agreement, to carry out the provisions of this Agreement and to carry on its respective business as presently conducted and as presently proposed to be conducted. Each of Della and its subsidiary is duly qualified and is authorized to do business and is in good standing as a foreign corporation in all jurisdictions in which the nature of its respective activities and of its respective properties (both owned and leased) makes such qualification necessary, except for those jurisdictions in which failure to do so would not have a Material Adverse Effect on it or its respective business.

**3.2 Subsidiaries.** Neither Della nor its subsidiary owns or has ever owned equity securities of any other corporation, limited partnership, limited liability company or other entity. Neither Della nor its subsidiary is a participant in any joint venture, partnership or similar arrangement.

**3.3 Capitalization; Voting Rights.** The authorized capital stock of Della consists of 43,700,000 shares of Common Stock, (par value \$0.001 per share), 4,721,083 shares of which are issued and outstanding and 2,590,906 shares of which are subject to outstanding options or warrants, and 30,300,000 shares of Preferred Stock (\$0.001 per share), 2,000,000 of which are designated Series A Preferred Stock (the "Series A Preferred"), all of which are issued and outstanding, 4,500,000 of which are designated Series B Preferred Stock (the "Series B Preferred"), all of which are issued and outstanding, 5,800,000 of which are designated Series C Preferred Stock (the "Series C Preferred"), 4,684,087 of which are issued and outstanding, 15,000,000 of which are designated Series D Preferred Stock (the "Series D Preferred"), 4,572,499 of which are issued and outstanding, and 3,000,000 of which are designated Series E Preferred Stock (the "Series E Preferred"), 1,189,950 of which are issued and outstanding. All issued and outstanding shares of Della Capital Stock (a) have been duly authorized and validly issued, (b) are fully paid and nonassessable, and (c) were issued in compliance with all applicable state and federal laws concerning the issuance of securities. The rights, preferences, privileges and restrictions of the Della Capital Stock are as stated in Della's Restated Articles of Incorporation (the "Della Articles"), a copy of which is attached as Part 3.3(a) of the Della Disclosure Schedule). Other than as set forth herein, there are no outstanding options, warrants, rights (including conversion or preemptive rights and rights of first refusal), proxy or shareholder agreements to which Della is a party, or agreements to which Della is a party of any kind for the purchase or acquisition from Della of any of its securities. The authorized capital stock of WebWisher consists of 3,000 shares of Common Stock, (par value \$0.01 per share), 300 shares of which are issued and outstanding and none of which are subject to outstanding options or warrants. All issued and outstanding shares of WebWisher capital stock (a) have been duly authorized and validly issued, (b) are fully paid and nonassessable, and (c) were issued in compliance with all applicable state and federal laws concerning the issuance of securities. The rights, preferences, privileges and restrictions of the WebWisher capital stock are as stated in WebWisher's Restated Certificate of Incorporation, a copy of which is attached as Part 3.3(b) of the Della Disclosure Schedule. There are no outstanding options, warrants, rights (including conversion or preemptive rights and rights of first refusal), proxy or shareholder agreements to



which WebWisher is a party, or agreements to which WebWisher is a party of any kind for the purchase or acquisition from WebWisher of any of its securities.

**3.4 No Consent Required.** Except for the filings contemplated by Section 2.3 above, no consent, authorization, approval, order, license, certificate or permit or act of or from, or declaration or filing with, any foreign, federal, state, local or other governmental authority or regulatory body or any court or other tribunal or any party to any Material Agreement to which Della is subject is required for the execution, delivery or performance by Della of this Agreement or any of the other agreements, instruments and documents being or to be executed and delivered hereunder or in connection herewith or for the consummation of the transactions contemplated hereby or thereby.

**3.5 Authorization: Binding Obligations.**

(a) Della has full corporate power and authority to execute, deliver and perform its obligations under this Agreement and all agreements, instruments and documents contemplated hereby, and all corporate action of Della, including, without limitation, approval of this Agreement, all agreements, instruments and documents contemplated hereby and the transactions contemplated hereby and thereby by Della's Board of Directors and shareholders, necessary for such execution, delivery and performance has been duly taken.

(b) This Agreement and the agreements contemplated hereby are legal, valid and binding obligations of Della, and, upon due execution and delivery by the parties thereto, all agreements, instruments and documents to be executed by Della in connection with the transactions contemplated hereby will be legal, valid and binding obligations of Della, each enforceable against Della in accordance with its respective terms, except as enforcement may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally, and subject to general equity principles and to limitations on availability of equitable relief, including specific performance.

**3.6 Financial Statements.** Della has delivered to WC (a) its audited balance sheet as at December 31, 1999 and audited statement of income and cash flows for the 12 months ending December 31, 1999 and (b) its unaudited balance sheet as at March 31, 2000 (the "Statement Date") and unaudited consolidated statement of income and cash flows for the 2 month period ending on the Statement Date (collectively, the "Della Financial Statements"), copies of which are attached as Part 3.6 to the Della Disclosure Schedule. The Financial Statements, together with the notes thereto, have been prepared in accordance with generally accepted accounting principles applied on a consistent basis throughout the periods indicated, except as disclosed therein, and present fairly the financial condition and position of Della as of December 31, 1999 and the Statement Date; *provided, however*, that the unaudited interim financial statements are subject to normal recurring year-end audit adjustments (which are not expected to be material), and the Financial Statements do not contain all footnotes required under generally accepted accounting principles.

**3.7 Liabilities.** Neither Della nor its subsidiary has any debts, liabilities (whether absolute or contingent, matured or unmatured, known or unknown) or adverse claims which are or would be of a nature required to be reflected in a balance sheet prepared in

accordance with generally accepted accounting principles, other than such debts, liabilities or claims: (a) that are stated or described on the Della Statement Date balance sheet or (b) that were incurred in the ordinary course of business and which individually or in the aggregate do not have and would not reasonably be expected to have a Material Adverse Effect on Della and its subsidiary, taken as a whole.

### **3.8 Agreements; Action.**

(a) Except for agreements explicitly contemplated hereby, there are no agreements, understandings or proposed transactions between Della or its subsidiary or and any of its respective officers, directors, affiliates or any affiliate thereof.

(b) **Material Agreements.** Except for the Material Agreements described in the Della Disclosure Schedule, neither Della nor its subsidiary is a party to or bound by any Material Agreement. Each such Material Agreement is in full force and effect and is a valid and binding obligation of Della or its subsidiary, enforceable against such party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally, and subject to general equity principles and to limitations on the availability of equitable relief, including specific performance). There is no default or breach under any agreement by Della or its subsidiary or, to Della's knowledge, any other party thereto which, individually or in the aggregate would reasonably be expected to result in a Material Adverse Effect. To Della's knowledge, no party to any such Material Agreement intends to cancel, withdraw, modify, terminate or amend such Material Agreement. Each of Della and its subsidiary has performed all obligations required to be performed by it on or prior to the date hereof under each Material Agreement. Neither Della nor its subsidiary has received any notice that it is in default or breach thereunder, nor is Della aware of any facts that could reasonably be expected to give rise to such a default or breach.

(c) There are no agreements, understandings, instruments, contracts, proposed transactions, judgments, orders, writs or decrees to which Della or its subsidiary is a party or to its knowledge by which it is bound which may involve (i) obligations (contingent or otherwise) of, or payments to, Della or its subsidiary in excess of \$100,000 (other than obligations of, or payments to, Della arising from purchase or sale agreements entered into in the ordinary course of business), or (ii) the license of any patent, copyright, trade secret or other proprietary right to or from Della (other than licenses arising from the purchase of "off the shelf" or other standard products or licenses granted in the ordinary course of business), or (iii) provisions restricting or affecting the development, manufacture or distribution of Della's products or services, or (iv) indemnification by Della with respect to infringements of proprietary rights (other than indemnification obligations arising from agreements entered into in the ordinary course of business).

(d) Neither Della nor its subsidiary has (i) declared or paid any dividends, or authorized or made any distribution upon or with respect to any class or series of its capital stock, (ii) incurred any indebtedness for money borrowed or any other liabilities (other than as disclosed in the Financial Statements) individually in excess of \$25,000 or, in the case of indebtedness and/or liabilities individually less than \$25,000, in excess of \$50,000 in the

aggregate, (iii) made any loans or advances to any person, other than advances for business expenses advanced in the ordinary course of business, or (iv) sold, exchanged or otherwise disposed of any of its assets or rights, other than through non-exclusive license grants or the sale of its inventory in the ordinary course of business.

(e) For the purposes of subsections (b), (c) and (d) above, all indebtedness, liabilities, agreements, understandings, instruments, contracts and proposed transactions involving the same person or entity (including persons or entities Della has reason to believe are affiliated therewith) shall be aggregated for the purpose of meeting the individual minimum dollar amounts set forth in such subsections.

**3.9 Obligations to Related Parties.** There are no obligations of Della or its subsidiary to any of its officers, directors, shareholders, or employees other than (a) for payment of salary for services rendered, (b) reimbursement for reasonable expenses incurred on behalf of it and (c) for other standard employee benefits made generally available to all employees (including stock option agreements outstanding under any stock option plan approved by the Board of Directors of Della). None of the officers, directors or shareholders of Della or its subsidiary, or any members of their immediate families, are indebted to Della or its subsidiary. No officer, director or shareholder, or any member of their immediate families has an interest, directly or indirectly, in any material contract or business relationship with Della or its subsidiary (other than such contracts as relate to any such person's ownership of capital stock or other securities of Della or its subsidiary). Except as may be disclosed in the Financial Statements, neither Della nor its subsidiary is a guarantor or indemnitor of any indebtedness of any other person, firm or corporation.

**3.10 Changes.** Since the Statement Date, there has not been:

(a) Any change in the assets, liabilities, financial condition or operations of Della or its subsidiary from that reflected in the Financial Statements, other than changes in the ordinary course of business, none of which individually or in the aggregate has had or would reasonably be expected to have a Material Adverse Effect on such assets, liabilities, financial condition or operations of Della or its subsidiary;

(b) Any resignation or termination of any officer of Della or its subsidiary; and Della, to the best of its knowledge, does not know of the impending resignation or termination of employment of any such officer;

(c) Any material change, except in the ordinary course of business, in the contingent obligations of Della or its subsidiary by way of guaranty, endorsement, indemnity, warranty or otherwise;

(d) Any damage, destruction or loss, whether or not covered by insurance, materially and adversely affecting the properties, business or prospects or financial condition of Della and its subsidiary, taken as a whole;

(e) Any waiver by Della or its subsidiary of a valuable right or of a material debt owed to it;

(f) Any direct or indirect loans made by Della or its subsidiary to any shareholder, employee, officer or director of Della or its subsidiary, other than reimbursements of expenses or travel advances made in the ordinary course of business and consistent with past practices;

(g) Any change in any compensation arrangement or agreement with any employee, officer, director or shareholder;

(h) Any declaration or payment of any dividend or other distribution of the assets or stock of Della or its subsidiary;

(i) Any labor organization activity;

(j) Any debt, obligation or liability incurred, assumed or guaranteed by Della or its subsidiary in excess of \$50,000 in the aggregate;

(k) Any sale, assignment or transfer of any patents, trademarks, copyrights, trade secrets or other intangible assets, other than licenses granted in the ordinary course of business;

(l) Any change in any material agreement to which Della or its subsidiary is a party or by which it is bound which materially and adversely affects the business, assets, liabilities, financial condition, operations or prospects of Della and its subsidiary, taken as a whole;

(m) Any sale, issuance or authorization to issue (i) any Della or its subsidiary capital stock or other security, (ii) any option or right to acquire any capital stock or any other security, or (iii) any instrument convertible into or exchangeable for any capital stock or other security;

(n) Any amendment to the Della Articles or Della's bylaws (the "Della Bylaws"), or the subsidiary articles and bylaws, and neither Della nor its subsidiary has effected or been a party to any acquisition transaction, recapitalization, reclassification of shares, stock split, reverse stock split or similar transaction;

(o) Any capital expenditure which, when added to all other capital expenditures made on behalf of Della or its subsidiary since the Statement Date, exceeds \$100,000;

(p) Any other event or condition of any character that, either individually or cumulatively, has materially and adversely affected or would reasonably be expected to materially and adversely affect the business, assets, liabilities, financial condition, operations or prospects of Della and its subsidiary, taken as a whole.

**3.11 Title to Properties and Assets; Liens, etc.** Each of Della and its subsidiary has good and marketable title to its properties and assets, including the properties and assets reflected in the most recent balance sheet included in the Financial Statements, and good title to its leasehold estates, in each case subject to no mortgage, pledge, lien, lease, encumbrance

or charge, other than (a) those resulting from taxes which have not yet become delinquent and for which adequate reserves have been provided on the Della Financial Statements in accordance with GAAP, (b) minor liens and encumbrances which do not materially detract from the value of the property subject thereto or have a Material Adverse Effect on the operations of Della and its subsidiary, taken as a whole, and (c) those that have otherwise arisen in the ordinary course of business. All facilities, machinery, equipment, fixtures, vehicles and other properties owned, leased or used by Della or its subsidiary are in good operating condition and repair and are reasonably fit and usable for the purposes for which they are being used. Each of Della and its subsidiary is in compliance with all material terms of each lease to which it is a party or is otherwise bound.

**3.12 Patents and Trademarks.** Each of Della and its subsidiary owns or possesses sufficient legal rights to all patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information and other proprietary rights and processes necessary for its business as now conducted and as presently proposed to be conducted, without any known infringement of the rights of others. There are no outstanding options, licenses or agreements of any kind relating to the foregoing, nor is Della or its subsidiary bound by or a party to any options, licenses or agreements of any kind with respect to the patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information and other proprietary rights and processes of any other person or entity other than such licenses or agreements arising from the purchase of "off the shelf" or standard products. Neither Della or its subsidiary has received any communications alleging that it has violated or, by conducting its business as presently proposed to be conducted, would violate any of the patents, trademarks, service marks, trade names, copyrights or trade secrets or other proprietary rights of any other person or entity. Neither Della nor its subsidiary is aware that any of its employees is obligated under any contract (including licenses, covenants or commitments of any nature) or other agreement, or subject to any judgment, decree or order of any court or administrative agency, that would interfere with their duties to Della or its subsidiary or that would conflict with Della's or its subsidiary's business as presently proposed to be conducted. Neither the execution nor delivery of this Agreement, nor the carrying on of Della's or its subsidiary's business by the employees of Della, nor the conduct of Della's or its subsidiary's business as presently proposed to be conducted, will, to Della's knowledge, conflict with or result in a breach of the terms, conditions or provisions of, or constitute a default under any contract, covenant or instrument under which any employee is now obligated. Neither Della nor its subsidiary believes it is or will be necessary to utilize any inventions, trade secrets or proprietary information of any of its employees made prior to their employment by Della or its subsidiary, except for inventions, trade secrets or proprietary information that have been assigned to Della or its subsidiary.

**3.13 Compliance with Other Instruments.** Neither Della nor its subsidiary is in violation or default of any term of the Della Articles or Della Bylaws or its subsidiary's articles or bylaws, or of any provision of any mortgage, indenture, contract, agreement, instrument or contract to which it is party or by which it is bound or of any judgment, decree, order, writ or, to its knowledge, any statute, rule or regulation applicable to Della or its subsidiary (collectively, the "Other Instruments") which would materially and adversely affect the business, assets, liabilities, financial condition, operations or prospects of Della and its subsidiary, taken as a whole. The execution, delivery, and performance of and compliance with this Agreement will not, with or without the passage of time or giving of notice, result in any

such material violation, or be in conflict with or constitute a default under any such term of the Other Instruments, or result in the creation of any mortgage, pledge, lien, encumbrance or charge upon any of the properties or assets of Della or its subsidiary or the suspension, revocation, impairment, forfeiture or nonrenewal of any permit license, authorization or approval applicable to Della or its subsidiary. its business or operations or any of its assets or properties.

**3.14 Litigation.** There is no action, suit, proceeding or investigation pending or to Della's knowledge currently threatened in writing against Della or its subsidiary that questions the validity of this Agreement or the right of Della to enter into this Agreement, or to consummate the transactions contemplated hereby, or which might result, either individually or in the aggregate, in any Material Adverse Effect in the assets, condition, affairs or prospects of Della or its subsidiary, financially or otherwise, or any change in the current equity ownership of Della or its subsidiary, nor is Della aware that there is any basis for the foregoing. The foregoing includes, without limitation, actions pending or currently threatened (or any basis therefor known to Della) involving the prior employment of any of Della's or its subsidiary's employees, their use in connection with Della's or its subsidiary's business of any information or techniques allegedly proprietary to any of their former employers, or their obligations under any agreements with prior employers. Neither Della nor its subsidiary is a party or subject to the provisions of any order, writ, injunction, judgment or decree of any court or government agency or instrumentality. There is no action, suit, proceeding or investigation by Della or its subsidiary currently pending or which Della or its subsidiary intends to initiate.

### **3.15 Tax Returns and Payments.**

(a) The provision made for taxes on the Della Financial Statements is sufficient for the payment of all federal, state, foreign, county, local and other income, ad valorem, excise, profits, franchise, occupation, property, payroll, sales, use, gross receipts and other taxes (and any additions to tax, interest and penalties) and assessments (collectively, "Taxes"), whether or not disputed at the Statement Date, and for all years and periods prior thereto. Since the Statement Date, neither Della nor its subsidiary has incurred any Taxes other than Taxes incurred in the ordinary course of business consistent in type and amount with past practices of Della and its subsidiary. All material federal, state, foreign, county, local and other tax returns, declarations, schedules, forms, reports or other documents (including any related or supporting information) and any amendments thereto ("Tax Returns") required to be filed by or on behalf of Della or its subsidiary have been timely filed and when filed were true and correct in all material respects, and the Taxes shown as due thereon were paid. Each of Della and its subsidiary has duly withheld and paid all Taxes which it is required to withhold and pay relating to salaries, wages and other compensation, remuneration or benefits paid to the employees of Della and its subsidiary. There are no claims or assessments pending with respect to any Tax Return for any alleged Tax deficiency relating to Della's or its subsidiary's business and no material tax issue has been raised by any taxing authority or representative thereof with respect to any such return. Neither Della nor its subsidiary has been provided with written notice (a) that any of their Tax Returns have been or are being audited as of the date hereof, or (b) of any deficiency in assessment or proposed assessment to their Taxes. Neither Della nor its subsidiary has any knowledge of any liability of any Tax to be imposed upon their properties or assets as of the date of this Agreement that is not adequately provided for.

(b) Neither Della nor its subsidiary is a party to, bound by, or obligated under any agreement or arrangement for the allocation, sharing, or indemnification of Taxes. Neither Della nor its subsidiary (i) has ever been a member of an affiliated group filing a consolidated Tax Return (other than the affiliated group of which Della is the parent) and (ii) has any liability for Taxes under Treas. Reg. 1.1502-6 (or similar provision under state or local law), including as a transferee or successor (other than liability arising from the affiliated group of which Della is the parent). Neither Della nor its subsidiary has any obligation by contract, agreement, arrangement or otherwise to permit any person, other than Della or its subsidiary to use the benefit of a refund, credit or offset of Tax of Della or its subsidiary. Neither Della nor its subsidiary has ever been a United States real property holding corporation within the meaning of section 897(c)(2) of the Code during the period specified in section 897(c)(1)(A)(ii) of the Code.

### **3.16 Employees.**

(a) Section 3.16 of the Della Disclosure Schedule contains a true and complete list of each employment, bonus, deferred compensation, incentive compensation, stock purchase, stock option, stock appreciation right or other stock-based incentive, severance, change-in-control, or termination pay, hospitalization or other medical, disability, life or other insurance, supplemental unemployment benefits, profit-sharing, pension, or retirement plan, program, agreement or arrangement and each other employee benefit plan, program, agreement or arrangement, sponsored, maintained or contributed to or required to be contributed to Della or any of its subsidiaries, or by any trade or business, whether or not incorporated (an "ERISA Affiliate"), that together with Della or any of its subsidiaries would be deemed a "single employer" within the meaning of Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), for the benefit of any current or former employee or director of Della, or any of its subsidiaries or any ERISA Affiliate (the "Plans"). Section 3.16(a) of the Della Disclosure Schedule identifies each of the Plans that is an "employee welfare benefit plan" or "employee pension benefit plan," as such terms are defined in Sections 3(1) and 3(2) of ERISA, respectively (such plans being hereinafter referred to collectively as the "ERISA Plans"). Neither Della nor any ERISA Affiliate has any formal plan or commitment, whether legally binding or not, to create any additional Plan or modify or change any existing Plan that would affect any current or former employee or director of Della, any of its subsidiaries or any ERISA Affiliate.

(b) With respect to each of the Plans, Della has heretofore delivered to WC true and complete copies of each of the following documents, as applicable:

(i) a copy of the Plan documents (including all amendments thereto) for each written Plan or a written description of any Plan that is not otherwise in writing;

(ii) a copy of the annual report or Internal Revenue Service Form 5500 Series, if required under ERISA, with respect to each ERISA Plan for the last three Plan years ending prior to the date of this Agreement for which such a report was filed;

(iii) a copy of the actuarial report, if required under ERISA, with respect to each ERISA Plan for the last three Plan years ending prior to the date of this Agreement;

(iv) a copy of the most recent Summary Plan Description (“SPD”), together with all Summaries of Material Modification issued with respect to such SPD, if required under ERISA, with respect to each ERISA Plan, and all other material employee communications relating to each ERISA Plan;

(v) if the Plan is funded through a trust or any other funding vehicle, a copy of the trust or other funding agreement (including all amendments thereto) and the latest financial statements thereof, if any;

(vi) all contracts relating to the Plans with respect to which Della, its subsidiary, or any ERISA Affiliate may have any liability, including insurance contracts, investment management agreements, subscription and participation agreements and record keeping agreements; and

(vii) the most recent determination letter received from the IRS with respect to each Plan that is intended to be qualified under Section 401(a) of the Code.

(c) Each of the Plans has been operated and administered in all material respects in accordance with applicable laws, including but not limited to ERISA and the Code.

(d) Each of the ERISA Plans that is intended to be “qualified” within the meaning of Section 401(a) of the Code is so qualified. Della has applied for and received a currently effective determination letter from the IRS stating that it is so qualified, and no event has occurred which would affect such qualified status.

(e) Any fund established under an ERISA Plan that is intended to satisfy the requirements of Section 501(c)(9) of the Code has so satisfied such requirements.

(f) No amounts payable under any of the Plans or any other contract, agreement or arrangement with respect to which Della or any of its subsidiaries may have any liability could fail to be deductible for federal income tax purposes by virtue of Section 280G of the Code.

(g) No Plan provides benefits, including without limitation death or medical benefits (whether or not insured), with respect to current or former employees of Della, its subsidiaries or any ERISA Affiliate after retirement or other termination of service (other than (i) coverage mandated by applicable laws, (ii) death benefits or retirement benefits under any “employee pension benefit plan,” as that term is defined in Section 3(2) of ERISA, (iii) deferred compensation benefits accrued as liabilities on the books of Della or any ERISA Affiliate, or (iv) benefits, the full direct cost of which is borne by the current or former employee (or beneficiary thereof)).

(h) The consummation of the transactions contemplated by this Agreement will not, either alone or in combination with any other event, (i) entitle any current or former employee, officer or director of Della, any of its subsidiaries or any ERISA Affiliate to severance pay, unemployment compensation or any other similar termination payment, or (ii)



accelerate the time of payment or vesting, or increase the amount of or otherwise enhance any benefit due any such employee, officer or director.

(i) There are no pending or, to Della's knowledge, threatened or anticipated claims by or on behalf of any Plan, by any employee or beneficiary under any such Plan or otherwise involving any such Plan (other than routine claims for benefits).

(j) Della does not maintain any plan subject to Title IV of ERISA. Della has no collective bargaining agreements with any of its employees. There is no labor union organizing activity pending or, to Della's knowledge, threatened with respect to Della. Della has never been a contributing employer, or a member of a contributing group of corporations that includes a contributing employer, to any multi-employer plans (as defined in ERISA), and Della is in material compliance with the requirements of all federal, state and local laws and regulations respecting employment, employment practices, terms and conditions of employment and wages and hours, except where such noncompliance would not, in the aggregate, have a Material Adverse Effect. Della has paid all compensation due its employees or consultants through the Closing Date, including, without limitation, wages and benefits.

(k) To Della's knowledge, no employee of Della, nor any consultant with whom Della has contracted, is in violation of any material term of any employment contract, proprietary information agreement or any other agreement relating to the right of any such individual to be employed by, or to contract with, Della because of the nature of the business to be conducted by Della; and to Della's knowledge, the continued employment by Della of its present employees, and the performance of Della's contracts with its independent contractors, will not result in any such violation. Della has not received any notice alleging that any such violation has occurred. No employee of Della or its subsidiary has been granted the right to continued employment by Della or its subsidiary or to any material compensation following termination of employment with Della or its subsidiary. Della is not aware that any officer intends to terminate his or her employment with Della. WebWisher does not have any employees.

**3.17 Proprietary Information and Inventions Agreements.** Each former and current employee, officer and consultant of Della and its subsidiary has executed a Proprietary Information and Inventions Agreement or Consulting Agreement in the form attached to the Della Disclosure Schedule as Part 3.17. No current employee or officer of Della or its subsidiary has excluded works or inventions made prior to his or her employment with Della or its subsidiary (as applicable) from his or her assignment of inventions pursuant to such employee or officer's Proprietary Information and Inventions Agreement.

**3.18 Registration Rights.** Della is presently not under any obligation, and has not granted any rights, to register any of Della's presently outstanding securities or any of its securities that may hereafter be issued.

**3.19 Compliance with Laws; Permits.** Neither Della nor its subsidiary is in violation of any applicable statute, rule, regulation, order or restriction of any domestic or foreign government or any instrumentality or agency thereof in respect of the conduct of its respective business or the ownership of its respective properties which violation would have a

Material Adverse Effect on its business, assets, liabilities, financial condition, operations or prospects. No governmental orders, permissions, consents, approvals or authorizations are required to be obtained and no registrations or declarations are required to be filed in connection with the execution and delivery of this Agreement, except such as has been duly and validly obtained or filed, or with respect to any filings that must be made after the Closing, as will be filed in a timely manner. Each of Della and its subsidiary has all franchises, permits, licenses and any similar authority necessary for the conduct of its business as now being conducted by it, the lack of which could have a Material Adverse Effect on its business, properties, prospects or financial condition and believes it can obtain, without undue burden or expense, any similar authority for the conduct of its business as planned to be conducted. None of such permits, licenses, consents, approvals and authorizations requires the consent of any third party to the transactions contemplated hereby. WebWisher does not engage in any business activities.

**3.20 Safety Laws.** Neither Della nor its subsidiary is in violation of any applicable statute, law or regulation relating to the environment or occupational health and safety, and to its knowledge, no material expenditures are or will be required in order to comply with any such existing statute, law or regulation.

**3.21 Minute Books.** The minute books of Della and its subsidiary provided to WC contain a complete summary of all meetings of the board of directors (and any committee of the board of directors) and shareholders since the time of incorporation.

**3.22 Shareholder Consent.** Under the terms of the CCC, Della's Articles of Incorporation, and any other agreement to which Della is a party, the only vote of Della Shareholders necessary to approve the Merger is (i) the affirmative vote of the holders of a majority of all outstanding shares of Della Capital Stock (voting together as a single class), (ii) the affirmative vote of the holders of 65% of the outstanding Della Preferred Stock (voting together as a single class) and (iii) the affirmative vote of the holders of a majority of the outstanding shares of each class of Della Preferred Stock.

**3.23 Full Disclosure.** To the best of Della's knowledge, the Information Statement delivered to the Della Shareholders in connection with the Merger does not contain any untrue statement of fact, nor does it omit to state any fact necessary to make any of the information contained therein not misleading.

#### **4. REPRESENTATIONS AND WARRANTIES OF WC.**

Except as set forth on a disclosure schedule delivered by WC to Della at the Closing (the "WC Disclosure Schedule"), WC hereby represents and warrants to Della as of the date of this Agreement as follows:

**4.1 Organization, Good Standing and Qualification.** WC is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. WC has all requisite corporate power and authority to own and operate its properties and assets, to execute and deliver this Agreement, to carry out the provisions of this Agreement and to carry on its business as presently conducted and as presently proposed to be conducted. WC is duly qualified and is authorized to do business and is in good standing as a foreign corporation in

California and in all other jurisdictions in which the nature of its activities and of its properties (both owned and leased) makes such qualification necessary, except for those jurisdictions in which failure to do so would not have a Material Adverse Effect on WC or its business.

**4.2 Subsidiaries.** WC owns no and has never owned equity securities of any other corporation, limited partnership, limited liability company or other entity. WC is not a participant in any joint venture, partnership or similar arrangement.

**4.3 Capitalization; Voting Rights.** The authorized capital stock of WC consists of 100,000,000 shares of Common Stock, (par value \$0.001 per share), 8,660,674 shares of which are issued and outstanding and 14,561,587 shares of which are subject to outstanding options or warrants, and 48,776,066 shares of Preferred Stock (\$0.001 per share), 3,000,000 of which are designated Series A Preferred Stock (the "Series A Preferred"), all of which are issued and outstanding, 1,300,000 of which are designated Series B Preferred Stock (the "Series B Preferred"), 1,231,627 of which are issued and outstanding, 3,010,029 of which are designated Series C Preferred Stock (the "Series C Preferred"), all of which are issued and outstanding, 9,000,000 of which are designated Series D Preferred Stock (the "Series D Preferred"), 8,216,927 of which are issued and outstanding, 12,397,483 of which are designated Series E Preferred Stock (the "Series E Preferred"), all of which are issued and outstanding, and 16,365,778 of which are designated Series F Preferred Stock (the "Series F Preferred"), 9,487,112 of which are issued and outstanding and 3,500,000 of which are designated Series G Preferred Stock (the "Series G Preferred"), all of which are issued and outstanding. Assuming consummation of the Merger and an amendment to Wedcom's Certificate of Incorporation in accordance with the terms hereof and the accuracy of Della's representation and warranty in Section 3.3 hereof, WC will have 175,000,000 shares of Common Stock authorized, of which 18,972,856 shares will be issued and outstanding and 98,946,738 shares of Preferred Stock, 78,564,954 of which will be issued and outstanding, including the shares of Series A Preferred, Series B Preferred, Series C Preferred, Series D Preferred, Series E Preferred, Series F Preferred and Series G Preferred as set forth above, 4,451,857 designated Series H Preferred Stock, all of which will be issued and outstanding, 10,016,678 designated Series I Preferred Stock, all of which will be issued and outstanding, 10,676,445 designated Series J Preferred Stock, 10,426,455 of which will be issued and outstanding, 21,696,811 designated Series K Preferred Stock, 10,178,053 of which will be issued and outstanding, and 3,531,657 designated Series L Preferred Stock, 2,648,743 of which will be issued and outstanding. All issued and outstanding shares of WC Capital Stock (a) have been duly authorized and validly issued, (b) are fully paid and nonassessable, and (c) were issued in compliance with all applicable state and federal laws concerning the issuance of securities. The rights, preferences, privileges and restrictions of the WC Capital Stock are as stated in WC's Restated Certificate of Incorporation (the "WC Certificate"), a copy of which is attached as Part 4.3(a) of the WC Disclosure Schedule). Other than as set forth herein, there are no outstanding options, warrants, rights (including conversion or preemptive rights and rights of first refusal), proxy or shareholder agreements to which WC is a party, or agreements to which WC is a party of any kind for the purchase or acquisition from WC of any of its securities.

**4.4 No Consent Required.** Except for the filings contemplated by Section 2.3 above, no consent, authorization, approval, order, license, certificate or permit or act of or from, or declaration or filing with, any foreign, federal, state, local or other governmental

authority or regulatory body or any court or other tribunal or any party to any Material Agreement to which WC is subject is required for the execution, delivery or performance by WC of this Agreement or any of the other agreements, instruments and documents being or to be executed and delivered hereunder or in connection herewith or for the consummation of the transactions contemplated hereby or thereby.

#### **4.5 Authorization; Binding Obligations.**

(a) WC has full corporate power and authority to execute, deliver and perform its obligations under this Agreement and all agreements, instruments and documents contemplated hereby, and all corporate action of WC, including, without limitation, approval of this Agreement, all agreements, instruments and documents contemplated hereby and the transactions contemplated hereby and thereby by WC's Board of Directors and shareholders, necessary for such execution, delivery and performance has been duly taken.

(b) This Agreement and the agreements contemplated hereby are legal, valid and binding obligations of WC, and, upon due execution and delivery by the parties thereto, all agreements, instruments and documents to be executed by WC in connection with the transactions contemplated hereby will be legal, valid and binding obligations of WC, each enforceable against WC in accordance with its respective terms, except as enforcement may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally, and subject to general equity principles and to limitations on availability of equitable relief, including specific performance.

**4.6 Financial Statements.** WC has delivered to Della (a) its unaudited balance sheet as at December 31, 1999 and unaudited statement of income and cash flows for the 12 months ending December 31, 1999 and (b) its unaudited balance sheet as at the Statement Date and unaudited consolidated statement of income and cash flows for the 2 month period ending on the Statement Date (collectively, the "WC Financial Statements"), copies of which are attached as Part 4.6 to the WC Disclosure Schedule. The Financial Statements, together with the notes thereto, have been prepared in accordance with generally accepted accounting principles applied on a consistent basis throughout the periods indicated, except as disclosed therein, and present fairly the financial condition and position of WC as of December 31, 1999 and the Statement Date; *provided, however*, that the unaudited interim financial statements are subject to normal recurring year-end audit adjustments (which are not expected to be material), and the Financial Statements do not contain all footnotes required under generally accepted accounting principles.

**4.7 Liabilities.** WC has no debts, liabilities (whether absolute or contingent, matured or unmatured, known or unknown) or adverse claims which are or would be of a nature required to be reflected in a balance sheet prepared in accordance with generally accepted accounting principles, other than such debts, liabilities or claims: (a) that are stated or described on the WC Statement Date balance sheet or (b) that were incurred in the ordinary course of business and which individually or in the aggregate do not and would not reasonably be expected to have a Material Adverse Effect on WC.

#### **4.8 Agreements; Action.**

(a) Except for agreements explicitly contemplated hereby, there are no agreements, understandings or proposed transactions between WC and any of its officers, directors, affiliates or any affiliate thereof.

(b) **Material Agreements.** Except for the Material Agreements described in the WC Disclosure Schedule, WC is not a party to or bound by any Material Agreement. Each such Material Agreement is in full force and effect and is a valid and binding obligation of WC, enforceable against WC in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally, and subject to general equity principles and to limitations on the availability of equitable relief, including specific performance). There is no default or breach under any agreement by WC or, to WC's knowledge, any other party thereto which, individually or in the aggregate would reasonably be expected to result in a Material Adverse Effect. To WC's knowledge, no party to any Material Agreement intends to cancel, withdraw, modify, terminate or amend such Material Agreement. WC has performed all obligations required to be performed by it on or prior to the date hereof under each Material Agreement. WC has not received any notice that it is in default or breach thereunder, nor is WC aware of any facts that could reasonably be expected to give rise to such a default or breach.

(c) There are no agreements, understandings, instruments, contracts, proposed transactions, judgments, orders, writs or decrees to which WC is a party or to its knowledge by which it is bound which may involve (i) obligations (contingent or otherwise) of, or payments to, WC in excess of \$100,000 (other than obligations of, or payments to, WC arising from purchase or sale agreements entered into in the ordinary course of business), or (ii) the license of any patent, copyright, trade secret or other proprietary right to or from WC (other than licenses arising from the purchase of "off the shelf" or other standard products or licenses granted in the ordinary course of business), or (iii) provisions restricting or affecting the development, manufacture or distribution of WC's products or services, or (iv) indemnification by WC with respect to infringements of proprietary rights (other than indemnification obligations arising from agreements entered into in the ordinary course of business).

(d) WC has not (i) declared or paid any dividends, or authorized or made any distribution upon or with respect to any class or series of its capital stock, (ii) incurred any indebtedness for money borrowed or any other liabilities (other than as disclosed in the Financial Statements) individually in excess of \$25,000 or, in the case of indebtedness and/or liabilities individually less than \$25,000, in excess of \$50,000 in the aggregate, (iii) made any loans or advances to any person, other than advances for business expenses advanced in the ordinary course of business, or (iv) sold, exchanged or otherwise disposed of any of its assets or rights, other than through non-exclusive license grants or the sale of its inventory in the ordinary course of business.

(e) For the purposes of subsections (b), (c) and (d) above, all indebtedness, liabilities, agreements, understandings, instruments, contracts and proposed transactions involving the same person or entity (including persons or entities WC has reason to

believe are affiliated therewith) shall be aggregated for the purpose of meeting the individual minimum dollar amounts set forth in such subsections.

**4.9 Obligations to Related Parties.** There are no obligations of WC to officers, directors, shareholders, or employees of WC other than (a) for payment of salary for services rendered, (b) reimbursement for reasonable expenses incurred on behalf of WC and (c) for other standard employee benefits made generally available to all employees (including stock option agreements outstanding under any stock option plan approved by the Board of Directors of WC). None of the officers, directors or shareholders of WC, or any members of their immediate families, are indebted to WC. No officer, director or shareholder, or any member of their immediate families, has an interest, directly or indirectly, in any material contract or business relationship with WC (other than such contracts as relate to any such person's ownership of capital stock or other securities of WC). Except as may be disclosed in the Financial Statements, WC is not a guarantor or indemnitor of any indebtedness of any other person, firm or corporation.

**4.10 Changes.** Since the Statement Date, there has not been:

(a) Any change in the assets, liabilities, financial condition or operations of WC from that reflected in the Financial Statements, other than changes in the ordinary course of business, none of which individually or in the aggregate has had or would reasonably be expected to have a Material Adverse Effect on such assets, liabilities, financial condition or operations of WC;

(b) Any resignation or termination of any officer of WC; and WC, to the best of its knowledge, does not know of the impending resignation or termination of employment of any such officer;

(c) Any material change, except in the ordinary course of business, in the contingent obligations of WC by way of guaranty, endorsement, indemnity, warranty or otherwise;

(d) Any damage, destruction or loss, whether or not covered by insurance, materially and adversely affecting the properties, business or prospects or financial condition of WC;

(e) Any waiver by WC of a valuable right or of a material debt owed to it;

(f) Any direct or indirect loans made by WC to any shareholder, employee, officer or director of WC, other than reimbursements of expenses or travel advances made in the ordinary course of business and consistent with past practices;

(g) Any change in any compensation arrangement or agreement with any employee, officer, director or shareholder;

(h) Any declaration or payment of any dividend or other distribution of the assets or stock of WC;

(i) Any labor organization activity;

(j) Any debt, obligation or liability incurred, assumed or guaranteed by WC in excess of \$50,000 in the aggregate;

(k) Any sale, assignment or transfer of any patents, trademarks, copyrights, trade secrets or other intangible assets, other than licenses granted in the ordinary course of business;

(l) Any change in any material agreement to which WC is a party or by which it is bound which materially and adversely affects the business, assets, liabilities, financial condition, operations or prospects of WC;

(m) Any sale, issuance or authorization to issue (i) any WC capital stock or other security, (ii) any option or right to acquire any capital stock or any other security, or (iii) any instrument convertible into or exchangeable for any capital stock or other security;

(n) Any amendment to the WC Certificate or WC's bylaws (the "WC Bylaws"), and WC has not effected or been a party to any acquisition transaction, recapitalization, reclassification of shares, stock split, reverse stock split or similar transaction;

(o) Any capital expenditure which, when added to all other capital expenditures made on behalf of WC since the Statement Date, exceeds \$100,000.

(p) Any other event or condition of any character that, either individually or cumulatively, has materially and adversely affected or would reasonably be expected to materially and adversely affect the business, assets, liabilities, financial condition, operations or prospects of WC.

**4.11 Title to Properties and Assets; Liens, etc.** WC has good and marketable title to its properties and assets, including the properties and assets reflected in the most recent balance sheet included in the Financial Statements, and good title to its leasehold estates, in each case subject to no mortgage, pledge, lien, lease, encumbrance or charge, other than (a) those resulting from taxes which have not yet become delinquent and for which adequate reserves have been provided on the Della Financial Statements in accordance with GAAP, (b) minor liens and encumbrances which do not materially detract from the value of the property subject thereto or have a Material Adverse Effect on the operations of WC, and (c) those that have otherwise arisen in the ordinary course of business. All facilities, machinery, equipment, fixtures, vehicles and other properties owned, leased or used by WC are in good operating condition and repair and are reasonably fit and usable for the purposes for which they are being used. WC is in compliance with all material terms of each lease to which it is a party or is otherwise bound.

**4.12 Patents and Trademarks** WC owns or possesses sufficient legal rights to all patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information and other proprietary rights and processes necessary for its business as now conducted and as presently proposed to be conducted, without any known infringement of the rights of others. There are no outstanding options, licenses or agreements of any kind relating to the foregoing, nor is WC bound by or a party to any options, licenses or agreements of any kind

with respect to the patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information and other proprietary rights and processes of any other person or entity other than such licenses or agreements arising from the purchase of "off the shelf" or standard products. WC has not received any communications alleging that WC has violated or, by conducting its business as presently proposed to be conducted, would violate any of the patents, trademarks, service marks, trade names, copyrights or trade secrets or other proprietary rights of any other person or entity. WC is not aware that any of its employees is obligated under any contract (including licenses, covenants or commitments of any nature) or other agreement, or subject to any judgment, decree or order of any court or administrative agency, that would interfere with their duties to WC or that would conflict with WC's business as presently proposed to be conducted. Neither the execution nor delivery of this Agreement, nor the carrying on of WC's business by the employees of WC, nor the conduct of WC's business as presently proposed to be conducted, will, to WC's knowledge, conflict with or result in a breach of the terms, conditions or provisions of, or constitute a default under, any contract, covenant or instrument under which any employee is now obligated. WC does not believe it is or will be necessary to utilize any inventions, trade secrets or proprietary information of any of its employees made prior to their employment by WC, except for inventions, trade secrets or proprietary information that have been assigned to WC.

**4.13 Compliance with Other Instruments.** WC is not in violation or default of any term of the WC Certificate or WC Bylaws, or of any provision of any mortgage, indenture, contract, agreement, instrument or contract to which it is party or by which it is bound or of any judgment, decree, order, writ or, to its knowledge, any statute, rule or regulation applicable to WC (collectively, the "Other Instruments") which would materially and adversely affect the business, assets, liabilities financial condition, operations or prospects of WC. The execution, delivery, and performance of and compliance with this Agreement will not, with or without the passage of time or giving of notice, result in any such material violation, or be in conflict with or constitute a default under any such term of the Other Instruments, or result in the creation of any mortgage, pledge, lien, encumbrance or charge upon any of the properties or assets of WC or the suspension, revocation, impairment, forfeiture or nonrenewal of any permit license, authorization or approval applicable to WC, its business or operations or any of its assets or properties.

**4.14 Litigation.** There is no action, suit, proceeding or investigation pending or to WC's knowledge currently threatened in writing against WC that questions the validity of this Agreement or the right of WC to enter into this Agreement, or to consummate the transactions contemplated hereby, or which might result, either individually or in the aggregate, in any Material Adverse Effect in the assets, condition, affairs or prospects of WC, financially or otherwise, or any change in the current equity ownership of WC, nor is WC aware that there is any basis for the foregoing. The foregoing includes, without limitation, actions pending or currently threatened (or any basis therefor known to WC) involving the prior employment of any of WC's employees, their use in connection with WC's business of any information or techniques allegedly proprietary to any of their former employers, or their obligations under any agreements with prior employers. WC is not a party or subject to the provisions of any order, writ, injunction, judgment or decree of any court or government agency or instrumentality. There is no action, suit, proceeding or investigation by WC currently pending or which WC intends to initiate.



#### **4.15 Tax Returns and Payments.**

(a) The provision made for taxes on the WC Financial Statements is sufficient for the payment of all Taxes, whether or not disputed at the Statement Date, and for all years and periods prior thereto. Since the Statement Date, WC and its subsidiaries have not incurred any Taxes other than Taxes incurred in the ordinary course of business consistent in type and amount with past practices of WC. All material Tax Returns required to be filed by or on behalf of WC or its subsidiaries have been timely filed and when filed were true and correct in all material respects, and the Taxes shown as due thereon were paid. Each of WC and its subsidiaries has duly withheld and paid all Taxes which it is required to withhold and pay relating to salaries, wages and other compensation, remuneration or benefits paid to the employees of WC and its subsidiaries. There are no claims or assessments pending with respect to any Tax Return for any alleged Tax deficiency relating to WC's business and no material tax issue has been raised by any taxing authority or representative thereof with respect to any such return. Neither WC nor its subsidiaries has been provided with written notice (a) that any of its Tax Returns have been or are being audited as of the date hereof, or (b) of any deficiency in assessment or proposed assessment to its Taxes. Neither WC nor its subsidiaries has knowledge of any liability of any Tax to be imposed upon its properties or assets as of the date of this Agreement that is not adequately provided for.

(b) WC is not a party to, bound by, or obligated under any agreement or arrangement for the allocation, sharing or indemnification of Taxes. WC (i) has never been a member of an affiliated group filing a consolidated Tax Return and (ii) has no liability for Taxes under Treas. Reg. 1.1502-6 (or similar provision under state or local law), including as a transferee or successor. WC does not have any obligation by contract, agreement, arrangement or otherwise to permit any person other than WC to use the benefit of a refund, credit or offset of Tax of WC. WC has never been a United States real property holding corporation within the meaning of section 897(c)(2) of the Code during the period specified in section 897(c)(1)(A)(ii) of the Code.

#### **4.16 Employees.**

(a) Section 4.16 of the WC Disclosure Schedule contains a true and complete list of each WC Plan. Section 4.16(a) of the WC Disclosure Schedule identifies each of the WC ERISA Plans. Neither WC nor any ERISA Affiliate has any formal plan or commitment, whether legally binding or not, to create any additional Plan or modify or change any existing Plan that would affect any current or former employee or director of WC, any of its subsidiaries or any ERISA Affiliate.

(b) With respect to each of the Plans, WC has heretofore delivered to Della true and complete copies of each of the following documents, as applicable:

(i) a copy of the Plan documents (including all amendments thereto) for each written Plan or a written description of any Plan that is not otherwise in writing;

(ii) a copy of the annual report or Internal Revenue Service Form 5500 Series, if required under ERISA, with respect to each ERISA Plan for the last three Plan years ending prior to the date of this Agreement for which such a report was filed;

(iii) a copy of the actuarial report, if required under ERISA, with respect to each ERISA Plan for the last three Plan years ending prior to the date of this Agreement;

(iv) a copy of the most recent SPD, together with all Summaries of Material Modification issued with respect to such SPD, if required under ERISA, with respect to each ERISA Plan, and all other material employee communications relating to each ERISA Plan;

(v) if the Plan is funded through a trust or any other funding vehicle, a copy of the trust or other funding agreement (including all amendments thereto) and the latest financial statements thereof, if any;

(vi) all contracts relating to the Plans with respect to which WC or any ERISA Affiliate may have any liability, including insurance contracts, investment management agreements, subscription and participation agreements and record keeping agreements; and

(vii) the most recent determination letter received from the IRS with respect to each Plan that is intended to be qualified under Section 401(a) of the Code.

(c) Each of the Plans has been operated and administered in all material respects in accordance with applicable laws, including but not limited to ERISA and the Code.

(d) Each of the ERISA Plans that is intended to be "qualified" within the meaning of Section 401(a) of the Code is so qualified. WC has applied for and received a currently effective determination letter from the IRS stating that it is so qualified, and no event has occurred which would affect such qualified status.

(e) Any fund established under an ERISA Plan that is intended to satisfy the requirements of Section 501(c)(9) of the Code has so satisfied such requirements.

(f) No amounts payable under any of the Plans or any other contract, agreement or arrangement with respect to which WC or any of its subsidiaries may have any liability could fail to be deductible for federal income tax purposes by virtue of Section 280G of the Code.

(g) No Plan provides benefits, including without limitation death or medical benefits (whether or not insured), with respect to current or former employees of WC, its subsidiaries or any ERISA Affiliate after retirement or other termination of service (other than (i) coverage mandated by applicable laws, (ii) death benefits or retirement benefits under any "employee pension benefit plan," as that term is defined in Section 3(2) of ERISA, (iii) deferred compensation benefits accrued as liabilities on the books of WC or any ERISA Affiliate, or (iv)

benefits, the full direct cost of which is borne by the current or former employee (or beneficiary thereof)).

(h) The consummation of the transactions contemplated by this Agreement will not, either alone or in combination with any other event, (i) entitle any current or former employee, officer or director of WC, any of its subsidiaries or any ERISA Affiliate to severance pay, unemployment compensation or any other similar termination payment, or (ii) accelerate the time of payment or vesting, or increase the amount of or otherwise enhance any benefit due any such employee, officer or director.

(i) There are no pending or, to WC's knowledge, threatened or anticipated claims by or on behalf of any Plan, by any employee or beneficiary under any such Plan or otherwise involving any such Plan (other than routine claims for benefits).

(j) WC does not maintain any plan subject to Title IV of ERISA. WC has no collective bargaining agreements with any of its employees. There is no labor union organizing activity pending or, to WC's knowledge, threatened with respect to WC. WC has never been a contributing employer, or a member of a contributing group of corporations that includes a contributing employer, to any multi-employer plans (as defined in ERISA), and WC is in material compliance with the requirements of all federal, state and local laws and regulations respecting employment, employment practices, terms and conditions of employment and wages and hours, except where such noncompliance would not, in the aggregate, have a Material Adverse Effect. WC has paid all compensation due its employees or consultants through the Closing Date, including, without limitation, wages and benefits.

(k) To WC's knowledge, no employee of WC, nor any consultant with whom WC has contracted, is in violation of any material term of any employment contract, proprietary information agreement or any other agreement relating to the right of any such individual to be employed by, or to contract with, WC because of the nature of the business to be conducted by WC; and to WC's knowledge, the continued employment by WC of its present employees, and the performance of WC's contracts with its independent contractors, will not result in any such violation. WC has not received any notice alleging that any such violation has occurred. No employee of WC has been granted the right to continued employment by WC or to any material compensation following termination of employment with WC. WC is not aware that any officer intends to terminate his or her employment with WC.

**4.17 Proprietary Information and Inventions Agreements.** Each former and current employee, officer and consultant of WC has executed an Employment, Confidential Information and Inventions Assignment Agreement or Consulting Agreement in the forms attached to the WC Disclosure Schedule as Part 4.17. No current employee or officer of WC has excluded works or inventions made prior to his or her employment with WC from his or her assignment of inventions pursuant to such employee or officer's Employment, Confidential Information and Inventions Assignment Agreement.

**4.18 Registration Rights.** WC is presently not under any obligation, and has not granted any rights, to register any of WC's presently outstanding securities or any of its securities that may hereafter be issued.

**4.19 Compliance with Laws; Permits.** WC is not in violation of any applicable statute, rule, regulation, order or restriction of any domestic or foreign government or any instrumentality or agency thereof in respect of the conduct of its business or the ownership of its properties which violation would have a Material Adverse Effect on the business, assets, liabilities, financial condition, operations or prospects of WC. No governmental orders, permissions, consents, approvals or authorizations are required to be obtained and no registrations or declarations are required to be filed in connection with the execution and delivery of this Agreement, except such as has been duly and validly obtained or filed, or with respect to any filings that must be made after the Closing, as will be filed in a timely manner. WC has all franchises, permits, licenses and any similar authority necessary for the conduct of its business as now being conducted by it, the lack of which could have a Material Adverse Effect on the business, properties, prospects or financial condition of WC and believes it can obtain, without undue burden or expense, any similar authority for the conduct of its business as planned to be conducted. None of such permits, licenses, consents, approvals and authorizations requires the consent of any third party to the transactions contemplated hereby.

**4.20 Safety Laws.** WC is not in violation of any applicable statute, law or regulation relating to the environment or occupational health and safety, and to its knowledge, no material expenditures are or will be required in order to comply with any such existing statute, law or regulation.

**4.21 Minute Books.** The minute books of WC provided to Della contain a complete summary of all meetings of the board of directors (and any committee of the board of directors) and shareholders since the time of incorporation.

**4.22 Stockholder Consent.** Under the terms of the DGCL, WC's Certificate of Incorporation, and any other agreement to which WC is a party, the only vote of WC Stockholders necessary to approve the Merger is (i) the affirmative vote of the holders of a majority of all outstanding shares of WC Capital Stock (voting together as a single class), (ii) the affirmative vote of the holders of a majority of the outstanding WC Series E Preferred Stock, WC Series F Preferred Stock and WC Series G Preferred Stock (voting together as a single class) and (iii) the affirmative vote of the holders of a majority of the outstanding shares of each class of WC Preferred Stock.

**4.23 Full Disclosure.** To the best of WC's knowledge, the Information Statement delivered to the Della Shareholders in connection with the Merger does not contain any untrue statement of fact, nor does it omit to state any fact necessary to make any of the information contained therein not misleading.

## **5. ADDITIONAL AGREEMENTS.**

**5.1 Non-disclosure Agreement.** The parties acknowledge that Della and WC have previously executed a non-disclosure agreement dated February 9, 2000 (the "Non-Disclosure Agreement"), which Non-Disclosure Agreement shall continue in full force and effect in accordance with its terms.

**5.2 Public Disclosure.** Unless otherwise permitted by this Agreement, Della and WC shall consult with each other before issuing any press release or otherwise making any public disclosure (whether or not in response to an inquiry) regarding the terms of this Agreement and the transactions contemplated hereby, and neither party, nor any of their respective directors, officers, employees or agents, shall issue any such press release or make any such statement or disclosure without the prior approval of the other (which approval shall not be unreasonably withheld), except as may be required by law.

**5.3 Legal Requirements.** Each of Della and WC will, and will cause their respective subsidiaries to, take all reasonable actions necessary to comply promptly with all legal requirements which have been or which may be imposed on them with respect to the consummation of the transactions contemplated by this Agreement and will promptly cooperate with and furnish information to any party hereto necessary in connection with any such requirements imposed upon such other party in connection with the consummation of the transactions contemplated by this Agreement and will take all reasonable actions necessary to obtain (and will cooperate with the other parties hereto in obtaining) any consent, approval, order or authorization of, or any registration, declaration or filing with, any Governmental Entity or other person, required to be obtained or made in connection with the taking of any action contemplated by this Agreement.

**5.4 Commercially Reasonable Efforts and Further Assurances.** Each of the parties to this Agreement shall use all commercially reasonable efforts to effectuate the transactions contemplated hereby and to fulfill and cause to be fulfilled the conditions to closing under this Agreement. Each party hereto, at the reasonable request of another party hereto, shall execute and deliver such other instruments and do and perform such other acts and things as may be necessary or desirable for effecting completely the consummation of this Agreement and the transactions contemplated hereby.

**5.5 Tax-Free Reorganization.** No party shall take any action either prior to or after the Effective Time that would reasonably be expected to cause the Merger to fail to qualify as a "reorganization" under Section 368 of the Code.

**5.6 Tax Representation Letters.** At or prior to the Closing, Della and WC shall each execute and deliver to Skadden, Arps, Slate, Meagher & Flom LLP and Cooley Godward LLP tax representation letters in the form attached hereto as Exhibits G and H respectively.

## **6. CONDITIONS PRECEDENT TO OBLIGATIONS OF THE PARTIES.**

### **6.1 Conditions Precedent to Obligations of Della.**

The obligations of Della to effect the Merger and otherwise consummate the transactions contemplated by this Agreement are subject to the satisfaction, at or prior to the closing of each of the following conditions:

**(a) Accuracy of Representations.** Each of the representations and warranties made by WC in this Agreement shall be and shall have been accurate in all material respects as of the date of this Agreement.

**(b) Performance of Covenants.** All of the covenants and obligations that WC is required to comply with or to perform at or prior to the Closing shall have been complied with and performed in all respects.

**(c) Stockholder Approval.** This Agreement and the Merger shall have been duly approved by the requisite vote of the holders of the shares of each class and series of WC Capital Stock and Della Capital Stock entitled to vote with respect thereto.

**(d) Consents.** All consents required to be obtained in connection with the Merger and the other transactions contemplated by this Agreement (all of which are identified in Part 3.4 of the Della Disclosure Schedule and Part 4.4 of the WC Disclosure Schedule) shall have been obtained and shall be in full force and effect.

**(e) Tax Opinion.** Della shall have received a written opinion from Cooley Godward LLP in form and substance reasonably satisfactory to it, to the effect that the Merger will constitute a reorganization within the meaning of Section 368 of the Code and such opinion shall not have been withdrawn; *provided, however*, that if Cooley Godward LLP does not render such opinion or withdraws or modifies such opinion to Della, this condition shall nonetheless be deemed to be satisfied if counsel to WC renders such opinion to Della. In rendering such tax opinion, counsel shall be entitled to rely on the tax representation letters referred to in Section 5.6.

**(f) No Injunctions or Restraints; Illegality.** No temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal or regulatory restraint or prohibition preventing the consummation of the Merger shall be in effect, nor shall any proceeding brought by an administrative agency or commission or other governmental authority or instrumentality, domestic or foreign, seeking any of the foregoing be pending; nor shall there be any action taken, or any statute, rule, regulation or order enacted, entered, enforced or deemed applicable to the Merger, which makes the consummation of the Merger illegal. In the event an injunction or other order shall have been issued, each party agrees to use its reasonable diligent efforts to have such injunction or other order lifted.

**(g) Amendments.** The agreements of WC listed on Schedule 6.1(g) hereof shall have been amended in the respects set forth in such schedule.

**(h) Agreements.** The following agreements shall have been executed by all of the parties thereto and each shall be in full force and effect:

- (i)** The Investor Rights Agreement in the form of Exhibit C;
- (ii)** The Voting Agreement in the form of Exhibit D;

**(i) Documents.** The following documents shall have been executed and delivered to Della:

- (i)** A legal opinion of Skadden, Arps, Slate, Meagher & Flom LLP dated as of the Closing Date, in the Form of Exhibit E; and

(ii) A certificate of WC executed by Adam Berger and Lee Essner that, except as set forth in the WC Disclosure Schedule, each of the representations and warranties set forth in Section 4 is accurate in all respects as of the Closing Date as if made on the Closing Date and that the conditions set forth in Sections 6.1(a) through (d) and Section 6.1(f) and (g) have been duly satisfied, provided that, with regard to the conditions set forth in 6.1(c) and 6.1(d), the certificate shall only apply to the requisite vote of the WC Capital Stock or the consents identified in Part 4.4 of the WC Disclosure Schedule, as the case may be (the "WC Closing Certificate").

## **6.2 Conditions Precedent to Obligations of WC.**

The obligations of WC to effect the Merger and otherwise consummate the transactions contemplated by this Agreement are subject to the satisfaction, at or prior to the closing of each of the following conditions:

(a) **Accuracy of Representations.** Each of the representations and warranties made by Della in this Agreement shall be and shall have been accurate in all material respects as of the date of this Agreement.

(b) **Performance of Covenants.** All of the covenants and obligations that Della is required to comply with or to perform at or prior to the Closing shall have been complied with and performed in all respects

(c) **Shareholder Approval.** This Agreement and the Merger shall have been duly approved by the requisite vote of the holders of the shares of each class and series of WC Capital Stock and Della Capital Stock entitled to vote with respect thereto.

(d) **Consents.** All Consents required to be obtained in connection with the Merger and the other transactions contemplated by this Agreement (all of which are identified in Part 3.4 of the Della Disclosure Schedule and Part 4.4 of the WC Disclosure Schedule) shall have been obtained and shall be in full force and effect.

(e) **Tax Opinion.** WC shall have received a written opinion from Skadden, Arps, Slate, Meagher & Flom LLP in form and substance reasonably satisfactory to it, to the effect that the Merger will constitute a reorganization within the meaning of Section 368 of the Code and such opinion shall not have been withdrawn; *provided, however*, that if Skadden, Arps, Slate, Meagher & Flom LLP does not render such opinion or withdraws or modifies such opinion to WC, this condition shall nonetheless be deemed to be satisfied if counsel to Della renders such opinion to WC. In rendering such tax opinion, counsel shall be entitled to rely on the tax representation letters referred to in Section 5.6.

(f) **No Injunctions or Restraints; Illegality.** No temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal or regulatory restraint or prohibition preventing the consummation of the Merger shall be in effect, nor shall any proceeding brought by an administrative agency or commission or other governmental authority or instrumentality, domestic or foreign, seeking any of the foregoing be pending; nor shall there be any action taken, or any statute, rule, regulation or order enacted, entered, enforced or deemed applicable to the

Merger, which makes the consummation of the Merger illegal. In the event an injunction or other order shall have been issued, each party agrees to use its reasonable diligent efforts to have such injunction or other order lifted.

(g) **Amendments** The agreements of Della listed on Schedule 6.2(g) hereof shall have been amended in the respects set forth in such schedule.

(h) **Termination.** Della shall have provided WC with evidence of the termination of the agreements set forth on Schedule 6.2(h).

(i) **Dissenter Rights.** Della shareholders shall not have made a demand for payment in accordance with Section 1300 et seq. of the CCC, with regard to more than 1% of the shares of Della Capital Stock outstanding, on a fully-diluted, as-converted basis.

(j) **Agreements.** The following agreements shall have been executed by all of the parties thereto and each shall be in full force and effect:

(i) The Investor Rights Agreement in the form of Exhibit C;

(ii) The Voting Agreement in the form of Exhibit D;

(k) **Documents.** The following documents shall have been executed and delivered to WC:

(i) A legal opinion of Cooley Godward LLP, dated as of the Closing Date, in the Form of Exhibit F;

(ii) A certificate of Della executed by Rebecca Patton and T. Carey White III that, except as set forth in the Della Disclosure Schedule, each of the representations and warranties set forth in Section 3 is accurate in all respects as of the Closing Date as if made on the Closing Date and that the conditions set forth in Sections 6.2(a) through (d) and Section 6.2(f) through (i) have been duly satisfied, provided that, with regard to the conditions set forth in 6.2(c) and 6.2(d), the certificate shall only apply to the requisite vote of the Della Capital Stock or the consents identified in Part 3.4 of the Della Disclosure Schedule, as the case may (the "Della Closing Certificate"); and

(iii) Share certificates, duly endorsed, representing all the outstanding shares of Della Capital Stock.

## **7. GENERAL PROVISIONS.**

**7.1 Termination of Representations and Warranties.** The representations, warranties, covenants and obligations of the parties hereto shall terminate at the Effective Time

**7.2 Further Assurances.** Della shall, at its sole expense, at any time and from time to time after the Closing and at the request of WC, execute, acknowledge and deliver any further assignments, conveyances and other assurances, documents and instruments of transfer, and will take any other action consistent with the terms of this Agreement, that may



reasonably be necessary for the purposes of effecting the transactions contemplated by this Agreement.

**7.3 Entire Agreement.** This Agreement, including the schedules and exhibits hereto, and the agreements contemplated hereby, contain the entire understanding between the parties hereto and with respect to the subject matter hereof and supersede all prior and contemporaneous agreements, understandings, representations, inducements or conditions, express or implied, oral or written, except as set forth herein. The express terms hereof control and supersede any course of performance and/or usage of the trade inconsistent with any of the terms hereof. This Agreement may not be modified, amended or supplemented other than by an agreement in writing executed by all parties hereto. No waiver shall be binding unless executed in writing by the party making the waiver. No waiver of any provisions, breach or default of this Agreement shall be deemed or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver.

**7.4 Binding Nature of Agreement; Assignment; Benefit.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns. Nothing in this Agreement, expressed or implied, is intended to confer on any other person other than the parties hereto, or their respective successors, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

**7.5 Incorporation of Schedules and Exhibits.** All schedules, exhibits and other documents and written information required to be delivered pursuant to this Agreement are incorporated into this Agreement by this reference and are warranted by the party or parties which deliver the same to be accurate and complete in all material respects.

**7.6 Notices.** All notices and other communications hereunder shall be in writing and shall be deemed given if delivered personally or by commercial delivery service, or mailed by registered or certified mail (return receipt requested) or sent via facsimile (with confirmation of receipt) to the parties at the following address (or at such other address for a party as shall be specified by like notice):

(a) if to Della, to:

Della.com, Inc.  
201 Potrero Avenue  
San Francisco, CA 94103  
Attention: President  
Facsimile No.: (415) 934-0052  
Telephone No.: (415) 934-4900

with a copy to:

Cooley Godward LLP  
3000 Sand Hill Road  
Building 3, Suite 230  
Menlo Park, CA 94025-7116  
Attention: Mark P. Tanoury  
Facsimile No.: (650) 854-2691  
Telephone No.: (650) 843-5016

and to:

Cooley Godward LLP  
One Maritime Plaza, Suite 2000  
San Francisco, CA 94111  
Attention: Craig Jacoby  
Facsimile No.: (415) 951-3699  
Telephone No.: (415) 693-2147

(b) if to WC, to:

WeddingChannel.com, Inc.  
888 S. Figueroa  
Suite 700  
Los Angeles, CA 90017  
Attention: General Counsel  
Facsimile No.: (213) 599-4187  
Telephone No.: (213) 599-4175

with a copy to:

Skadden, Arps, Slate, Meagher & Flom LLP  
300 S. Grand Avenue  
Suite 3400  
Los Angeles, CA 90071  
Attention: Michael A. Woronoff, Esq.  
Facsimile No.: (213) 687-5600  
Telephone No.: (213) 687-5253

**7.7 Captions.** The captions contained in this Agreement are for convenience and reference purposes only and shall not affect in any way the meaning and interpretation of this Agreement.

**7.8 Invalidity.** If any provision of this Agreement is declared invalid in a court proceeding between the parties, such invalidity shall not invalidate this Agreement, and this Agreement shall be construed as if the invalid part were not contained herein, and the rights and obligations of the parties shall be construed and enforced accordingly.

**7.9 Governing Law.** In all respects, including all matters of construction, validity and performance, this Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California applicable to contracts made and performed in such state, without regard to the principles thereof regarding conflict of laws.

**7.10 Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof shall bear the signatures of all of the parties indicated as the signatories hereto.

**7.11 Attorneys' Fees.** In the event that any action or proceeding is brought to enforce or interpret any provision, covenant or condition contained in this Agreement on the part of any party hereto, the prevailing party in such action or proceeding (whether after trial or appeal) shall be entitled to recover from the party not prevailing its expenses therein, including reasonable attorneys' fees and allowable costs.

**7.12 Expenses.** Whether or not the Merger is consummated, all costs and expenses incurred in connection with this Agreement, the Certificate of Merger and the transactions contemplated hereby and thereby shall be paid by the party incurring such expense.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement and Plan of Merger and Reorganization as of the date first above written.

**WEDCOM INC.,**  
a Delaware corporation

By:   
Name: Donald Drapkin  
Title: Chief Executive Officer

**DELLA.COM, INC.,**  
a California corporation

By: \_\_\_\_\_  
Name: Rebecca Patton  
Title: Chief Executive Officer


SIGNATURE PAGE

IN WITNESS WHEREOF, the parties hereto have executed this Agreement and Plan of Merger and Reorganization as of the date first above written.

WEDCOM INC.,  
a Delaware corporation

By: \_\_\_\_\_  
Name: Donald Drapkin  
Title: Chief Executive Officer

DELLA.COM, INC.,  
a California corporation

By:  \_\_\_\_\_  
Name: Rebecca Patton  
Title: Chief Executive Officer

SIGNATURE PAGE

## **LIST OF EXHIBITS AND SCHEDULES**

### **EXHIBITS**

- A Post-reorganization Certificate of Incorporation of WC
- B Post-reorganization Bylaws of WC
- C Post-reorganization Investor Rights Agreement of WC
- D Post-reorganization Voting Agreement of WC
- E Opinion of Skadden, Arps, Slate, Meagher & Flom LLP
- F Opinion of Cooley Godward LLP
- G Della Tax Representation Letter
- H WC Tax Representation Letter

### **SCHEDULES**

- 2.4 Directors and Officers of the Surviving Corporation
- 6.1(g) Amendment of WC agreements
- 6.2(g) Amendment of Della agreements
- 6.2(h) Termination of Della agreements

**EXHIBIT A**

**POST-REORGANIZATION CERTIFICATE  
OF INCORPORATION OF THE SURVIVING CORPORATION**

**EXHIBIT B**

**POST-REORGANIZATION BYLAWS OF THE SURVIVING CORPORATION**



**EXHIBIT C**

**POST-REORGANIZATION INVESTOR RIGHTS AGREEMENT  
OF THE SURVIVING CORPORATION**

**EXHIBIT D**

**POST-REORGANIZATION VOTING AGREEMENT  
OF THE SURVIVING CORPORATION**

**EXHIBIT E**

**OPINION OF SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP**

**V.**

**EXHIBIT F**

**OPINION OF COOLEY GODWARD LLP**

**EXHIBIT G**

**TAX REPRESENTATION LETTER OF DELLA**

**EXHIBIT H**

**TAX REPRESENTATION LETTER OF WC**

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**DIRECTORS AND OFFICERS OF THE SURVIVING CORPORATION**

**DIRECTORS**

**Donald Drapkin  
Ronald W. Tysoe  
Adam Berger  
Raj Dhaka  
Rebecca L. Patton  
Doug Mackenzie  
Robert Smith  
Tod Francis**

**OFFICERS**

**Executive Chairman – Donald Drapkin  
Chief Executive Officer – Rebecca L. Patton  
President – Adam Berger  
Vice President, New Business Development – Michael Blend  
Vice President, Sales and Promotions – Wendy Buckley  
Chairman, International – Raj Dhaka  
Vice President, General Counsel and Secretary – Lee Essner  
Chief Information Officer – Greg Franchina  
Vice President, Product Strategy – Jessica DiLullo Herrin  
Vice President, Marketing – Jennifer Lefcourt  
Vice President and General Manager, Business Lines – Rosanna McCollough  
Chief Financial Officer – Carey White**

**The President and the Vice President, New Business Development shall report to the Chief Executive Officer. All other officers shall report to the President.**

**SCHEDULE 6.1(g)**  
**AMENDMENT OF WC AGREEMENTS**

X



**SCHEDULE 6.2(g)**

**AMENDMENT OF DELLA AGREEMENTS**

**SCHEDULE 6.2(h)**

**TERMINATION OF DELLA AGREEMENTS**

Amended and Restated Co-Sale Agreement

Fourth Amended and Restated Investor Rights Agreement

Fourth Amended and Restated Shareholders Agreement

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