Form PTO-1595

Attorney Docket No.: **VIGN1690-3**

08-31-2005

103072191

To the Honorable Commissioner for Patents: Please record the attached original documents or copy thereof.

1. Name of Conveying party(ies):

Epicentric, Inc.

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

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

Name: **Vignette Corporation**
1301 S. MoPac Expressway
Suite 100
Austin, TX 78746

Additional name(s) & address(es) attached?
☐ Yes ☒ **No**

3. Nature of conveyance:

☐: Assignment
☐: Security Agreement
☐: Other:
☒ : **Merger**
☐ : Change of name

Execution Date: **October 29, 2002**

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) **10/091,486**	B. Patent No.(s)

Additional numbers attached? ☐ Yes : ☒ **No**

5. Name and address of party to whom correspondence concerning document should be mailed:

Name **Customer No. 44654**
Sprinkle IP Law Group
1301 W. 25th Street, Suite 408
Austin, Texas 78705

6. Total number of Applications and patents involved: 1

7. Total fee (37 CFR 3.41).... **$ 40.00**

8. ☒ **Enclosed**

9. ☐ Authorized to charge the recordation fee or any underpayment to deposit account No. 50-3183. A duplicate copy of this page is attached.

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

Ari G. Akmal
Reg. No. 51,388

8-25-05
Date

Certificate of Mailing Under 37 C.F.R. 1.8

I hereby certify that this document is being deposited with the U.S. Postal Service as First Class Mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22312-1450 on August 25, 2005.

Quita Cannon
Name

Total number of pages including cover sheet, attachments, and document: **73**

08/30/2005 ECOOPER 00000057 10091486
01 FC:8021 40.00 OP

Docket No. 19312.0021

ASSIGNMENT OF APPLICATION FOR PATENT

WHEREAS:

Dean MOSES, residing at 527 Holly Park Circle, San Francisco, CA 94110, USA; John PETERSEN, residing at 261 Carl St., Apt. #A, San Francisco, CA 94117, USA; Edith HARBAUGH, residing at 214 Grand Ave., #8, Oakland, CA 94610, USA; Miles CHASTON, residing at 798 Post Street, #603, San Francisco, CA 94109, USA; Hans AKKESON, residing at 1455 Polk Street, #8 San Francisco, CA 94109, USA; David SHUE, residing at 755 5th Ave., #202, San Francisco, CA 94118, USA; Sandeep CHAUHAN, 38660 Lexington St., Fremont, CA 94536, USA; and Jean TESSIER, residing at 615 Bridgeport Lane, Foster City, CA 94404, USA.

(full name(s) and post office address(s) of inventor(s) (including country))

(hereinafter referred to as ASSIGNOR(S)), has made a discovery or invention entitled:

METHOD AND SYSTEM FOR DEPLOYING WEB COMPONENTS BETWEEN PORTALS IN A PORTAL FRAMEWORK

☒ for which application for Letters Patent of the United States has been executed on even date herewith,

☐ for which application for Letters Patent of the United States has been filed on _____, under Application No. _____, and

WHEREAS:

Epicentric, Inc., with a business address of The Landmark @ One Market Street, One Market Street, 7th Floor, San Francisco, CA 94905
(name, state of incorporation, and address of assignee)

(hereinafter referred to as ASSIGNEE), is desirous of acquiring the entire interest in, to and under said invention and in, to and under Letters Patent or similar legal protection to be obtained therefor in the United States and in any and all foreign countries.

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN:

Be it known that for good and valuable consideration, the receipt of which is hereby acknowledged, ASSIGNOR(S) hereby sells, assigns and transfers to ASSIGNEE, its successors, legal representatives and assigns, the full and exclusive right, title and interest to said discovery or invention in the United States and its territorial possessions and in all foreign countries and to all Letters Patent or similar legal protection in the United States and its territorial possessions and in any and all foreign countries to be obtained for said invention by said application or any continuation, division, renewal, substitute or reissue thereof or any legal equivalent thereof in a foreign country for the full term or terms for which the same may be granted.

I, SAID ASSIGNOR(S), hereby authorize and request the Commissioner of Patents and Trademarks of the United States of America and any Official of any country or countries foreign to the United States of America whose duty it is to issue Letters Patent on applications as aforesaid, to issue all such Letters Patent for said discovery or invention to the ASSIGNEE, as assignee of the entire right, title and interest in, to and under the same, for the sole use and behoof of the ASSIGNEE, its successors, legal representatives and assigns, in accordance with the terms of this instrument.

Docket No. 19312.0021

I, SAID, ASSIGNOR(S), hereby covenant that I have full right to convey the entire right, title and interest herein sold, assigned, transferred and set over;

AND I, SAID ASSIGNOR(S) hereby further covenant and agree that the ASSIGNEE, its successors, legal representatives, or assigns, may apply for foreign Letters Patent on said discovery or invention and claim the benefits of the International Convention, and that I will, at any time, when called upon to do so by the ASSIGNEE, its successors, legal representatives, or assigns, communicate to the ASSIGNEE, its successors, legal representatives, or assigns, as the case may be, any facts known to me respecting said discovery or invention, and execute and deliver any and all lawful papers that may be necessary or desirable to perfect the title to the said discovery or invention, the said applications and the said Letters Patent in the ASSIGNEE, its successors, legal representatives and assigns, and that if reissues of the said Letters Patent or disclaimers relating thereto, or divisions, continuations, or refilings of the said applications, or any thereof, shall hereafter be desired by the ASSIGNEE, its successors, legal representatives, or assigns, I will, at any time, when called upon to do so by the ASSIGNEE its successors, legal representatives, or assigns, sign all lawful papers, make all rightful oaths, execute and deliver all such disclaimers and all divisional, continuation and reissue applications so desired, and do all lawful acts requisite for the application for such reissues and the procuring thereof and for the filing of such disclaimers and such applications, and generally do everything possible to aid the ASSIGNEE, its successors, legal representatives and assigns, to obtain and enforce proper patent protection for said invention or discovery in all countries, all without further compensation but at the expense of the ASSIGNEE, its successors, legal representatives and assigns.

Signed:

(1) _____ Date: 2002-3-4
Dean MOSES

(2) _____ Date: 3/4/02
John PETERSEN

(3) _____ Date: 3/4/02
Edith HARBAUGH

(4) _____ Date: 3/4/2002
Miles CHASTON

(5) _____ Date: 3/4/2002
Hans ~~AKKESON~~ Akesson AA

(6) _____ Date: 3/4/02
David SHUE

(7) _____ Date: 3/4/02
Sandeep CHAUHAN

(8) _____ Date: 3/4/02
Jean TESSIER

United States Patent and Trademark Office

Assignments on the Web > Patent Query

Patent Assignment Abstract of Title

NOTE:Results display only for issued patents and published applications. For pending or abandoned applications please consult USPTO staff.

Total Assignments: 1

Patent #: NONE **Issue Dt:** **Application #:** 10091486 **Filing Dt:** 03/07/2002

Publication #: US20030172129 **Pub Dt:** 09/11/2003

Inventors: Dean Moses, John Petersen, Edith Harbaugh, Miles Chaston, Hans Akesson, David Shue et al

Title: Method and system for deploying web components between portals in a portal framework

Assignment: 1

Reel/Frame: 014519/0100 **Recorded:** 09/22/2003 **Pages:** 3

Conveyance: ASSIGNMENT OF ASSIGNORS INTEREST (SEE DOCUMENT FOR DETAILS).

Assignors:	MOSES, DEAN	**Exec Dt:** 03/04/2002
	PETERSEN, JOHN	**Exec Dt:** 03/04/2002
	HARBAUGH, EDITH	**Exec Dt:** 03/04/2002
	CHASTON, MILES	**Exec Dt:** 03/04/2002
	AKESSON, HAN	**Exec Dt:** 03/04/2002
	SHUE, DAVID	**Exec Dt:** 03/04/2002
	CHAUHAN, SANDEEP	**Exec Dt:** 03/04/2002
	TESSIER, JEAN	**Exec Dt:** 03/04/2002

Assignee: EPICENTRIC, INC.
THE LANDMARK @ ONE MARKET STREET
7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94905

Correspondent: GRAY CARY WARE & FREIDENRICH LLP
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1221 SO. MOPAC EXPRESSWAY
SUITE 400
AUSTIN, TEXAS 78746

Search Results as of: 08/23/2005 11:39 AM

If you have any comments or questions concerning the data displayed, contact OPR / Assignments at 703-308-9723

COPY

MERGER AGREEMENT

BY AND AMONG

VIGNETTE CORPORATION,

ATHENS ACQUISITION CORP.,

EPICENTRIC, INC.,

U.S. BANK, N.A., AS ESCROW AGENT,

AND

CARL NICHOLS, AS SHAREHOLDERS' REPRESENTATIVE

October 29, 2002

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EXHIBITS

MERGER AGREEMENT

This Merger Agreement (the "**Agreement**") is entered into as of October 29, 2002, by and among Vignette Corporation, a Delaware corporation ("**Parent**"), Athens Acquisition Corp., a Delaware corporation and a wholly-owned subsidiary of Parent ("**Merger Sub**"), Epicentric, Inc., a California corporation ("**Company**"), as to Section 9 only, U.S. Bank, N.A., as the Escrow Agent (the "**Escrow Agent**"), and, as to Section 9 only, Carl Nichols, as the Shareholders' Representative (the "**Shareholders' Representative**"). Parent, Merger Sub, Company, the Escrow Agent and the Shareholders' Representative are sometimes referred to herein individually as a "**Party**" and collectively as the "**Parties**."

RECITALS

A. Upon the terms and subject to the conditions of this Agreement and in accordance with the Delaware General Corporation Law ("**DGCL**") and the California Corporations Code (the "**CCC**" or "**California Law**"), Parent, Merger Sub and Company intend to enter into a business combination transaction.

B. The Board of Directors of Company (i) has determined that the Merger (as defined herein) is consistent with and in furtherance of the long-term business strategy of Company and in the best interests of Company and its shareholders, (ii) has approved this Agreement, the Merger and the other transactions contemplated by this Agreement, (iii) has adopted a resolution declaring the Merger advisable and (iv) has determined to recommend that the shareholders of Company adopt this Agreement.

C. The Board of Directors of Parent (i) has determined that the Merger is consistent with and in furtherance of the long-term business strategy of Parent and fair to, and in the best interests of, Parent and its stockholders, (ii) has approved this Agreement, the Merger and the other transactions contemplated by this Agreement and (iii) has adopted a resolution declaring the Merger advisable.

D. The Parties desire to enter into this Agreement for the purpose of setting forth certain representations, warranties and covenants made by each to the other as an inducement to the execution and delivery of this Agreement, and to serve as conditions precedent to the consummation of the merger of Merger Sub into Company whereby Company will become a wholly-owned subsidiary of Parent.

E. In connection with the Merger, each share of the Company's Common Stock (the "**Company Common Stock**"), each share of the Company's Series A Preferred Stock (the "**Series A Preferred**"), each share of the Company's Series B Preferred Stock (the "**Series B Preferred**"), each share of the Company's Series C Preferred Stock (the "**Series C Preferred**"), each share of the Company's Series D Preferred Stock (the "**Series D Preferred**") (the Series A Preferred, Series B Preferred, Series C Preferred and Series D Preferred, are collectively referred to as the "**Company Preferred Stock**," and together with the Company Common Stock are collectively referred to as the "**Company Capital Stock**") shall be exchanged for cash and, with

respect to the Series B Preferred, Series C Preferred and Series D Preferred, the right to receive certain proceeds resulting from that certain litigation matter entitled "*Epicentric, Inc. v. Arter & Hadden, LLP, et al.*" (the "**Land Use Litigation**"), each upon the terms and subject to the conditions of this Agreement.

F. Concurrently with the execution of this Agreement and as a condition and inducement to Parent's willingness to enter into this Agreement, certain shareholders of Company are entering into agreements in substantially the form attached hereto as Exhibit A (the "**Voting Agreements**").

G. Concurrently with the execution of this Agreement and as a condition and inducement to Parent's willingness to enter into this Agreement, (i) certain Company employees are entering into offer letters with Parent and (ii) certain Company employees are executing agreements not to compete in any related business and not to solicit employees of Parent or Company.

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

AGREEMENT

SECTION 1

1. Certain Definitions. As used in this Agreement, the following terms have the following meanings. Certain other terms are defined in the text of this Agreement.

"**Affiliate**" of a person means any other person that directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with such person.

"**Company Material Adverse Effect**" means any change, event, violation, inaccuracy, circumstance or effect, individually or when aggregated with other changes, events, violations, inaccuracies, circumstances or effects, that is or would reasonably be expected to be materially adverse to the business, assets (including intangible assets), capitalization, condition (financial or otherwise) or results of operations of Company and its subsidiaries taken as a whole; provided, however, that a Company Material Adverse Effect shall not include any change, event, violation, inaccuracy, circumstance or effect resulting from, arising or in connection with (i) any matter if and only to the extent specifically disclosed on the Company Schedule (as defined below) prior to the date of this Agreement, (ii) any delays in placing (or cancellation of) orders for the products and services of Company occurring primarily and directly as a result of the public announcement of this Agreement and the transactions contemplated hereby, or (iii) any changes in law or generally accepted accounting principles. For purposes hereof, any Material Adverse Effect on the business of Company which is cured by Company shall not be a Company Material Adverse Effect.

"**Knowledge**" shall mean with respect to Company the knowledge of Michael Crosno, Ed Anuff, Vince Fleming, David Achim, Paul Emery, Cynthia Parks, Rich Link, Kathleen Hays, Terry Joyce, Oliver Muoto and Fergus Griffin, after reasonable inquiry of those other employees, consultants and contract workers of Company, whom such individuals have reason to believe would have actual knowledge of the matters represented.

"**Parent Material Adverse Effect**" means any change, event, violation, inaccuracy, circumstance or effect, individually or when aggregated with other changes, events, violations, inaccuracies, circumstances or effects, that is or is substantially likely to be materially adverse to the business, assets (including intangible assets), capitalization, condition (financial or otherwise) or results of operations of Parent and its subsidiaries taken as a whole; provided, however, that a Parent Material Adverse Effect shall not include any change, event, violation, inaccuracy, circumstance or effect resulting from, arising or in connection with (i) any matter if and only to the extent specifically disclosed on the Parent Schedule (as defined below) prior to the date of this Agreement, (ii) any changes in law or generally accepted accounting principles, (iii) in and of itself, any change in the market price, trading volume or Nasdaq listing status of the Parent Common Stock or (iv) in and of itself, the failure by Parent to meet revenue or earnings forecasts of equity analysts reflected in the First Call consensus estimate, or any other revenue or earnings forecasts, for any period ending on or after the date of this Agreement. For purposes hereof, any Material Adverse Effect on the business of the Parent which is cured by the Parent shall not be a Parent Material Adverse Effect.

"**Ordinary Course of Business**" means the ordinary course of business consistent with past custom and practice.

SECTION 2

2. The Merger.

2.1 Effective Time. As soon as practicable on or after the Closing Date (as defined herein), and upon the terms and subject to the conditions of this Agreement, the Parties hereto shall cause the merger of Merger Sub and Company (the "**Merger**") to be consummated by filing an Agreement of Merger (the "**Agreement of Merger**") together with an officers' certificate of each of the Constituent Corporations (as defined herein) with the Secretary of State of the State of California in accordance with the applicable provisions of the CCC and concurrently therewith by filing a Certificate of Merger (the "**Certificate of Merger**") with the Secretary of State of the State of Delaware in accordance with the applicable provisions of the DGCL (the time of such filings (or such later time as may be agreed upon in writing by Parent and Company and specified in the Agreement of Merger and Certificate of Merger) being referred to herein as the "**Effective Time**").

2.2 Closing. The closing of the Merger (the "**Closing**") will take place as soon as practicable after satisfaction or waiver of the latest to occur of the conditions set forth in Section 8 hereof (the "**Closing Date**"), at the offices of Wilson Sonsini Goodrich & Rosati, Professional Corporation, One Market, Spear Tower, Suite 3300, San Francisco, CA 94105.

2.3 Effect of the Merger. At the Effective Time of the Merger, (i) the separate existence of Merger Sub shall cease and Merger Sub shall be merged with and into Company (Merger Sub and Company are sometimes referred to herein as the "**Constituent Corporations**" and Company after the Merger is sometimes referred to herein as the "**Surviving Corporation**"), (ii) the Certificate of Incorporation of Merger Sub in effect prior to the Effective Time shall, subject to Section 7.4, be the Certificate of Incorporation of the Surviving Corporation except that the name of the Surviving Corporation will be changed to Epicentric Merger Corp., (iii) the Bylaws of Merger Sub in effect prior to the Effective Time shall, subject to Section 7.4, be the Bylaws of the Surviving

Corporation, (iv) the directors and officers of Merger Sub prior to the Effective Time shall be the directors and officers of the Surviving Corporation and (v) the Merger shall, from and after the Effective Time of the Merger, have all the effects provided by applicable law. Without limiting the generality of the foregoing, and subject thereto, at the Effective Time, all the property, rights, privileges, powers and franchises of each of Company and Merger Sub shall vest in the Surviving Corporation, and all debts, liabilities, obligations, restrictions, disabilities and duties of each of Company and Merger Sub shall become the debts, liabilities, obligations, restrictions, disabilities and duties of the Surviving Corporation.

SECTION 3

3. Effect of Merger; Exchange of Certificates.

3.1 Merger Consideration; Conversion of Company Capital Stock.

(a) Company Capital Stock. On the terms and subject to the conditions of this Agreement, including the Escrow Funds discussed in Section 9, all of the outstanding shares of Company Capital Stock shall be converted into the right to receive (x) cash in the aggregate amount of $26 million (the "**Cash Merger Consideration**") less $150,000 (the "**Land Use Reserve**") to be held in reserve to pay certain costs and expenses associated with the Land Use Litigation as set forth in Section 3.10 below, and (y) the Litigation Proceeds (as defined below), if any, resulting from the Land Use Litigation (the Litigation Proceeds together with the Cash Merger Consideration, the "**Merger Consideration**"). As of the Effective Time of the Merger, each share of Company Capital Stock that is issued and outstanding immediately prior to the Effective Time of the Merger (other than shares, if any, held by persons exercising dissenters' rights in accordance with Chapter 13 of the CCC ("**Dissenting Shares**") as provided in Section 3.5 below), shall, by virtue of the Merger and without any action on the part of Company shareholders, be converted into the right to receive the Merger Consideration as follows:

(i) the Series A Preferred Merger Consideration shall be allocated to each share of Series A Preferred issued and outstanding immediately prior to the Effective Time (other than any Dissenting Shares) in an amount equal to the quotient of (1) the Series A Preferred Merger Consideration and (2) the number of shares of Series A Preferred issued and outstanding immediately prior to the Effective Time,

(ii) the Series B Preferred Merger Consideration shall be allocated to each share of Series B Preferred issued and outstanding immediately prior to the Effective Time (other than any Dissenting Shares) in an amount equal to the quotient of (1) the Series B Preferred Merger Consideration and (2) the number of shares of Series B Preferred issued and outstanding immediately prior to the Effective Time,

(iii) the Series B Preferred Allocation of the Litigation Proceeds shall be allocated pro rata to each share of Series B Preferred issued and outstanding immediately prior to the Effective Time (other than any Dissenting Shares),

(iv) the Series C Preferred Merger Consideration shall be allocated to each share of Series C Preferred issued and outstanding immediately prior to the Effective Time (other than any Dissenting Shares) in an amount equal to the quotient of (1) the Series C Preferred Merger Consideration and (2) the number of shares of Series C Preferred issued and outstanding immediately prior to the Effective Time,

(v) the Series C Preferred Allocation of the Litigation Proceeds shall be allocated pro rata to each share of Series C Preferred issued and outstanding immediately prior to the Effective Time (other than any Dissenting Shares),

(vi) the Series D Preferred Merger Consideration shall be allocated to each share of Series D Preferred issued and outstanding immediately prior to the Effective Time (other than any Dissenting Shares) in an amount equal to the quotient of (1) the Series D Preferred Merger Consideration and (2) the number of shares of Series D Preferred issued and outstanding immediately prior to the Effective Time, and

(vii) the Series D Preferred Allocation of the Litigation Proceeds shall be allocated pro rata to each share of Series D Preferred issued and outstanding immediately prior to the Effective Time (other than any Dissenting Shares).

(b) As used in this Agreement, the following terms have the following meanings:

(i) **"Litigation Proceeds"** means, regardless of whether the Land Use Litigation is settled or otherwise concluded prior to, on or subsequent to the Effective Time, any proceeds from, or other amounts paid or payable in connection with, any settlement, conclusion or other resolution of the Land Use Litigation and any amounts remaining in the Land Use Reserve following such settlement, conclusion or other resolution.

(ii) **"Series A Preferred Merger Consideration"** means six hundred thirty-seven thousand five hundred dollars ($637,500).

(iii) **"Series B Preferred Merger Consideration"** means three million three hundred thirty-two thousand six hundred seventy dollars ($3,332,670).

(iv) **"Series B Preferred Allocation"** shall mean the right to receive fourteen and fifty-two hundreths percent (14.52%) of the Litigation Proceeds.

(v) **"Series C Preferred Merger Consideration"** means one million seven hundred sixteen thousand eight hundred and thirty dollars ($1,716,830).

(vi) **"Series C Preferred Allocation"** shall mean the right to receive seven and forty-eight hundreths percent (7.48%) of the Litigation Proceeds.

(vii) **"Series D Preferred Merger Consideration"** means twenty million one hundred and sixty three thousand dollars ($20,163,000).

(viii) "**Series D Preferred Allocation**" shall mean the right to receive seventy-eight percent (78%) of the Litigation Proceeds.

(c) Each share of Company Common Stock that is issued and outstanding immediately prior to the Effective Time of the Merger (other than any Dissenting Shares) shall, by virtue of the Merger and without any action on the part of Company shareholders, be canceled and extinguished without any conversion thereof.

(d) Attached hereto as Schedule 3.1(d) is a schedule reflecting the amount of cash payable under Section 3.1 hereof to each holder of the Company Capital Stock (as of the date hereof in the Company's transfer books) determined in accordance with the terms hereof as if the Effective Time were the date hereof, including the mailing address for each holder. Company shall deliver to Parent at Closing a revised Schedule 3.1(d), provided that in no event will any such changes increase the aggregate amount of Cash Merger Consideration.

3.2 Cancellation of Company-Owned Stock. Each share of Company Common Stock or Company Preferred Stock held by Company or any direct or indirect wholly-owned subsidiary of Company immediately prior to the Effective Time shall be canceled and extinguished without any conversion thereof.

3.3 Capital Stock of Merger Sub. Each share of the common stock, $0.001 par value per share, of Merger Sub issued and outstanding immediately prior to the Effective Time of the Merger shall be converted into and exchanged for one validly issued, fully paid and non-assessable share of common stock of the Surviving Corporation. Each stock certificate of Merger Sub evidencing ownership of any such shares shall continue to evidence ownership of such shares of capital stock of the Surviving Corporation.

3.4 Treatment of Company Options. Each option to purchase shares of Company Common Stock (a "**Company Option**") which is outstanding and has not been exercised prior to the Closing Date shall not be assumed by Parent. The Company shall provide a notice (the "**Notice**") to the optionees, no later than 15 days prior to the Closing Date (or earlier if required by the applicable governing documents), informing them of such termination, the form and substance of such Notice shall be subject to review and approval of Parent. Prior to the Closing Date, the Company shall take all action necessary to effect the termination of all Company Options as contemplated by this Section 3.4.

3.5 Dissenters' Rights.

(a) Notwithstanding anything to the contrary contained in this Agreement, any shares of Company Capital Stock held by a holder who has demanded and perfected dissenters' rights for such shares in accordance with California Law and who, as of the Effective Time, has not effectively withdrawn or lost such dissenters' rights ("**Dissenting Shares**") shall not be converted into or represent the right to receive cash in accordance with Section 3.1, and the holder or holders of such shares shall be entitled only to such rights as may be granted to such holder or holders pursuant to Chapter 13 of the CCC; provided, however, that if such holder or holders withdraw or lose such

dissenters' rights subsequent to the Effective Time they shall be entitled to receive cash in accordance with Section 3.1.

(b) The Company shall give Parent (i) prompt notice of any demands for purchase of any shares of Company Capital Stock by dissenting shareholders, withdrawals of such demands, and any other instruments served pursuant to California Law and received by Company and (ii) the opportunity to participate in all negotiations and proceedings with dissenting shareholders under California Law. The Company shall not, except with the prior written consent of Parent, voluntarily make any payment with respect to any demands for purchase of the Company Capital Stock by dissenting shareholders or offer to settle or settle any such demands.

3.6 Exchange of Certificates.

(a) Exchange Agent. Prior to the Closing Date, Parent shall appoint itself as the exchange agent (the "**Exchange Agent**") in the Merger.

(b) Parent to Provide Cash. As of the Effective Time of the Merger, Parent shall make available for exchange in accordance with this Section 3.6, through such reasonable procedures as Parent may adopt, the amount of cash issuable pursuant to Section 3.1.

(c) Exchange Procedures. Within ten (10) days after the Effective Time of the Merger, the Exchange Agent shall mail to each holder of record of a certificate or certificates which immediately prior to the Effective Time of the Merger represented outstanding shares of Company Capital Stock (the "**Certificates**") whose shares are being converted into the Merger Consideration pursuant to Section 3.1 hereof (less any Cash Merger Consideration held in escrow as described in Section 3.8 hereof), (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Certificates shall pass, only upon delivery of the Certificates to the Exchange Agent and which shall be in such form and have such other provisions as Parent may reasonably specify) (the "**Letter of Transmittal**") and (ii) instructions for use in effecting the surrender of the Certificates in exchange for the Merger Consideration (less any Cash Merger Consideration held in escrow as described in Section 3.8 hereof). Upon surrender of a Certificate for cancellation to the Exchange Agent or to such other agent or agents as may be appointed by Parent, together with such letter of transmittal, duly executed, the holder of such Certificate shall be entitled to receive in exchange therefor the amount of cash (less any Cash Merger Consideration held in escrow as described in Section 3.8 hereof) to which the holder of Company Capital Stock is entitled pursuant to Section 3.1 hereof. The Certificate so surrendered shall forthwith be canceled. No interest will accrue or be paid to the holder of any outstanding Company Capital Stock. From and after the Effective Time of the Merger, until surrendered as contemplated by this Section 3.6(c), each Certificate shall be deemed for all corporate purposes to evidence the amount of cash into which the shares of Company Capital Stock represented by such Certificate have been converted.

(d) No Further Ownership Rights in Capital Stock of Company. The Cash Merger Consideration delivered upon the surrender for exchange of shares of Company Capital Stock in accordance with the terms hereof and the right to receive Litigation Proceeds shall be deemed to have been delivered in full satisfaction of all rights pertaining to such Company Capital Stock. There shall be no further registration of transfers on the stock transfer books of the Surviving

Corporation of Company Capital Stock, which were outstanding immediately prior to the Effective Time of the Merger. If, after the Effective Time of the Merger, Certificates are presented to the Surviving Corporation for any reason, they shall be canceled and exchanged as provided in this Section 3.6(d), provided that the presenting holder is listed on Company's shareholder list as a holder of Company Capital Stock.

(e) Required Withholding. Each of the Exchange Agent, Parent and the Surviving Corporation shall be entitled to deduct and withhold from any consideration payable or otherwise deliverable pursuant to this Agreement to any holder or former holder of Company Capital Stock such amounts as may be required to be deducted or withheld therefrom under the Code (as defined below) or state, local or foreign law. To the extent such amounts are so deducted or withheld, such amounts shall be treated for all purposes under this Agreement as having been paid to the person to whom such amounts would otherwise have been paid.

(f) No Liability. Notwithstanding anything to the contrary in this Section 3.6, neither the Exchange Agent, Parent, or the Surviving Corporation shall be liable to a holder of shares of Company Capital Stock for any amount properly paid to a public official pursuant to any applicable abandoned property, escheat or similar law.

(g) No Further Transfers. At the Effective Time, holders of certificates representing shares of Company Capital Stock that were outstanding immediately prior to the Effective Time shall cease to have any rights as shareholders of the Company, and the stock transfer books of the Company shall be closed with respect to all shares of such Company Capital Stock outstanding immediately prior to the Effective Time. No further transfer of any such shares of Company Capital Stock shall be made on such stock transfer books after the Effective Time. If, after the Effective Time, a valid certificate previously representing any of such shares of Company Capital Stock is presented to the Surviving Corporation or Parent, such stock certificate shall be canceled and shall be exchanged as provided in Section 3.6 hereof.

3.7 Taking of Necessary Action; Further Action. Parent, Merger Sub and Company shall take all such actions as may be necessary or appropriate in order to effect the Merger as promptly as possible. If, at any time after the Effective Time of the Merger, 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 Company, the officers and directors of such corporation are fully authorized in the name of the corporation or otherwise to take, and shall take, all such action.

3.8 Escrow Agreement. The parties hereto agree that ten percent (10%) of the Cash Merger Consideration and seven hundred and fifty thousand dollars ($750,000) of the Litigation Proceeds received by Parent or Company, if any, (the "**Escrow Amount**") shall be held in escrow pursuant to the terms of Section 9. Notwithstanding anything to the contrary in this Agreement, no Company shareholder shall receive cash held in escrow unless and until permitted under the terms of Section 9.

3.9 Adjustments for Stock Splits. The share and per share information herein shall be adjusted to reflect appropriately the effect of any stock split, reverse stock split, stock dividend

(including any dividend or distribution of securities convertible into or exercisable or exchangeable for Company Capital Stock), extraordinary cash dividend, reorganization, recapitalization, reclassification, combination, exchange of shares or other like change with respect to Company Capital Stock occurring or having a record date on or after the date hereof and prior to the Effective Time.

3.10 Land Use Litigation.

(a) At the Effective Time, Parent shall deposit Land Use Reserve to an account to be maintained and controlled by a person or persons (the "**Litigation Representatives**") designated by the Shareholders' Representative to cover costs and expenses associated with the prosecution of the Land Use Litigation. Any expenses or liabilities incurred in connection with the Land Use Litigation subsequent to the Effective Time shall be the sole responsibility of the holders of Series B Preferred, Series C Preferred and Series D Preferred immediately prior to Closing; provided, however, that neither the Shareholders' Representative nor the Litigation Representatives shall incur costs and expenses in excess of the Land Use Reserve without the prior approval of the shareholders. The Litigation Representatives shall be given a power-of-attorney by Parent and Company, if necessary, and such other power and authority as necessary to allow the Litigation Representatives, or a designee thereof, to prosecute the Land Use Litigation and to take such other actions as are reasonably necessary in connection therewith. The Litigation Representatives shall keep the Shareholders' Representative reasonably apprised of the status of the Land Use Litigation and shall have the authority to settle the Land Use Litigation, subject to the approval of the Shareholders' Representative upon consultation with the shareholders.

(b) Prior to the Closing, the Company shall provide to Parent the names, addresses and pro rata percentage of the Litigation Proceeds to which each of the former holders of Series B Preferred, Series C Preferred and Series D Preferred are entitled pursuant to Section 3.1 hereof. Subject to Section 9.2 hereof, any Litigation Proceeds shall be paid by Parent or Company promptly upon receipt of any such amounts by Parent or Company.

(c) Following the Effective Time, each of Parent and Company shall use its commercially reasonable efforts to take, or cause to be taken, all appropriate action and do, or cause to be done, all things necessary, proper or advisable to effect this Section 3.10.

(d) The Litigation Representatives, effective upon their appointment by the Shareholders' Representative, and without further act of Parent, Company or any shareholder, shall be entitled to direct the prosecution of the Land Use Litigation, to retain such persons as required for the prosecution of the Land Use Litigation, to pay costs and expenses incurred in connection with the Land Use Litigation out of the Land Use Reserve, to authorize such other persons as necessary to take action in connection with the prosecution of the Land Use Litigation, and to take all actions necessary or appropriate in the judgment of the Litigation Representatives for the accomplishment of the foregoing; provided, however, if the holders of Series B Preferred, Series C Preferred and Series D Preferred fail to promptly pay any costs or expenses in excess of the Land Use Reserve, then Parent shall not be obligated to continue the Land Use Litigation and the Litigation Representatives shall, upon Parent's request, promptly take any and all required action to dismiss the Land Use Litigation. The Litigation Representatives may be changed by the

Shareholders' Representative at any time. The Litigation Representatives shall at all times act in their capacity as Litigation Representatives in a manner that the Litigation Representatives believe to be in the best interest of the holders of Series B Preferred, Series C Preferred and Series D Preferred entitled to receive any Litigation Proceeds; provided, however, that if such holders fail to pay any costs and expenses in excess of the Land Use Reserve, the Litigation Representatives shall promptly, upon Parent's request, take any and all required action to dismiss the Land Use Litigation. The Litigation Representatives may consult with legal counsel and other experts selected by it and shall not be liable for any action taken or omitted to be taken in good faith by it in accordance with the advice of such counsel or other experts. The Litigation Representatives shall not be liable for any act done or omitted hereunder as Litigation Representatives while acting in good faith and in the exercise of reasonable judgment. In the event that the Litigation Representatives are current or former officers of Company, their indemnification agreements in effect with Company shall apply to their services performed as Litigation Representatives. In addition, the holders of Series B Preferred, Series C Preferred and Series D Preferred shall severally (but not jointly) indemnify the Litigation Representatives and hold the Litigation Representatives harmless against any loss, liability or expense incurred without negligence or bad faith on the part of the Litigation Representatives and arising out of or in connection with the acceptance or administration of the Litigation Representatives' duties pursuant to this Section 3.10, including the reasonable fees and expenses of any legal counsel retained by the Litigation Representatives; provided, however, that in no event shall any such holder be liable under any circumstance for an amount in excess of any Merger Consideration actually received by such holder.

SECTION 4

4. Representations and Warranties of the Company. Company represents and warrants to Parent and Merger Sub, subject to such exceptions as are disclosed in writing in the disclosure letter supplied by Company to Parent dated as of the date hereof (the "**Company Schedule**"), which disclosure shall provide an exception to or otherwise qualify the representations or warranties of Company contained in the section of this Agreement corresponding by number to such disclosure (provided that the inclusion of an item as an exception or qualification to one section of this Agreement shall cause that item to be an exception or qualification to any other section of this Agreement where the meaning of such exception or qualification is apparent on its face without any further investigation by Parent):

4.1 Organization and Qualification; Subsidiaries.

(a) Each of Company and its subsidiaries is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and has the requisite corporate power and authority to own, lease and operate its assets and properties and to carry on its business as it is now being conducted.

(b) Section 4.1(b) of the Company Schedule sets forth (i) each subsidiary of Company, (ii) the ownership interest therein of Company and (iii) if not wholly-owned by Company, the identity and ownership interest of each other owner of such subsidiary. Neither Company nor any of its subsidiaries has agreed to make nor is obligated to make nor is bound by any written or oral agreement, contract, understanding, negotiable instrument, commitment or

undertaking of any nature, in effect as of the date hereof or as may hereafter be in effect (a "**Contract**"), under which it may become obligated to make, any future investment in or capital contribution to any other entity. Neither Company nor any of its subsidiaries directly or indirectly owns any equity or similar interest in or any interest convertible, exchangeable or exercisable for, any equity or similar interest in, any corporation, partnership, joint venture or other business, association or entity other than the entities identified in Section 4.1(b) of the Company Schedule.

(c) Company and each of its subsidiaries is qualified or licensed to do business as a foreign corporation, and is in good standing (with respect to jurisdictions which recognize such concept), under the laws of all jurisdictions where the character of the properties owned, leased or operated by them or the nature of their activities requires such qualification or licensing, except where the failure to be so qualified or licensed has not resulted in, and would not reasonably be expected to result in, a Company Material Adverse Effect.

4.2 Articles of Incorporation and Bylaws. Company has previously furnished to Parent a complete and correct copy of its Articles of Incorporation and Bylaws as amended and in effect as of the date of this Agreement (together, the "**Company Charter Documents**"). Such Company Charter Documents and equivalent organizational documents of each of its subsidiaries are in full force and effect. Company is not in violation of any of the provisions of the Company Charter Documents, and no subsidiary of Company is in violation of its equivalent organizational documents. Section 4.2 of the Company Schedule lists the directors and officers of Company. The operations now being conducted by Company are not now and have never been conducted under any other name.

4.3 Capitalization.

(a) As of the date of this Agreement, the entire authorized capital stock of Company consists of:

(i) 31,565,114 shares of Company Preferred Stock of which (A) 4,250,000 shares are designated Series A Preferred, all of which are issued and outstanding, (B) 8,800,000 shares are designated Series B Preferred, 8,657,315 of which are issued and outstanding, (C) 4,811,905 shares are designated Series C Preferred, 4,759,955 of which are issued and outstanding, and (D) 13,703,209 shares are designated Series D Preferred, 13,024,007 of which are issued and outstanding, and 50,000 of which are reserved for issuance pursuant to warrants for Series D Preferred.

(ii) 70,000,000 shares of Company Common Stock of which (A) 13,150,379 shares are issued and outstanding, (B) 5,807,268 shares are reserved for issuance pursuant to outstanding options or options reserved for future issuance pursuant to the 1998 Stock Plan and related sub-plans (the "1998 Plan"), (C) 2,687,817 shares are reserved for issuance pursuant to outstanding options or options reserved for future issuance pursuant to the 2000 Stock Plan and related sub-plans (the "2000 Plan"), (D) 195,555 shares are reserved for issuance pursuant to outstanding options or options reserved for future issuance pursuant to the Application Park, Inc. 1999 Stock Option Plan (the "1999 Plan"), (E) 50,000 shares are reserved for issuance pursuant to warrants for Company Common Stock, (F) 31,096,160 shares are reserved for issuance upon

redemption or conversion of Series A Preferred, Series B Preferred, Series C Preferred, and Series D Preferred currently outstanding and Series D Preferred reserved for issuance pursuant to warrants.

(iii) All of the issued and outstanding shares of Company Capital Stock have been duly authorized, are validly issued, fully paid, and non-assessable, are free of any liens or Encumbrances (as defined below) and are held of record by the respective shareholders as set forth in Section 4.3(a) of the Company Schedule. There are no declared or accrued but unpaid dividends with respect to any shares of Company Capital Stock.

(b) Section 4.3(b) of the Company Schedule lists all of the holders, as of the date of this Agreement, of options, warrants, purchase rights, subscription rights, conversion rights, exchange rights and other rights that could require Company to issue, sell or otherwise cause to become outstanding any of its capital stock (the "**Stock Rights**"), and the number of shares of Company Capital Stock subject to such Stock Rights. There are no outstanding or authorized stock appreciation, phantom stock, profit participation, or similar rights with respect to Company.

(c) Company has made available to Parent accurate and complete copies of all stock option plans pursuant to which Company has granted such Company Options or Stock Rights and the form of all stock option agreements and stock option grants evidencing such Company Options or Stock Rights.

(d) There are no commitments or agreements of any character to which Company is bound obligating Company to accelerate the vesting of any Company Option or Stock Rights as a result of the Merger. All outstanding shares of Company Capital Stock, all outstanding Company Options or Stock Rights, and all outstanding shares of capital stock of each subsidiary of Company have been issued and granted in compliance with (i) all applicable securities laws and other applicable Legal Requirements (as defined below) in effect as of the time of grant and issuance and (ii) all requirements set forth in applicable Contracts by which Company is bound and which were in effect as of the time of grant and issuance. "**Legal Requirements**" means any federal, state, local, municipal, foreign or other law, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any court, administrative agency, commission, governmental or regulatory authority, domestic or foreign (a "**Governmental Entity**").

(e) There are no equity securities, partnership interests or similar ownership interests of any class of equity security of any subsidiary of Company, or any security exchangeable or convertible into or exercisable for such equity securities, partnership interests or similar ownership interests, issued, reserved for issuance or outstanding, except for securities Company owns free and clear of all liens, pledges, hypothecations, charges, mortgages, security interests, encumbrances, claims, options, rights of first refusal, preemptive rights, community property interests or similar restriction (including any restriction on the voting of any security, any restriction on the transfer of any security or other asset, any restriction on the possession, exercise or transfer of any other attribute of ownership of any asset) ("**Encumbrances**") directly or indirectly through one or more subsidiaries.

(f) Except as set forth in Sections 4.3(a) and 4.3(b) hereof or in Sections 4.3(a) and 4.3(b) of the Company Schedule, as of the date hereof, there are no subscriptions, options, warrants, equity securities, partnership interests or similar ownership interests, calls, rights (including preemptive, purchase or conversion rights), commitments or agreements of any character to which Company or any of its subsidiaries is a party or by which it is bound obligating Company or any of its subsidiaries to issue, deliver or sell, or cause to be issued, delivered or sold, or repurchase, redeem or otherwise acquire, or cause the repurchase, redemption or acquisition of, any shares of capital stock, partnership interests or similar ownership interests of Company or any of its subsidiaries or obligating Company or any of its subsidiaries to grant, extend, accelerate the vesting of or enter into any such subscription, option, warrant, equity security, call, right, commitment or agreement.

(g) As of the date of this Agreement, except as contemplated by the Registration Rights Agreement (as defined herein), there are no registration rights and there is, except for the Voting Agreements and the Irrevocable Proxies (as defined herein), no voting trust, proxy, rights plan, antitakeover plan or other agreement currently in effect to which Company or any of its subsidiaries is a party or by which they are bound with respect to any equity security of any class of Company or with respect to any equity security, partnership interest or similar ownership interest of any class of any of its subsidiaries. Other than as contemplated by Section 3.5 hereof, shareholders of Company will not be entitled to appraisal or dissenters rights under applicable state laws in connection with the Merger.

4.4 Authority Relative to this Agreement. Company has all necessary corporate power and authority to execute and deliver this Agreement and to perform its obligations hereunder and, subject to adoption of this Agreement by the shareholders of Company in accordance with the CCC and the Company Charter Documents, to consummate the transactions contemplated hereby. The execution and delivery of this Agreement by Company and the consummation by Company of the transactions contemplated hereby have been duly and validly authorized by all necessary corporate action on the part of Company and no other corporate proceedings on the part of Company are necessary to authorize this Agreement or to consummate the transactions contemplated hereby and thereby (other than the adoption of this Agreement by the shareholders of Company in accordance with the CCC and the Company Charter Documents). This Agreement has been duly and validly executed and delivered by Company and, assuming the due authorization, execution and delivery by Parent and Merger Sub, constitute the legal and binding obligation of Company, enforceable against Company in accordance with its terms, subject to bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application relating to or affecting the enforcement of creditors' rights and the exercise by courts of equitable powers.

4.5 No Conflict; Required Filings and Consents.

(a) The execution and delivery of this Agreement by Company does not, and the performance of this Agreement by Company will not, (i) conflict with or violate the Company Charter Documents or the equivalent organizational documents of any of Company's subsidiaries, (ii) subject to obtaining the vote of Company's shareholders in favor of the adoption of this Agreement and compliance with the requirements set forth in Section 4.5(b) below, conflict with or violate in any material respect any material law, rule, regulation, order, judgment or decree

applicable to Company or any of its subsidiaries or by which its or any of their respective properties is bound or affected, or (iii) result in any breach of or constitute a default (or an event that with notice or lapse of time or both would become a default) under any material provision, or alter the material rights or obligations of any third party against or to Company under, or give to others any material rights of termination, amendment, acceleration or cancellation of, or result in the creation of an Encumbrance on any of the material properties or assets of Company or any of its subsidiaries pursuant to, any mortgage, Contract, permit, franchise or other obligation to which Company or any of its subsidiaries is a party or by which Company or any of its subsidiaries or its or any of their respective properties are bound or affected (a "**Company Obligation**").

(b) The execution and delivery of this Agreement by Company does not, and the performance of this Agreement by Company shall not, require Company to obtain or make, at or prior to the Effective Time, any consent, approval, authorization or permit of, or filing with or notification to, any Governmental Entity or third party except the (i) filing and recordation of each of the Agreement of Merger, as required by the CCC, and Certificate of Merger, as required by the DGCL and (ii) where the failure to obtain such consents, approvals, authorizations or permits, or to make such filings or notifications (A) would not prevent the consummation of the Merger or otherwise prevent Company from performing its obligations under the Agreement or (B) would not, individually or in the aggregate, reasonably be expected to have a Company Material Adverse Effect.

4.6 Legal Compliance; Permits.

(a) Neither Company nor any of its subsidiaries is in any material respect in conflict with, or in default or violation of, any Legal Requirement or Company Obligation. No charge, complaint, claim, demand, notice, inquiry, investigation, action, suit, proceeding, hearing or review by any Governmental Entity, which, if determined adversely to Company, would have a material impact on the operation of Company's business as currently conducted, is pending or, to the Knowledge of Company, being threatened against Company or its subsidiaries, nor, to Company's Knowledge, has any Governmental Entity indicated to Company in writing an intention to conduct the same.

(b) Company and its subsidiaries hold all franchises, grants, authorizations, permits, licenses, variances, exemptions, easements, consents, certifications, orders and approvals from Governmental Entities which are necessary to the operation of the business of Company and its subsidiaries taken as a whole (collectively, the "**Company Permits**"); and Company and its subsidiaries are in compliance in all material respects with the terms of the Company Permits.

4.7 Export Control Laws. Company and its subsidiaries have conducted their export transactions in accordance in all material respects with applicable provisions of United States export control laws and regulations, including but not limited to the Export Administration Act and implementing Export Administration Regulations. Without limiting the foregoing:

(a) Company and its subsidiaries have obtained all export licenses and other approvals required for their exports of products, software and technologies from the United States;

(b) Company and its subsidiaries are in compliance in all material respects with the terms of all applicable export licenses or other approvals;

(c) There are no pending or, to the Company's Knowledge, threatened claims against Company or its subsidiaries with respect to such export licenses or other approvals;

(d) To Company's Knowledge, there are no actions, conditions or circumstances pertaining to the export transactions of Company or its subsidiaries that may give rise to any future claim; and

(e) No consents or approvals for the transfer of export licenses to Parent are required, or such consents and approvals can be obtained expeditiously without material cost.

4.8 Financial Statements. Section 4.8 of the Company Schedule contains the following financial statements (collectively the "**Financial Statements**"): (i) audited balance sheets and statements of income and cash flows as of and for the fiscal years ended December 31, 1999, December 31, 2000 and December 31, 2001 (the "**Most Recent Fiscal Year Ends**") for Company; and (ii) an unaudited balance sheet and statements of income and cash flows (the "**Most Recent Financial Statements**") as of and for the nine month period ended September 30, 2002 (the "**Most Recent Fiscal Period End**") for Company. The Financial Statements (including the notes thereto) are true and correct in all material respects and have been prepared in accordance with generally accepted accounting principles ("**GAAP**") applied on a consistent basis throughout the periods covered thereby (except as may be indicated in the notes thereto or, in the case of unaudited statements, to normal, recurring year-end adjustments that would not be reasonably expected to, either individually or in the aggregate, be material). The Financial Statements present fairly the financial condition of Company as of such dates and the results of operations of Company for such periods; provided, however, that the Most Recent Financial Statements lack footnotes. The books of account of Company reflect as of the dates shown thereon all items of income and expenses, and all assets, liabilities and accruals of Company required to be reflected therein.

4.9 No Undisclosed Liabilities. Neither Company nor any of its subsidiaries has any liabilities (absolute, accrued, contingent or otherwise) except (i) liabilities disclosed in Company's unaudited balance sheet as of the Most Recent Fiscal Period End (the "**Most Recent Balance Sheet**") or in the related notes, (ii) liabilities incurred since the Most Recent Fiscal Period End and on or prior to the date hereof in the Ordinary Course of Business, or (iii) liabilities expected to be incurred after the date hereof in the Ordinary Course of Business.

4.10 Absence of Certain Changes or Events. Since the Most Recent Fiscal Period End:

(a) there has not been any Company Material Adverse Effect;

(b) there has not been any declaration, setting aside or payment of any dividend on, or other distribution (whether in cash, stock or property) in respect of, any of Company's or any of its subsidiaries' capital stock, or any purchase, redemption or other acquisition by Company of any of Company's capital stock or any other securities of Company or its subsidiaries or any options, warrants, calls or rights to acquire any such shares or other securities other than the repurchase of Company Common Stock at cost from employees and other service providers in connection with the termination of employment with, or services to, Company;

(c) there has not been any split, combination or reclassification of any of Company's or any of its subsidiaries' capital stock;

(d) except as expressly contemplated by this Agreement, there has not been any granting by Company or any of its subsidiaries of any increase in compensation or fringe benefits or any change in employment terms or any payment by Company or any of its subsidiaries of any bonus, or any granting by Company or any of its subsidiaries of any increase in severance or termination pay or any entry by Company or any of its subsidiaries into any currently effective employment, severance, termination or indemnification agreement or any agreement the benefits of which would be contingent or the terms of which would be materially altered upon the consummation of the transactions contemplated hereby;

(e) there has not been any change by Company in its accounting methods, principles or practices, except as required by concurrent changes in GAAP nor have there been any Tax (as defined below) elections made which have resulted in any increase in the Company's liabilities from those disclosed in the Most Recent Balance Sheet or a change of tax accounting method;

(f) there has not been any revaluation by Company of any of its assets, including, without limitation, writing down the value of capitalized inventory or writing off notes or accounts receivable;

(g) Company has not sold, leased, transferred, or assigned any assets or properties, tangible or intangible, outside the Ordinary Course of Business;

(h) except for those agreements, contracts, leases and commitments identified in Section 4.10 of the Company Schedule, Company has not entered into, assumed or become bound under or obligated by any agreement, Contract, lease or commitment or extended or modified the terms of any such agreement, Contract, lease or commitment which (i) involves the payment of greater than $50,000 per annum or which extends for more than one (1) year, (ii) involves any payment or obligation to any Affiliate of the Company, (iii) involves the sale of any assets, (iv) involves any OEM relationship, or (v) involves any license or other agreement with respect to Company Intellectual Property (as defined herein) outside the Ordinary Course of Business;

(i) no party (including Company) has accelerated, terminated, made modifications to, or canceled any agreement, contract, lease, or license that is material to the conduct of Company's business and to which Company is a party or by which it is bound and Company has

not modified, canceled or waived or settled any material debts or claims held by it, outside the Ordinary Course of Business, or waived or settled any rights or claims of a substantial value, whether or not in the Ordinary Course of Business;

(j) none of the assets of Company, tangible or intangible, has become subject to any security interest or other lien or Encumbrance (for purposes of this Section 4.10(j) only, non-exclusive licenses for Company Intellectual Property granted in the Ordinary Course of Business shall not be deemed Encumbrances);

(k) Company has not made any capital expenditures exceeding $50,000 in the aggregate of all such capital expenditures;

(l) Company has not made any capital investment in, or any loan to, any other person;

(m) Company has not created, incurred, assumed, prepaid or guaranteed any indebtedness for borrowed money and capitalized lease obligations, or extended or modified any existing indebtedness;

(n) there has been no change made or authorized in the Company Charter Documents;

(o) Company has not experienced any damage, destruction, or loss (whether or not covered by insurance) to its property in excess of $50,000 in the aggregate of all such damage, destruction and losses;

(p) Company has not suffered any repeated, recurring or prolonged shortage, cessation or interruption of inventory shipments, supplies or utility services;

(q) Company has not made any loan to, or entered into any other transaction with, or paid any bonuses to, any of its Affiliates, directors, officers, or employees or their Affiliates, thereof;

(r) Company has not entered into any employment contract or collective bargaining agreement, written or oral, or modified the terms of any existing such contract or agreement;

(s) except as expressly contemplated by this Agreement, Company has not adopted, amended, modified, or terminated any bonus, profit-sharing, incentive, severance, or other plan, contract, or commitment for the benefit of any of its directors, officers, or employees (or taken any such action with respect to any other employee benefit plan);

(t) Company has not suffered any adverse change or, to Company's Knowledge, any threat of any adverse change in its relations with, or any loss or, to Company's Knowledge, threat of loss of, any of its major customers, distributors or dealers;

(u) Company has not suffered any adverse change or any threat of any adverse change in its relations with, or any loss or threat of loss of, any of it major suppliers;

(v) Company has not received notice or had Knowledge of any actual or threatened labor trouble or strike, or any other occurrence, event or condition of a similar character;

(w) Company has not entered into any transaction other than in the Ordinary Course of Business; and

(x) Company is not obligated to do any of the foregoing.

4.11 Employee Benefit Plans.

(a) All employee compensation, incentive, fringe or benefit plans, programs, policies, commitments or other similar arrangements (whether or not set forth in a written document and including, without limitation, all "employee benefit plans" within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**")) covering any active employee, former employee, director or consultant of Company or any subsidiary of Company or any trade or business (whether or not incorporated) which is a member of a controlled group or which is under common control with Company within the meaning of Section 414 of the Code (an "**ERISA Affiliate**") or with respect to which Company has liability as of the date hereof, and covering any active, former employee, director or consultant of Company, any subsidiary of Company or any ERISA Affiliate are listed in Section 4.11(a) of the Company Schedule (the "**ERISA Plans**"). Company has provided Parent: (i) correct and complete copies of all documents embodying each ERISA Plan including (without limitation) all amendments thereto, and all related trust documents; (ii) the three (3) most recent annual reports (Form Series 5500 and all schedules and financial statements attached thereto), if any, required under ERISA or the Code in connection with each ERISA Plan; (iii) the most recent summary plan description, as applicable, together with the summary(ies) of material modifications thereto, if any, required under ERISA with respect to each ERISA Plan; (iv) the most recent IRS determination, opinion, notification and advisory letters; (v) all material correspondence to or from any governmental agency relating to an actual or potential liability under any ERISA Plan received in the most recent three plan years; (vi) all forms of notice and election documents related to the Consolidated Omnibus Budget Reconciliation ERISA Plan of 1985, as amended ("**COBRA**"); (vii) all discrimination tests performed with respect to each ERISA Plan for the most recent three (3) plan years; (viii) the most recent annual actuarial valuations, if any, prepared for each ERISA Plan; (ix) if the ERISA Plan is funded, the most recent annual and periodic accounting of ERISA Plan assets; (x) all administrative service agreements, group annuity contracts, group insurance contracts and similar written agreements and contracts relating to each ERISA Plan; and (xi) all communications to employees or former employees relating to any amendments, terminations, establishments, increases or decreases in benefits, acceleration of payments or vesting schedules which would result in a material liability under any ERISA Plan or proposed ERISA Plan.

(b) Each ERISA Plan has been maintained and administered in compliance with its terms and with the requirements prescribed by any and all statutes, orders, rules and regulations, including but not limited to ERISA and the Code, which are applicable to such

ERISA Plans. No suit, action or other litigation (excluding claims for benefits incurred in the ordinary course of ERISA Plan activities) has been brought or, to the Knowledge of Company, is threatened, against or with respect to any such ERISA Plan. There are no audits, inquiries or proceedings pending or, to the Knowledge of Company, threatened by the Internal Revenue Service (the "**IRS**"), Department of Labor (the "**DOL**") or any other governmental agency with respect to any ERISA Plans. All contributions, reserves or premium payments required to be made or accrued as of the date hereof to the ERISA Plans have been timely made or accrued. Any ERISA Plan intended to be qualified under Section 401(a) of the Code and each related trust intended to qualify under Section 501(a) of the Code (i) has either obtained a favorable determination, notification, advisory and/or opinion letter, as applicable, as to its qualified status from the IRS or still has a remaining period of time under applicable Treasury Regulations or IRS pronouncements in which to apply for such letter and to make any amendments necessary to obtain a favorable determination, and (ii) incorporates or has been amended to incorporate all provisions required to comply with the Tax Reform Act of 1986 and subsequent legislation to the extent such amendment or incorporation is required. Company does not have any plan or commitment to establish any new ERISA Plan or to modify any ERISA Plan (except to the extent required by law or to conform any such ERISA Plan to the requirements of any applicable law, in each case as previously disclosed to Parent in writing). Each ERISA Plan can be amended, terminated or otherwise discontinued after the Effective Time in accordance with its terms, without liability to Parent, Company or any of its ERISA Affiliates except as otherwise provided in the ERISA Plan.

(c) Neither Company nor any its ERISA Affiliates has at any time ever maintained, established, sponsored, participated in, or contributed to any plan subject to Title IV of ERISA or Section 412 of the Code, and at no time has Company or any of its ERISA Affiliates contributed to or been requested to contribute to any "multiemployer plan," as such term is defined in ERISA or to any plan described in Section 413(c) of the Code. Neither Company, any of its ERISA Affiliates, nor, to the Knowledge of Company, any officer or director of Company or any of ERISA Affiliates is subject to any liability or penalty under Section 4975 through 4980B of the Code or Title I of ERISA. No "prohibited transaction," within the meaning of Section 4975 of the Code or Sections 406 and 407 of ERISA, and not otherwise exempt under Section 408 of ERISA, has occurred with respect to any ERISA Plan, which could subject Company or its subsidiaries to liabilities.

(d) Each ERISA Plan that is an employee welfare benefit plan under Section 3(1) of ERISA is funded through an insurance company contract and is not a "welfare benefit fund" within the meaning of Section 419 of the Code. Neither the Company nor any of its ERISA Affiliates has any current or future liability for life, health, medical or other welfare benefits to former employees or beneficiaries or dependents thereof, except for health continuation coverage as required by Section 4980B of the Code or Part 6 of Title I of ERISA (or similar state law) and at no expense to the Company (other than administrative expenses) except for reimbursements of COBRA premiums to former employees. No ERISA Plan is intended to meet the requirements of Code Section 501(c)(9).

(e) Neither Company nor any of its subsidiaries is bound by or subject to (and none of its respective assets or properties is bound by or subject to) any arrangement with any labor union. No employee of Company or any of its subsidiaries is represented by any labor union

or covered by any collective bargaining agreement relating to Company or any of its subsidiaries and, to the Knowledge of Company, no campaign to establish such representation is in progress. Neither Company nor any of its subsidiaries experienced any labor interruptions over the past three (3) years. There are no actions, suits, claims, labor disputes or grievances pending, or, to the Knowledge of Company, threatened relating to any labor, safety or discrimination matters involving any Company employee, including, without limitation, charges of unfair labor practices or discrimination complaints. Neither Company nor any of its subsidiaries has engaged in any unfair labor practices within the meaning of the National Labor Relations Act. The Company and each of its subsidiaries is in material compliance with all applicable foreign, federal, state and local laws, rules and regulations respecting employment, employment practices, terms and conditions of employment, employee safety and wages and hours, and in each case, with respect to its current and former employees and consultants: (i) has withheld and reported all amounts required by law or by agreement to be withheld and reported with respect to wages, salaries and other payments to current and former employees and consultants, (ii) is not liable for any arrears of wages, severance pay or any taxes or any penalty for failure to comply with any of the foregoing, and (iii) is not liable for any payment to any trust or other fund governed by or maintained by or on behalf of any governmental authority, with respect to unemployment compensation benefits, social security or other benefits or obligations for current or former employees or consultants (other than routine payments to be made in the normal course of business and consistent with past practice). The services provided by the Company employees are terminable at the will of the Company and its ERISA Affiliates.

(f) Neither Company nor any of its ERISA Affiliates has, prior to the Effective Time and in any material respect, violated any of the health continuation requirements of COBRA, the requirements of the Family Medical Leave Act of 1993, as amended, the requirements of the Women's Health and Cancer Rights Act, as amended, the requirements of the Newborns' and Mothers' Health Protection Act of 1996, as amended, the requirements of the Health Insurance Portability and Accountability Act of 1996, as amended, or any similar provisions of state law applicable to employees of Company.

(g) Except as discussed in Section 7.2 of this Agreement, neither the execution and delivery of this Agreement by Company nor the consummation by Company of the transactions contemplated hereby will (i) result in any payment (including severance, unemployment compensation, golden parachute, bonus or otherwise) becoming due to any shareholder, director or employee of Company or any of its subsidiaries under any ERISA Plan or otherwise, (ii) increase any benefits otherwise payable under any ERISA Plan, or (iii) except as required by the Code, result in the acceleration of the time of payment or vesting of any such benefits.

(h) Each ERISA Plan that covers employees who perform services outside the United States is specifically identified in Section 4.11(h) of the Company Schedule (the "**International Plans**"). Each International Plan has been established, maintained and administered in compliance with its terms and conditions and with the requirements prescribed by any and all statutory or regulatory laws that are applicable to such International Plan. Furthermore, no International Plan has unfunded liabilities that as of the Effective Time will not be offset by insurance or fully accrued. Except as required by law, no condition exists that would prevent Company or Parent from terminating or amending any International Plan at any time for any reason

without liability to Parent, Company or its ERISA Affiliates (other than ordinary administration expenses or routine claims for benefits).

(i) To Company's Knowledge, no employee, consultant, or advisor of Company (a "**Company Service Provider**") is in violation of any term of any employment contract, patent disclosure agreement, non-competition agreement, or any restrictive covenant to a former employer that in any way adversely affects in any material respect (a) the right of any Company Service Provider to provide services to Company or the scope or type of work in which the Service Provider may be engaged in connection with services to be provided to Company, or (b) the ability of Company to conduct its business as currently conducted. To the Knowledge of Company, the execution and delivery of this Agreement will not conflict with or result in a breach of the terms, conditions or provisions of, or constitute a default under, any such contract, covenant or instrument with a former employer under which any Company Service Provider is now obligated.

(j) Company has complied with all requirements under the Worker Adjustment and Retraining Notification Act (the "**WARN Act**") and any state or local equivalents with respect to any plant closing or mass layoff completed prior to the Closing Date. Company has not terminated any Company employees since August 1, 2002, except as listed in Section 4.11(j) of the Company Schedule.

4.12 Certain Business Relationships With Company. To Company's Knowledge, neither the shareholders of Company nor any director or officer of Company, nor any member of their immediate families, nor any Affiliate of any of the foregoing, owns, directly or indirectly, or has an ownership interest (other than ownership interests in public companies that are less than 1% of such public company's outstanding capital stock) in (a) any business (corporate or otherwise) which is a party to, or in any property which is the subject of, any business arrangement or relationship of any kind with Company, or (b) any business (corporate or otherwise) which conducts the same business as, or a business similar to, that conducted by Company.

4.13 Restrictions on Business Activities. There is no judgment, injunction, order or decree binding upon Company or its subsidiaries or to which Company or any of its subsidiaries is a party which has or would reasonably be expected to have the effect of prohibiting or restricting any current material business practice of Company or any of its subsidiaries, any acquisition of property by Company or any of its subsidiaries or the conduct of any material aspect of the Company's business by Company or any of its subsidiaries as currently conducted.

4.14 Title to Property. Neither Company nor any of its subsidiaries owns, nor has Company or any of its subsidiaries previously owned, any real property. Company and each of its subsidiaries have good and valid title to, or valid leasehold interests in, all of their material tangible properties and assets, free and clear of all Encumbrances except for liens for taxes or other governmental charges or levies not yet due and payable. All leases or subleases pursuant to which Company or any of its subsidiaries lease from others real or personal property are set forth in Section 4.14 of the Company Schedule, except for leases of personal property involving aggregate annual payments not in excess of $10,000 (the "**Company Leases**"). Company has delivered to Parent full and complete copies of all Company Leases as amended to date. Each of the Company Leases is in full force and effect in accordance with their respective terms and there is not, under any

of such leases, any existing default or event of default of Company or any of its subsidiaries of any material provision thereof or, to Company's Knowledge, of any other party. There are no agreements modifying the Company Leases except as specifically set forth in Section 4.14 of the Company Schedule and to Company's Knowledge no party has repudiated any provision of the Company Leases.

No party other than the Company has the right to occupy the premises subject to the Company Leases. The premises that are the subject of the Company Leases ("**Company Premises**") are in good condition and repair, reasonable wear and tear excepted. The present use of the Company Premises conform, and at the Closing date will conform in all material respects (i) to the requirements of the Company Leases, and (ii) with all applicable ordinances and regulations and all building, zoning, health, safety, air and water pollution and other Laws. All permits necessary for occupancy and operation of the Company Premises have been obtained and are, and immediately prior to the Closing will be, in full force and effect.

4.15 Taxes.

(a) Definition of Taxes. For the purposes of this Agreement, "**Tax**" or "**Taxes**" refers to (i) any and all federal, state, local and foreign taxes, assessments and other governmental charges, duties, impositions and liabilities relating to taxes, including taxes based upon or measured by gross receipts, income, profits, sales, use and occupation, and value added, ad valorem, transfer, franchise, withholding, payroll, recapture, employment, excise and property taxes, together with all interest, penalties and additions imposed with respect to such amounts (ii) any liability for the payment of any amounts of the type described in clause (i) of this Section 4.15(a) as a result of being a member of an affiliated, consolidated, combined or unitary group for any period, and (iii) any liability for the payment of any amounts of the type described in clauses (i) and (ii) of this Section 4.15(a) as a result of any express or implied obligation to indemnify any other person or as a result of any obligations under any agreements or arrangements with any other person with respect to such amounts and including any liability for Taxes of a predecessor entity.

(b) Tax Returns and Audits.

(i) Except as reserved in the Financial Statements or the Most Recent Financial Statements, Company and each of its subsidiaries have timely filed all required federal, state, local and foreign returns, estimates, forms, information statements and reports ("**Returns**") relating to any and all Taxes concerning or attributable to Company and each of its subsidiaries or any of their operations with any Tax authority. Such Returns are true and accurate and have been completed in accordance with applicable law. Company and each of its subsidiaries have timely paid all Taxes required to be paid whether or not shown to be due on such Returns.

(ii) Company and each of its subsidiaries have withheld with respect to their employees (and timely paid over to the appropriate Tax authority) all federal and state income Taxes, Taxes pursuant to the Federal Insurance Contribution Act, Taxes pursuant to the Federal Unemployment Tax Act and other Taxes required to be withheld.

(iii) Neither Company nor any of its subsidiaries is delinquent in the payment of any Tax. There is no Tax deficiency outstanding, proposed or assessed against Company or any of its subsidiaries. Neither Company nor any of its subsidiaries has executed any unexpired waiver of any statute of limitations on or extension of any period for the assessment or collection of any Tax.

(iv) No audit or other examination of any Return of Company or any of its subsidiaries by any Tax authority is presently in progress, nor has Company or any of its subsidiaries been notified of any request for such an audit or other examination.

(v) No adjustment relating to any Returns filed or required to be filed by Company or any of its subsidiaries has been proposed, formally or informally, by any Tax authority to Company or any of its subsidiaries or any representative thereof.

(vi) Neither Company nor any of its subsidiaries has any liability for any unpaid Taxes (whether or not shown to be done on any Return) which has not been accrued for or reserved on Company's balance sheet for the Most Recent Fiscal Year End, whether asserted or unasserted, contingent or otherwise, other than any liability for unpaid Taxes that may have accrued since the Most Recent Fiscal Year End in connection with the operation of the business of Company and its subsidiaries in the Ordinary Course of Business. There are no liens with respect to Taxes on any of the assets of Company or any of its subsidiaries, other than customary liens for current Taxes not yet due and payable.

(vii) To Company's Knowledge, there are (immediately following the Effective Time there will be) no Encumbrances relating or attributable to Taxes ("**Tax Lien**") on any of the assets of Company or any of its subsidiaries, other than customary liens for current Taxes not yet due and payable. There is no reasonable basis for the assertion of any claim relating to or attributable to Taxes that, if adversely determined, would result in any Tax Lien on the assets of the Company or any of its subsidiaries.

(viii) There is no contract, agreement, plan or arrangement to which Company or any of its subsidiaries is a party as of the date of this Agreement, including but not limited to the provisions of this Agreement, that, individually or collectively, could give rise to the payment of any amount that would not be deductible pursuant to Sections 280G, 404 or 162(m) of the Internal Revenue Code of 1986, as amended (the "**Code**"). There is no contract, agreement, plan or arrangement to which Company or any of its subsidiaries is a party or by which it is bound to compensate any individual for excise taxes paid pursuant to Section 4999 of the Code.

(ix) Neither Company nor any of its subsidiaries has filed any consent agreement under Section 341(f) of the Code or agreed to have Section 341(f)(2) of the Code apply to any disposition of a subsection (f) asset (as defined in Section 341(f)(4) of the Code) owned by Company or any of its subsidiaries.

(x) The Company has (a) never been a member of an affiliated group (within the meaning of Code §1504(a)) filing a consolidated federal income Tax Return (other than a group the common parent of which was Company), (b) never been a party to any Tax sharing,

indemnification or allocation agreement, nor does the Company owe any amount under any such agreement and (c) no liability for the Taxes of any person (other than Company or any of its subsidiaries) under Treas. Reg. § 1.1502-6 (or any similar provision of state, local or foreign law), as a transferee or successor, by contract, or otherwise, and (d) never been a party to any joint venture partnership or other agreement that, to the Company's Knowledge, could be treated as a partnership for tax purposes.

(xi) None of Company's or its subsidiaries' assets are tax exempt use property within the meaning of Section 168(h) of the Code.

(xii) Neither Company nor any of its subsidiaries has constituted either a "distributing corporation" or a "controlled corporation" in a distribution of stock intended to qualify for tax-free treatment under Section 355 of the Code (x) in the two years prior to the date of this Agreement or (y) in a distribution which could otherwise constitute part of a "plan" or "series of related transactions" (within the meaning of Section 355(e) of the Code) in conjunction with the Merger.

(xiii) To Company's Knowledge, Company and each of its subsidiaries are in compliance with all terms and conditions of any Tax exemptions, Tax holiday or other Tax reduction agreement or order of a territorial or foreign government and the consummation of the Merger will not have any adverse effect on the continued validity and effectiveness of any such Tax exemptions, Tax holiday or other Tax reduction agreement or order.

(xiv) The Company is not, and has not been at any time, a "United States Real Property Holding Corporation" within the meaning of Section 897(c)(2) of the Code.

4.16 Brokers. Except for fees payable to Credit Suisse First Boston, pursuant to an engagement letter dated July 30, 2002, a copy of which has been provided to Parent, Company has not incurred, nor will it incur, directly or indirectly, any liability for brokerage or finders fees or agent's commissions or any similar charges in connection with this Agreement or any transaction contemplated hereby. Company acknowledges that all such amounts will be paid as part of the Company Transaction Expenses as described in Section 10.3 hereof in accordance with whether or not the Merger is consummated.

4.17 Intellectual Property. For the purposes of this Agreement, the following terms have the following definitions:

"**Intellectual Property**" shall mean any or all of the following and all worldwide common law and statutory rights in, arising out of, or associated therewith: (i) patents (including utility patents, design patents) and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof ("**Patents**"); (ii) inventions (whether patentable or not), invention disclosures, improvements, trade secrets, proprietary information, know how, show how, technology, technical data and customer lists, and all documentation relating to any of the foregoing; (iii) mask works, copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto throughout the world; (iv) domain names, uniform resource locators ("**URLs**") and other names and locators associated

with the Internet ("**Domain Names**"); (v) industrial designs and any registrations and applications therefor; (vi) trade names, logos, common law trademarks and service marks, trademark and service mark registrations and applications therefor; and (vii) all databases and data collections and all rights therein.

"**Company Intellectual Property**" shall mean any Intellectual Property that is owned by, or exclusively licensed to, Company and its subsidiaries.

"**Registered Intellectual Property**" means all Intellectual Property that is the subject of an application, certificate, filing, registration or other document issued, filed with, or recorded by any private, state, government or other legal authority and that has not been abandoned or allowed to lapse, excluding any filings or recordations of Encumbrances.

"**Company Registered Intellectual Property**" means all of the Registered Intellectual Property owned by, or filed in the name of Company or any of its subsidiaries.

(a) Section 4.17(a) of the Company Schedule is a complete and accurate list of (i) all Company Registered Intellectual Property including the jurisdictions in which each such item of Company Registered Intellectual Property has been issued or registered; and (ii) all Company Products (as defined herein) where such Company Products are believed by Company to have material or strategic value to Company. For each of the foregoing, Section 4.17(a) shall also list any proceedings, mediation, arbitration, claims, notices, or actions before any court or tribunal (including the United States Patent and Trademark Office (the "**PTO**") or equivalent authority anywhere in the world) or claims of infringement, invalidity or the like related to any of the Company Intellectual Property.

(b) To Company's Knowledge, there is not any Company Intellectual Property or product or service distributed or marketed by Company or any of its subsidiaries (excluding Intellectual Property licensed from third parties) (a "**Company Product**") that is subject to any proceeding or outstanding claim, mediation, arbitration, notice, decree, order, judgment, contract, license, agreement, stipulation (other than those imposed by applicable law) or the threat thereof restricting in any manner the use, transfer, or licensing thereof by Company or any of its subsidiaries, or which Company reasonably believes will affect the validity, use or enforceability of such Company Intellectual Property or Company Product.

(c) Each item of Company Registered Intellectual Property is, to the Knowledge of Company, valid and subsisting. All necessary registration, maintenance and renewal fees currently due in connection with such Company Registered Intellectual Property have been made. All necessary documents, recordations and certificates in connection with such Company Registered Intellectual Property have been filed with the relevant patent, copyright, trademark or other authorities in the United States or foreign jurisdictions, as the case may be, for the purposes of maintaining such Company Registered Intellectual Property registered in such jurisdiction. As of the date of signing, there are no actions that must be taken by the Company within sixty (60) days of the Closing Date that, if not taken, will result in the loss of any Company Registered Intellectual Property, including the payment of any registration, maintenance or renewal fees or the filing of any responses to Patent and Trademark Office (or equivalent authority) actions, documents, applications

or certificates for the purposes of obtaining, maintaining, perfecting or preserving or renewing any Company Registered Intellectual Property.

(d) Company owns and has good title to or has all necessary licenses to use and exploit each item of Company Intellectual Property free of any Encumbrance as necessary for the conduct of its business as currently conducted (excluding rights of licensor and non-exclusive licenses and related restrictions granted in the Ordinary Course of Business). In this paragraph the term "Encumbrance" excludes infringement of Company Intellectual Property by third parties. With respect to patent or trademark rights of a third party other than any third party disclosed with respect to Section 4.17(j), the representation of the first sentence of this paragraph is limited to the Company's Knowledge. The Company has secured valid written assignments from all consultants, contractors, agents, employees, and other parties who contributed to the creation or development of Company Intellectual Property of the rights to such contributions that the Company does not already own by operation of law.

(e) To the extent that any Intellectual Property that has been developed or created by a third party is incorporated into any Company Products, Company has a written binding agreement with such third party with respect thereto and Company thereby either (i) has obtained ownership of, and is the exclusive owner of, or (ii) has obtained a perpetual, non-terminable license to such Intellectual Property as necessary for the conduct of its business as currently conducted. Section 4.17(e) of the Company Schedule is a list of all such third party Intellectual Property incorporated into any Company Product that is licensed to Company.

(f) Neither Company nor any of its subsidiaries has transferred ownership of, or granted any exclusive license with respect to, any Company Intellectual Property, to any third party.

(g) Section 4.17(g) of the Company Schedule lists all material contracts, licenses and agreements to which Company or any of its subsidiaries is a party: (i) with respect to Company Intellectual Property licensed or transferred to any third party (other than end-user licenses in the Ordinary Course of Business); (ii) pursuant to which a third party has licensed or transferred any material Intellectual Property to Company or any of its subsidiaries (other than proprietary information/confidentiality agreements with Company employees and contractors); or (iii) by which Company has agreed to, or assumed, any obligation or duty to warrant, indemnify, reimburse, hold harmless, guarantee or otherwise assume or incur any obligation or liability to provide a right of rescission with respect to the infringement or misappropriation by Company or such other person of any Intellectual Property Rights (other than end-user licenses in the Ordinary Course of Business).

(h) All contracts, licenses and agreements listed in Section 4.17(g) of the Company Schedule are in full force and effect or expired with certain provisions surviving. The consummation of the transactions contemplated by this Agreement will neither violate nor result in the breach, modification, cancellation, termination or suspension ("**Termination**") of such contracts, licenses and agreements by their terms. Each of Company and its subsidiaries is in compliance with any such contracts, licenses and agreements. To the Knowledge of Company, all other parties to such contracts, licenses and agreements are in compliance with, and have not breached any term of, such contracts, licenses and agreements, which breach has not been cured. Following the Closing

Date, the Surviving Corporation will be permitted to exercise all of Company's rights under such contracts, licenses and agreements by their terms to the same extent Company and its subsidiaries would have been able to had the transactions contemplated by this Agreement not occurred and without the payment of any additional amounts or consideration other than ongoing fees, royalties or payments which Company would otherwise be required to pay. There is no provision in any of such contracts, licenses or agreements that the consummation of the transactions contemplated by this Agreement requires Parent or Merger Sub to (i) grant to any third party any right to or with respect to any Intellectual Property owned by, or licensed to, either of them prior to the Closing, (ii) be bound by, or subject to, any material non-compete or other material restriction on the operation or scope of their respective businesses, or (iii) be obligated to pay any royalties or other amounts to any third party in excess of those payable by Company prior to the Closing.

(i) Company's and its subsidiaries' design, development, manufacture, distribution, reproduction, marketing or sale of Company Products has not infringed or misappropriated and does not infringe or misappropriate the Intellectual Property of any third party. With respect to patent or trademark rights of a third party other than any third party disclosed with respect to Section 4.17(j), the representation of this paragraph is limited to Company's Knowledge.

(j) Neither Company nor any of its subsidiaries has received notice from any third party that the operation of the business of Company or any of its subsidiaries or any Company Product infringes or misappropriates the Intellectual Property of any third party or constitutes unfair competition or trade practices under the laws of any jurisdiction.

(k) Except as listed on Section 4.17(k)(i) of the Company Schedule, to the Knowledge of Company, no person has infringed or misappropriated or is infringing or misappropriating any Company Intellectual Property. The Company has not brought any action, suit or proceeding for infringement of Company Intellectual Property or breach of any license or agreement involving Company Intellectual Property and does not currently have any plans to do so. Section 4.17(k)(ii) of the Company Schedule is a complete list of all entities that are, to the Company's Knowledge, infringing any Company Intellectual Property, including a description of the infringing action.

(l) Company and each of its subsidiaries has taken reasonable steps to protect Company's and its subsidiaries' rights in Company's confidential information and trade secrets that it wishes to protect or any trade secrets or confidential information of third parties provided to Company or any of its subsidiaries. All use, disclosure, or appropriation of Company's Products by or to third parties have been pursuant to the terms of a written agreement. Each of Company and its subsidiaries has a policy requiring each employee and independent contractor to execute a proprietary information/confidentiality agreement substantially in the form provided to Parent. All current and former employees and independent contractors of Company and any of its subsidiaries have executed such an agreement, except where the absence of such executed agreement would not have a Company Material Adverse Effect. To Company's Knowledge, none of Company's current or former employees and contractors are in violation of such agreements.

4.18 Agreements, Contracts and Commitments. As of the date of this Agreement, neither Company nor any of its subsidiaries is a party to or is bound by:

(a) any employment or consulting agreement, Contract or commitment with any officer, director or employee of Company or any of its subsidiaries (whether on a full-time, part-time or other basis), other than those that are terminable by Company or any of its subsidiaries at will without liability or financial obligation to Company as a result of such termination;

(b) any agreement of indemnification by Company or any power of attorney or guaranty (granted to a third party) other than any agreement of indemnification entered into in connection with the sale of products or license of technology in the Ordinary Course of Business;

(c) any agreement, contract or commitment containing any covenant limiting the right of Company or any of its subsidiaries to engage in any line of business or to compete with any person or granting any exclusive distribution rights;

(d) any agreement, contract or commitment relating to the disposition or acquisition by Company or any of its subsidiaries after the date of this Agreement of assets not in the Ordinary Course of Business or pursuant to which Company or any of its subsidiaries has any material ownership interest in any corporation, partnership, joint venture or other business enterprise other than Company's subsidiaries;

(e) any dealer, distributor, joint marketing or development agreement under which Company or any of its subsidiaries have continuing obligations to jointly market any product, technology or service and which may not be canceled without penalty upon notice of ninety (90) days or less, or any agreement pursuant to which Company or any of its subsidiaries have continuing obligations to jointly develop any intellectual property that will not be owned, in whole or in part, by Company or any of its subsidiaries and which may not be canceled without penalty upon notice of ninety (90) days or less;

(f) any agreement, contract or commitment to license any third party to manufacture or reproduce any Company product, service or technology or any agreement, contract or commitment to sell or distribute any Company products, service or technology;

(g) any agreement relating to the licensing of source code, other than the licensing of sample source code as such term is used in Company's user licensing agreements;

(h) any mortgages, indentures, guarantees, loans or credit agreements, security agreements or other agreements or instruments relating to the borrowing of money by Company or any of its subsidiaries or extension of credit (other than customer accounts receivable owing to Company or any of its subsidiaries in the Ordinary Course of Business and payable or dischargeable in accordance with customary trade terms);

(i) any agreement (or group of related agreements) for the purchase or sale of raw materials, commodities, supplies, products, or other personal property, or for the furnishing or receipt of services, the performance of which will extend over a period of more than one year or involve consideration in excess of $50,000;

(j) any agreement for the purchase of supplies, components, products or services from single source suppliers, custom manufacturers or subcontractors that involves aggregate annual payments of more than $50,000;

(k) any agreement (or group of related agreements) under which it has created, incurred, assumed, or guaranteed any indebtedness for borrowed money or any capitalized lease obligation in or under which a security interest has been imposed on any of its assets, tangible or intangible;

(l) any agreement with any Company shareholder or any of such shareholder's Affiliates (other than Company) or with any Affiliate of Company;

(m) any profit sharing, stock option, stock purchase, stock appreciation, deferred compensation, severance, or other plan or arrangement for the benefit of its current or former directors, officers or employees;

(n) any collective bargaining agreement;

(o) any agreement under which it has advanced or loaned any amount to any of its directors, officers, and employees;

(p) any agreement under which the consequences of a default or termination could have a Company Material Adverse Effect;

(q) any agreement pursuant to which Company is obligated to provide maintenance, support or training for its products, other than in the Ordinary Course of Business;

(r) any agreement pursuant to which any of Company's products are manufactured which involves aggregate annual payments of more than $50,000; and

(s) any other agreement (or group of related agreements) not listed above the performance of which involves consideration in excess of $50,000 or which is expected to continue for more than one (1) year from the date hereof, other than agreements relating to the sale or licensing of Company products, services or technology, and licenses to use third party software entered into in the Ordinary Course of Business.

Company has delivered to Parent a correct and complete copy of each written agreement required to be listed in Section 4.18 of the Company Schedule and a written summary setting forth the terms and conditions of each oral agreement required to be listed in Section 4.18 of the Company Schedule. With respect to each such agreement: (A) the agreement is legal, valid, binding, enforceable, and in full force and effect in all material respects; (B) neither Company nor, to Company's Knowledge, any other party is in material breach or default, and no event has occurred, which with notice or lapse of time would constitute a material breach or default, or permit termination, modification, or acceleration, under the agreement; (C) to Company's Knowledge, no party has repudiated any provision of the agreement; (D) there are no material disputes, oral agreements or forbearance programs in effect; and (E) Company does not have any reason to believe that the service called for thereunder cannot be supplied in accordance with its terms.

4.19 Board Approval. The Board of Directors of Company has, as of the date of this Agreement, (i) approved, subject to shareholder approval, this Agreement and the Merger and the other transactions contemplated hereby, (ii) determined that the Merger is consistent with the long-term business strategy of Company and is in the best interests of the shareholders of Company and is on terms that are fair to such shareholders, (iii) adopted a resolution declaring the Merger advisable and (iv) determined to recommend that the shareholders of Company adopt this Agreement.

4.20 Vote Required. The affirmative vote or written consent of (a) the holders of at least a majority of any outstanding shares of Company Preferred Stock, voting together as a single class, (b) the holders of at least a majority of any outstanding shares of Company Preferred Stock, voting together as a single class and on an as converted basis, (c) the holders of at least a majority of the outstanding shares of Series D Preferred Stock, voting as a single class, and (d) the holders of at least a majority of the outstanding shares of Company Common Stock, voting together as a single class, are the only votes of the holders of any class or series of Company Capital Stock necessary to adopt this Agreement.

4.21 Insurance. Company and each of its subsidiaries has insurance policies and fidelity bonds of the type and in amounts customarily carried by persons conducting business or owning assets, equipment and properties similar to Company and its subsidiaries (collectively, the "**Insurance Policies**"). There is no claim by Company or any of its subsidiaries pending under any of the Insurance Policies as to which coverage has been questioned, denied or disputed in writing by the underwriters of such policies or bonds, which denial of coverage could reasonably be expected to have a Company Material Adverse Effect. All premiums due and payable under the Insurance Policies have been paid and Company and its subsidiaries are otherwise in material compliance with the terms of the Insurance Policies. Company has not received notice of any threatened termination of, or any material premium increase with respect to, any of the Insurance Policies.

4.22 State Takeover Statutes. No state takeover statute is applicable to the Merger or other transactions contemplated hereby.

4.23 Tangible Assets. The buildings, machinery, equipment, and other tangible assets that Company owns and leases have been maintained in accordance with normal industry practice, and are in good operating condition and repair (subject to normal wear and tear) and are usable in the Ordinary Course of Business.

4.24 Litigation. Section 4.24 of the Company Schedule sets forth each instance in which Company (or any of its assets) (i) is subject to any outstanding injunction, judgment, order, decree, ruling, or charge or (ii) is or has been since its inception a party, or, to the Knowledge of Company, is threatened to be made a party, to any action, suit, proceeding, hearing, arbitration, or investigation of, in, or before any court or quasi-judicial or administrative agency of any federal, state, local, or foreign jurisdiction or before any arbitrator. To Company's Knowledge, there are no facts or circumstances which would form the basis of any claim against Company.

4.25 Product Warranty. Company Products have conformed in all material respects with applicable contractual commitments and express warranties, and Company has no

material liability (whether known or unknown, whether asserted or unasserted, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, and whether due or to become due) for replacement or repair thereof or other damages in connection therewith, other than in the Ordinary Course of Business.

4.26 Product Liability. Section 4.26 of the Company Schedule contains a description of all product liability claims and similar claims, actions, litigation and other proceedings relating to Company products that are presently pending or which, to the Knowledge of Company, are threatened, or which have been asserted or commenced against Company since its inception, in which a party thereto either requests injunctive relief (whether temporary or permanent) or alleges damages (whether or not covered by insurance).

4.27 Environment, Health, and Safety.

(a) For purposes of this Agreement, the following terms have the following meanings:

"**Environmental, Health, and Safety Laws**" means any and all federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, plans, injunctions, judgments, decrees, requirements or rulings now or hereafter in effect, imposed by any governmental authority regulating, relating to, or imposing liability or standards of conduct relating to pollution or protection of the environment (including, without limitation, ambient air, surface water, groundwater, land surface or subsurface strata), public health and safety, or employee health and safety, concerning any Hazardous Materials or Extremely Hazardous Substances, as such terms as defined herein, or otherwise regulated, under any Environmental, Health and Safety Laws. The term "**Environmental, Health and Safety Laws**" shall include, without limitation, the Clean Water Act (also known as the Federal Water Pollution Control Act), 33 U.S.C. Section 1251 et seq., the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq., the Clean Air Act, 42 U.S.C. Section 7401 et seq., the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Section 136 et seq., the Safe Drinking Water Act, 42 U.S.C. Section 300f et seq., the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., the Superfund Amendment and Reauthorization Act of 1986, Public Law 99-4, 99, 100 Stat. 1613, the Emergency ERISA Planning and Community Right to Know Act, 42 U.S.C. Section 11001 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., and the Occupational Safety and Health Act, 29 U.S.C. Section 651 et seq., all as amended, together with any amendments thereto, regulations promulgated thereunder and all substitutions thereof.

"**Extremely Hazardous Substance**" means a substance on the list described in Section 302 (42 U.S.C. Section 11002(a)(2)) of the Emergency ERISA Planning and Community Right to Know Act, 42 U.S.C. Section 11001 et seq., as amended.

"**Hazardous Material**" means any material or substance that, whether by its nature or use, is now or hereafter defined as a pollutant, dangerous substance, toxic substance, hazardous waste, hazardous material, hazardous substance or contaminant under any Environmental, Health and Safety Laws, or which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic or otherwise hazardous and which is now or hereafter regulated under any

Environmental, Health and Safety Laws, or which is or contains petroleum, gasoline, diesel fuel or other petroleum hydrocarbon product.

(b) Each of Company and its predecessors and Affiliates (A) has complied with the Environmental, Health, and Safety Laws (and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, directive or notice has been filed or commenced against any of them alleging any such failure to comply), (B) has obtained and been in compliance in all material respects with the terms and conditions of all permits, licenses, certificates and other authorizations which are required under the Environmental, Health, and Safety Laws, and (C) has complied all material respects with all other limitations, restrictions, conditions, standards, prohibitions, requirements, obligations, schedules, and timetables which are contained in the Environmental, Health, and Safety Laws.

(c) To Company's Knowledge, Company has no liability (whether known or unknown, whether asserted or unasserted, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, and whether due or to become due), and none of Company and its predecessors and Affiliates has handled or disposed of any Hazardous Materials or extremely Hazardous Substances, arranged for the disposal of any Hazardous Materials or Extremely Hazardous Substances, exposed any employee or other individual to any Hazardous Materials or Extremely Hazardous Substances, or owned or operated any property or facility in any manner that could give rise to any liability, for damage to any site, location, surface water, groundwater, land surface or subsurface strata, for any illness of or personal injury to any employee or other individual, or for any reason under any Environmental, Health, and Safety Law.

(d) To Company's Knowledge, no Extremely Hazardous Substances are currently, or have been, located at, on, in, under or about all properties and equipment used in the business of Company and its predecessors and Affiliates.

(e) To Company's Knowledge, no Hazardous Materials are currently located at, on, in, under or about all properties and equipment used in the business of Company and its predecessors and Affiliates in a manner which violates any Environmental, Health and Safety Laws or which requires cleanup or corrective action of any kind under any Environmental, Health and Safety Laws.

4.28 Information Statement. None of the information supplied or to be supplied by Company for inclusion in the Information Statement (as defined herein) will at the date mailed to the shareholders of Company, at the time of the shareholders' meeting of Company in connection with the transactions contemplated hereby or at the time of execution and delivery of any written consent of the shareholders of Company (the "**Company Shareholders' Meeting**") and at the Effective Time, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they are made, not misleading. Notwithstanding the foregoing, Company makes no representation or warranty with respect to any information supplied by Parent or Merger Sub, which is contained in any of the foregoing documents.

4.29 Full Disclosure. To Company's Knowledge, no representation or warranty in this Section 4, the Company Schedule or in any certificate required to be delivered by Company pursuant to this Agreement, and no statement or certificate furnished to Parent pursuant hereto or in connection with this Agreement, contains any untrue statement of a material fact, or omits to state any fact necessary to make any statement herein or therein not materially misleading. To Company's Knowledge, there is no fact, development or threatened development which Company has not disclosed to Parent in writing and which is having or may reasonably be expected to have a Company Material Adverse Effect. For the avoidance of doubt, Company is not making any representation or warranty regarding any projections, forecasts or other similar forward looking information.

4.30 Voting Agreements; Irrevocable Proxies. Certain shareholders of the Company, who collectively hold at least that number of shares required to approve the Merger under Company's Charter Documents as well as the CCC which number shall be at least a majority of the outstanding shares of Company Preferred Stock (on each of an outstanding and an as converted basis), at least a majority of the outstanding shares of the Series D Preferred Stock and at least a majority of the outstanding shares of Company Common Stock have agreed in writing to vote for the approval of the Merger pursuant to Voting Agreements in substantially the form attached hereto as Exhibit A and pursuant to Irrevocable Proxies attached thereto as Exhibit B ("**Irrevocable Proxies**").

SECTION 5

5. Representations and Warranties of Parent. Parent and Merger Sub jointly and severally represent and warrant to Company, subject to such exceptions as are disclosed in writing in the disclosure letter supplied by Parent to Company dated as of the date hereof (the "Parent Schedule"), which disclosure shall provide an exception to or otherwise qualify the representations or warranties of Parent and Merger Sub contained in the section of this Agreement corresponding by number to such disclosure (provided that the inclusion of an item as an exception or qualification to one section of this Agreement shall cause that item to be an exception or qualification to any other section of this Agreement where the meaning of such exception or qualification is apparent on its face without any further investigation by Company):

5.1 Organization and Qualification; Subsidiaries.

(a) Each of Parent and Merger Sub is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and has the requisite corporate power and authority to own, lease and operate its assets and properties and to carry on its business as it is now being conducted.

(b) Parent has no material subsidiaries except for those listed on Exhibit 21.1 to Parent's Annual Report on Form 10-K for the fiscal year ended December 31, 2001.

(c) Each of Parent and Merger Sub is qualified or licensed to do business as a foreign corporation, and is in good standing (with respect to jurisdictions which recognize such concept), under the laws of all jurisdictions where the character of the properties owned, leased or

operated by them or the nature of their activities requires such qualification or licensing, except where the failure to be so qualified or licensed, has not resulted in, and would not reasonably be expected to result in Parent Material Adverse Effect.

5.2 Authority Relative to this Agreement. Each of Parent and Merger Sub has all necessary corporate power and authority to execute and deliver this Agreement and to perform its obligations hereunder and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement by Parent and Merger Sub and the consummation by Parent and Merger Sub of the transactions contemplated hereby have been duly and validly authorized by all necessary corporate action on the part of Parent and Merger Sub, and no other corporate proceedings on the part of Parent or Merger Sub are necessary to authorize this Agreement or to consummate the transactions so contemplated. This Agreement has been duly and validly executed and delivered by Parent and Merger Sub and, assuming the due authorization, execution and delivery by Company, constitutes a legal and binding obligation of Parent and Merger Sub, enforceable against Parent and Merger Sub in accordance with its terms, subject to bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application relating to or affecting the enforcement of creditors' rights and the exercise by courts of equitable powers.

5.3 No Conflict; Required Filings and Consents.

(a) The execution, delivery and performance of this Agreement do not and will not, (i) conflict with or violate the Parent Certificate of Incorporation or Bylaws or Merger Sub's Certificate of Incorporation or Bylaws, (ii) subject to the requirements set forth in Section 5.3(b) below, conflict with or violate any law, rule, regulation, order, judgment or decree applicable to Parent or any of its subsidiaries or by which they or any of their respective properties are bound or affected, or (iii) result in any breach of or constitute a default (or an event that with notice or lapse of time or both would become a default) under, or materially impair Parent's or Merger Sub's rights or alter the rights or obligations of any third party against or to Parent or Merger Sub under, or give to others any rights of termination, amendment, acceleration or cancellation of, or result in the creation of an Encumbrance on any of the properties or assets of Parent or Merger Sub pursuant to, any material mortgage, Contract, permit, franchise or other obligation to which Parent or Merger Sub is a party or by which Parent or Merger Sub or any of their respective properties are bound or affected, except to the extent such conflict, violation, breach, default, impairment or other effect could not in the case of clauses (ii) or (iii) individually or in the aggregate, reasonably be expected to have a Parent Material Adverse Effect.

(b) The execution and delivery of this Agreement by Parent and Merger Sub do not, and the performance of this Agreement by Parent and Merger Sub shall not, require Parent to obtain or make any consent, approval, authorization or permit of, or filing with or notification to, any Governmental Entity or third party except (i) pursuant to applicable requirements, if any, of the Securities Act, the Exchange Act, Blue Sky Laws, the rules and regulations of Nasdaq, and the filing and recordation of each of the Agreement of Merger, as required by CCC, and the Certificate of Merger as required by the DGCL and (ii) where the failure to obtain such consents, approvals, authorizations or permits, or to make such filings or notifications, (A) would not prevent consummation of the Merger or otherwise prevent Parent or Merger Sub from

performing their respective obligations under this Agreement or (B) would not, individually or in the aggregate, reasonably be expected to have a Parent Material Adverse Effect.

5.4 Information Statement. None of the information supplied or to be supplied by Parent for inclusion in the Information Statement will at the date mailed to the shareholders of Company, at the time of the Company Shareholders' Meeting and at the Effective Time, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they are made, not misleading. Notwithstanding the foregoing, Parent makes no representation or warranty with respect to any information supplied by Company, which is contained in any of the foregoing documents.

5.5 Board Approval. The Board of Directors of Parent has, as of the date of this Agreement, (i) approved this Agreement and the Merger and the other transactions contemplated hereby, (ii) determined that the Merger is consistent with the long-term business strategy of Parent and is in the best interests of the stockholders of Parent and is on terms that are fair to such stockholders and (iii) adopted a resolution declaring the Merger advisable.

5.6 Financing. Parent has available to it all funds necessary to consummate the transactions contemplated by this Agreement.

5.7 No Vote Required. No vote of the holders of any class or series of capital stock of Parent is necessary in connection with the execution and delivery of this Agreement by Parent and Merger Sub and the consummation of the Merger and the other transactions contemplated by this Agreement.

5.8 Interim Operations of Merger Sub. Merger Sub is a direct, wholly-owned subsidiary of Parent, was formed solely for the purpose of engaging in the transactions contemplated hereby, has engaged in no other business activities and has conducted its operations only as contemplated hereby.

SECTION 6

6. Pre-Closing Covenants. With respect to the period between the execution of this Agreement and the earlier of the termination of this Agreement and the Effective Time of the Merger:

6.1 General. Each of the Parties will use commercially reasonable efforts to take, or cause to be taken, all action and to do all things necessary, proper, or advisable in order to consummate and make effective the Merger and the transactions contemplated by this Agreement (including satisfaction, but not waiver, of the closing conditions set forth in Section 8 below) as promptly as practicable.

6.2 Notices and Consents. Company will give any notices to third parties and will use commercially reasonable efforts to obtain any third party consents that are required in connection with the matters identified in Section 4.5(a) of the Company Schedule. Each of the Parties will give any notices to, make any filings with, and use its commercially reasonable efforts to

obtain any authorizations, consents, and approvals of governments and governmental agencies in connection with the matters identified in Section 4.5(b) of the Company Schedule.

6.3 Operation of Business. Company agrees, except to the extent that Parent shall otherwise consent in writing (such consent or notification that consent will not be given not to be unreasonably withheld, delayed or conditioned) and except as expressly contemplated by this Agreement, to carry on its activities in the usual, regular and Ordinary Course of Business, to pay its debts and Taxes when due, to pay or perform other obligations when due, and, to the extent consistent with such business, use its commercially reasonable efforts consistent with past practice and policies to preserve intact its present business organizations, keep available the services of its present officers and key employees and preserve its relationships with customers, suppliers, distributors, licensors, licensees, and others having business dealings with it, all with the goal of preserving unimpaired its goodwill and ongoing businesses at the Effective Time of the Merger. Company shall promptly notify Parent of any event, occurrence or emergency not in the Ordinary Course of Business of Company, and any material event involving Company. Except as set forth on Schedule 6.3 hereto and without limiting the generality of the foregoing, Company shall not, without the prior written consent of Parent (such consent or notification that consent will not be given not to be unreasonably withheld, delayed or conditioned):

(a) make any expenditures or enter into any commitment or transaction exceeding $50,000 individually or $100,000 in the aggregate or any commitment or transaction of the type described in Section 4.18 hereof;

(b) (i) sell, license or transfer to any person or entity any rights to any Intellectual Property or enter into any agreement with respect to any Intellectual Property with any person or entity or with respect to any intellectual property of any person or entity, other than in the Ordinary Course of Business, (ii) buy or license any intellectual property or enter into any agreement with respect to the intellectual property of any person or entity, other than the licensing of Company Products, (iii) enter into any agreement with respect to the development of any intellectual property with a third party, (iv) or change pricing or royalties charged by Company to its customers or licensees, or the pricing or royalties set or charged by persons who have licensed intellectual property to Company;

(c) enter into or amend any contract pursuant to which any other party is granted marketing, distribution, development or similar rights of any type or scope with respect to any products or technology of Company;

(d) amend or otherwise modify any material term of (or agree to do so), or violate the terms of, any of the contracts and agreements set forth or described in the Company Schedule;

(e) commence or settle any litigation other than the Land Use Litigation or to enforce its rights under this Agreement;

(f) declare, set aside or pay any dividends on or make any other distributions (whether in cash, stock or property) in respect of any Company Capital Stock, or split,

combine or reclassify any Company Capital Stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of Company Capital Stock, or repurchase, redeem or otherwise acquire, directly or indirectly, any shares of Company Capital Stock (or options, warrants or other rights exercisable therefor);

(g) issue, grant, deliver or sell or authorize or propose the issuance, grant, delivery or sale of, or purchase or propose the purchase of, any shares of Company Capital Stock or securities convertible into, or subscriptions, rights, warrants or options to acquire, or other agreements or commitments of any character obligating Company to issue or purchase any such shares or other convertible securities;

(h) cause or permit any amendments to the Company Charter Documents;

(i) acquire or agree to acquire by merging or consolidating with, or by purchasing any assets or equity securities of, or by any other manner, any business or any corporation, partnership, association or other business organization or division thereof, or otherwise acquire or agree to acquire any assets which are material, individually or in the aggregate, to the Company's business;

(j) sell, lease, license or otherwise dispose of any properties or assets, except properties or assets in the Ordinary Course of Business;

(k) incur any indebtedness for borrowed money or guarantee any indebtedness or issue or sell any debt securities or guarantee any debt securities of others;

(l) grant any loans to others or purchase debt securities of others or amend the terms of any outstanding loan agreement;

(m) grant any severance or termination pay to any director, officer, employee, consultant or contract worker other than as expressly contemplated under this Agreement;

(n) adopt or amend any employee benefit plan, or enter into any employment contract, pay or agree to pay any special bonus or special remuneration to any director, employee, consultant or contract worker, or increase the salaries or wage rates of its employees, consultants or contract workers (other than as expressly contemplated under this Agreement);

(o) revalue any of their assets, including without limitation writing down the value of inventory or writing off notes or accounts receivable except in the Ordinary Course of Business;

(p) pay, discharge or satisfy any claim, liability or obligation (absolute, accrued, asserted or unasserted, contingent or otherwise), other than the payment, discharge or satisfaction in the Ordinary Course of Business of liabilities reflected or reserved against in the Most Recent Balance Sheet or any payment, discharge or satisfaction less than $50,000;

(q) make or change any material election in respect of Taxes, adopt or change any accounting method in respect of Taxes, enter into any closing agreement, settle any

claim or assessment in respect of Taxes, or consent to any extension or waiver of the limitation period applicable to any claim or assessment in respect of Taxes;

(r) enter into any strategic alliance or joint marketing arrangement or agreement;

(s) take any action to accelerate the vesting schedule of any of the outstanding Company Options, Stock Rights or Company Capital Stock, except as a result of the termination of Company Option Plans;

(t) hire or terminate any employees or contract workers, or encourage any employees or contract workers to resign from Company, other than as expressly contemplated under this Agreement; or

(u) take, or agree in writing or otherwise to take, any of the actions described in this Section 6.3, or knowingly take any other action that would (i) prevent Company from performing in all material respects or cause Company not to perform in all material respects its covenants hereunder or (ii) cause or result in the material breach of any of the Company's representations and warranties contained herein.

6.4 Confidentiality; Access to Information.

(a) The parties acknowledge that Company and Parent have previously executed a Nondisclosure Agreement, dated as of August 1, 2001, as amended (the "**Nondisclosure Agreement**"), which Nondisclosure Agreement will continue in full force and effect in accordance with its terms.

(b) Company will afford Parent and its accountants, counsel and other representatives reasonable access during normal business hours, upon reasonable notice, to the properties, books, records and key personnel of Company during the period prior to the Effective Time to obtain all information concerning the business, including the status of product development efforts, properties, results of operations and personnel of Company, as Parent may reasonably request. Neither such access nor furnishing of information to Parent and its representatives, nor any investigation by Parent and its representatives, whether before or after the date hereof, shall in any way diminish or otherwise affect Parent's right to rely on any representation or warranty made by Company hereunder.

(c) Company acknowledges that the Parent Common Stock is publicly traded and that any information obtained during the course of this transaction could be considered to be material non-public information within the meaning of federal and state securities laws. Accordingly, Company acknowledges and agrees not to engage in any transactions in the Parent Common Stock in violation of applicable insider trading laws.

6.5 Notice of Developments. Each Party will give prompt written notice to the others of any material adverse development causing a breach of any of its own representations and warranties in Section 4 or Section 5 above. No disclosure by any Party pursuant to this Section 6.5, however, shall be deemed to amend or supplement the Company Schedule or the Parent Schedule or

to prevent or cure any misrepresentation, breach of warranty, breach of covenant or diminish or otherwise affect the right of Parent to rely on the representations made by the Company.

6.6 Exclusivity. Until the earlier of the termination of this Agreement in accordance with Section 10 hereof and the Effective Time of the Merger, Company will not directly or indirectly, through any officer, director, employee, shareholder, Affiliate, representative or agent of Company or otherwise, take any action to solicit, initiate, seek, support, entertain, knowingly encourage or assist any inquiry, proposal or offer from, furnish any information to, or participate in any negotiations with, any third party regarding any acquisition or consolidation with or involving Company or any sale of any equity interests or assets (other than sales of inventory or other assets in the Ordinary Course of Business) of Company (a "**Third Party Transaction**"). Company agrees that any such negotiations (other than negotiations with Parent) in progress as of this Agreement will be suspended and that, in no event, will Company accept or enter into an agreement concerning any such Third Party Transaction. Company will notify Parent promptly after receipt by it (or any of its officers, directors, employees, shareholder, Affiliates, representatives or agents) of any unsolicited written, oral, or electronic proposal for, or inquiry respecting, any Third Party Transaction or any request for information in connection with such a proposal or inquiry, or for access to the properties, books or records relating to Company by any person or entity that informs Company that it is considering making, or has made, such a proposal or inquiry. Such notice to Company will indicate in reasonable detail the identity of the person or entity making the proposal or inquiry and the terms and conditions of such proposal or inquiry.

6.7 Information Statement; Board Recommendation.

(a) As promptly as practicable after the execution of this Agreement and with the cooperation of Parent as necessary, Company shall prepare an information statement to be sent to the holders of Company Capital Stock (the "**Information Statement**"). Each of Parent and Company shall provide promptly to the other such information concerning its business and financial statements and affairs as, in the reasonable judgment of the providing party or its counsel, may be required or appropriate for inclusion in the Information Statement. As promptly as practicable thereafter, Company shall cause the Information Statement to be mailed to its shareholders.

(b) The Information Statement shall solicit the approval of this Agreement and the Merger and include the recommendation of the Board of Directors of Company to Company's shareholders that they vote in favor of approval of this Agreement and the Merger.

6.8 Shareholder Approval.

(a) Company shall call and hold the Company Shareholders' Meeting or solicit the written consent of its shareholders as promptly as practicable after the mailing of the Information Statement for the purpose of voting upon the approval of this Agreement and the Merger, and Company shall use all reasonable efforts to hold the Company Shareholders' Meeting or obtain such written consent as soon as practicable after the date hereof. Company shall use all reasonable efforts to solicit from its shareholders proxies (or written consents) in favor of the approval of this Agreement and the Merger and shall take all other commercially reasonable action necessary or advisable to secure the vote or consent of shareholders required by CCC to obtain such

approval. The Company shall take all other action reasonably necessary or advisable to promptly and expeditiously secure any vote or consent of shareholders required by applicable law and its Articles of Incorporation and Bylaws to effect the Merger.

(b) Neither the Board of Directors of Company nor any committee thereof shall withdraw, amend or modify, or propose or resolve to withdraw, amend or modify in a manner adverse to Parent, the recommendation of the Board of Directors of Company that Company's shareholders vote in favor of and adopt and approve this Agreement and the Merger.

6.9 Company 401(k) Plan. At Parent's election, Company shall terminate, effective as of the day immediately preceding the Effective Time, any and all 401(k) plans sponsored or maintained by Company. In such event, Parent shall receive from Company evidence that Company's plan(s) and / or program(s) have been terminated pursuant to resolutions of Company's Board of Directors (the form and substance of such resolutions shall be subject to review and approval of Parent), effective as of the day immediately preceding the Effective Time. Company shall amend and restate its 401(k) plan(s) to incorporate all applicable GUST and EGTRRA amendments no later than the day immediately preceding the Effective Time. Prior to the Closing Date, Parent shall receive from Company evidence that Company's 401(k) plan(s) have been properly amended no later than the day immediately preceding the Effective Time.

SECTION 7

7. Post-Closing Covenants. With respect to the period following the Effective Time of the Merger:

7.1 S-8 Registration. As promptly as practicable after the Closing Date, Parent agrees to file with the SEC, if available for use by Parent, a registration statement on Form S-8 registering a number of shares of Parent Common Stock equal to the number of shares of Parent Common Stock issuable upon the exercise of all options to purchase Parent Common Stock ("**Parent Options**") issued to employees of Company continuing employment with Parent after the Closing Date.

7.2 Severance or Bonus Payments. As of the Closing Date, Parent agrees to reserve sufficient funds for severance payments to be paid to employees of Company that do not receive offers of continuing employment from Parent. The amount of severance that each such employee shall receive shall be as set forth on Schedule 7.2(i) hereto. In addition, as promptly as practicable after the Closing Date, certain employees identified on Schedule 7.2(ii) shall receive a bonus as set forth on Schedule 7.2(ii).

7.3 Retention Pool. Parent agrees to grant that number of options to purchase Parent Common Stock to certain employees of the Company set forth on Schedule 7.3 who continue as employees of Parent such that the total aggregate number of options granted pursuant to this Section 7.3 shall not exceed 5,500,000. Such options will be granted with an exercise price equal to the fair market value of Parent Common Stock on the date of grant. Such options will vest twenty-five percent (25%) on the date that is one (1) year after the Closing Date and 1/36th per

month thereafter, subject to the optionees continued employment with Parent and unless otherwise approved by the Board of Directors of Parent. Parent further agrees to make the cash payments and grant the shares of restricted stock to certain employees of Company who continue as employees of Parent as set forth on Schedule 7.3.

7.4 Indemnification of Officers and Directors.

(a) For a period of six years from and after the Closing Date, Parent and the Surviving Corporation agree to indemnify (including the advancement of expenses) and hold harmless all past and present officers and directors of Company to the same extent such individuals are indemnified as of the date of this Agreement by Company pursuant to Company's Amended and Restated Articles of Incorporation, Bylaws, employment agreements and/or indemnification agreements or under applicable law for acts or omissions which occurred at or prior to the Effective Time. This Section 7.4 shall survive the consummation of the Merger and is intended to be for the benefit of, and shall be enforceable by, all past and present officers and directors of Company, their respective heirs and personal representatives and shall be binding upon Parent and the Surviving Corporation.

(b) For a period of six years from and after the Closing Date, Parent and the Surviving Corporation agree to provide officers' and directors' liability insurance with respect to acts or omissions occurring prior to the Effective Time covering each past and present officer and director of Company covered by Company's officers' and directors' liability insurance policy on terms and amounts no less favorable than those of such policy in effect on the date of this Agreement; provided that, in satisfying its obligations under this Section 7.4, Parent or the Surviving Corporation, as the case may be, shall not be obligated to pay premiums in excess of 200% of the amount per annum Company paid in its last full fiscal year.

(c) If Parent, the Surviving Corporation or any of their successors or assigns (i) consolidates with or merges into any other person and shall not be the continuing or surviving corporation or entity of such consolidation or merger, or (ii) transfers or conveys all or substantially all of its properties and assets to any person, then, and in each such case, to the extent necessary, proper provision shall be made so that the successors and assigns of Parent or the Surviving Corporation, as the case may be, shall assume the obligations set forth in this Section 7.4.

(d) The rights of each past and present officer and director of Company under this Section 7.4 shall be in addition to any rights such individual may have under Company's Amended and Restated Articles of Incorporation or Bylaws or under applicable law.

7.5 Employee Benefits Matters. On and for one year after the Effective Time, Parent and/or any of Parent's subsidiaries shall arrange for each eligible employee who is employed by Parent during such period and who resides in the United States and was participating in any of the Company employee benefit plans immediately before the Effective Time, to participate in any counterpart benefit plans in which employees of Parent participate (the "**Counterpart Plans**"), in accordance with the eligibility criteria thereof, provided that: (i) such participants shall receive full credit for years of service with the Company and any of its subsidiaries to the extent such service is taken into account under such Company employee benefit plans and to the extent such service credit

does not result in the duplication of benefits of benefit accruals and (ii) such participants shall participate in the Counterpart Plans on terms no less favorable than those offered by the Parent to its similarly situated employees. Notwithstanding the foregoing, Parent or any of it subsidiaries may continue one or more of Company employee benefit plans, in which case Parent and its subsidiaries shall have satisfied their obligations hereunder with respect to the benefits so provided. Nothing in this Section 7.5 shall be construed to entitle any employee to continue his or her employment for any period of time or prevent Parent from amending any of the Counterpart Plans or Company employee benefit plans at any time.

7.6 Payment of Wasserman Settlement. Parent shall pay, as due, the scheduled payments of no more than $1,500,000 required to be paid by Company pursuant to the terms of that certain Settlement Agreement and Mutual Releases by and among Company, Larry Wasserman and the other parties named therein, effective as of December 11, 2001 (the "Wasserman Settlement").

SECTION 8

8. Conditions to Obligations to Close.

8.1 Conditions to Parent's and Merger Sub's Obligation to Close. The obligations of Parent and Merger Sub to consummate the transactions to be performed by them in connection with the Closing is subject to satisfaction of the following conditions:

(a) the representations and warranties set forth in Section 4 above shall be true and correct as of the date of this Agreement and as of the Closing with the same force and effect as if then made, except to the extent that such representations and warranties refer to a specific date, in which case such representations and warranties shall have been true and correct as of such specified date; provided, however, this Section 8.1(a) shall be deemed to be satisfied so long as any failures of such representations and warranties to be so true and correct, in the aggregate, do not constitute a Company Material Adverse Effect as of the Closing (it being understood that, for purposes of determining the accuracy of the representations and warranties of the Company, all "Material Adverse Effect" qualifications and other qualifications based on the word "material" contained in such representations and warranties shall be disregarded).

(b) Company shall have performed and complied with all of its covenants hereunder in all material respects through the Closing;

(c) no action, suit, or proceeding shall be pending before any court or quasi-judicial or administrative agency of any federal, state, local, or foreign jurisdiction or before any arbitrator wherein an unfavorable injunction, judgment, order, decree, ruling, or charge would (A) prevent consummation of any of the transactions contemplated by this Agreement, (B) cause any of the transactions contemplated by this Agreement to be rescinded following consummation, (C) affect materially and adversely the right of Parent to control Company following the Effective Time of the Merger, or (D) affect materially and adversely the right of Company to own its assets (including without limitation its intellectual property assets) and to operate its businesses (and no such injunction, judgment, order, decree, ruling or charge shall be in effect) and no law, statute,

ordinance, rule, regulation or order shall have been enacted, enforced or entered which has caused any of the effects under clause (A), (B), (C), or (D) of this Section 8.1(c) to occur;

(d) Company shall have delivered to Parent a certificate signed by its President and Secretary to the effect that each of the conditions specified above in 8.1(a) to 8.1(c), (h), (i), (l), (m) and (j) is satisfied in all respects;

(e) Company shall have procured all of the consents set forth on Schedule 8.1(e) and any other consent the absence of which would materially and adversely affect the right of Parent to control Company following the Effective Time of the Merger or the right of Company to own its material assets (including without limitation its intellectual property assets) and to operate its business;

(f) Company shall provide Parent with certificates of good standing from the secretary of state or other appropriate agency for the states of California, Illinois, Colorado, Virginia, Texas and Georgia.

(g) the Parties shall have received all authorizations, consents and approvals of governments and governmental agencies referred to in Section 4.5(b) hereof or disclosed in Section 4.5(b) of the Company Schedule;

(h) this Agreement and the Merger shall have been approved and adopted by the requisite affirmative vote of the holders of Company Common Stock and Company Preferred Stock required by Company Charter Documents and applicable law, and the holders of no more than ten percent (10%) of the outstanding Company capital stock shall have exercised or be eligible to exercise any appraisal rights with respect to the Merger;

(i) the Third Amended and Restated Registration Rights Agreement dated March 13, 2001, as amended, to which the Company and certain Company shareholders are a party (the "**Registration Rights Agreement**") shall have been terminated;

(j) the Fourth Amended and Restated Shareholders Agreement dated April 30, 2002, as amended, to which the Company and certain Company shareholders are a party shall have been terminated;

(k) Parent shall have received an opinion of Gunderson Dettmer Stough Villeneuve Franklin & Hachigian, LLP, counsel to Company, in the form of Exhibit B attached hereto;

(l) since the date of this Agreement, there shall not have occurred a Company Material Adverse Effect; and

(m) the Holders of Company Preferred Stock shall agree to either indemnify Parent and Company and hold Parent and Company harmless against any and all losses, expenses and liabilities, incurred in connection with the Land Use Litigation or provide, at such shareholders' own expense, an insurance policy to cover Parent and Company any such losses,

expenses incurred in connection with the Land Use Litigation; provided, however, that in no event shall any such holder be liable under any circumstance for an amount in excess of any Merger Consideration actually received by such holder.

Parent may waive any condition (in whole or in part) specified in this Section 8.1 if it executes a writing so stating at or prior to the Closing.

8.2 Conditions to Company's Obligation. The obligation of Company to consummate the transactions to be performed by it in connection with the Closing is subject to satisfaction of the following conditions:

(a) the representations and warranties set forth in Section 5 above shall be true and correct as of the date of this Agreement and as of the Closing with the same force and effect as if then made, except to the extent that such representations and warranties refer to a specific date, in which case such representations and warranties shall have been true and correct as of such specified date, and except for changes contemplated by this Agreement; *provided, however,* this Section 8.2(a) shall be deemed to be satisfied so long as any failures of such representations and warranties to be so true and correct, in the aggregate, do not constitute a Parent Material Adverse Effect as of the Closing (it being understood that, for purposes of determining the accuracy of the representations and warranties of the Parent, all "Material Adverse Effect" qualifications and other qualifications based on the word "material" contained in such representations and warranties shall be disregarded).

(b) Parent and Merger Sub shall have performed and complied with all of their respective covenants hereunder in all material respects through the Closing Date;

(c) a duly authorized officer of Parent and Merger Sub shall have delivered to Company a certificate to the effect that each of the conditions specified above in Section 8.2(a) to 8.2(b) (inclusive) is satisfied in all respects;

(d) this Agreement and the Merger shall have been approved and adopted by the requisite affirmative vote of the holders of Company Common Stock and Company Preferred Stock required by Company Charter Documents and applicable law;

(e) no unfavorable injunction, judgment, order, decree, ruling, or charge would (A) prevent consummation of any of the transactions contemplated by this Agreement, or (B) cause any of the transactions contemplated by this Agreement to be rescinded following consummation (and no such injunction, judgment, order, decree, ruling or charge shall be in effect) and no law, statute, ordinance, rule, regulation or order shall have been enacted, enforced or entered which has caused any of the effects under clause (A) or (B) of this Section 8.1(c) to occur; and

(f) Company shall have received an opinion of Wilson Sonsini Goodrich & Rosati, counsel to Parent, in the form of Exhibit C attached hereto.

Company may waive any condition (in whole or in part) specified in this Section 8.2 if it executes a writing so stating at or prior to the Closing.

SECTION 9

9. Survival of Representations, Warranties and Covenants; Escrow.

9.1 Survival of Representations and Warranties. All representations and warranties of Company, Parent and Merger Sub in this Agreement or in any certificate delivered at the Closing pursuant to Section 8 of this Agreement shall survive the Merger for a period of twelve (12) months from the Effective Time of the Merger; *provided however*, that in the event that Parent delivers an Officer's Certificate (defined below) during the twelve (12) month period following the Effective Time, the representations and warranties of Company shall survive past such twelve (12) month period with respect to the subject matter of such Officer's Certificate. The covenants and agreements of the Parties shall survive until the expiration of the time period for their performance as provided herein. Following the Effective Time of the Merger, the remedies of Parent for breach of any of the foregoing shall be as set forth in Section 9.2. The Company acknowledges that Parent is entitled to rely on the representations and warranties made by the Company regardless of any independent investigation or diligence efforts by Parent.

9.2 Escrow Arrangements.

(a) Escrow Funds. As soon as practicable after the Effective Time, Parent will deposit the Cash Merger Consideration portion of the Escrow Amount comprised of 10% of the Cash Merger Consideration (the "**Primary Escrow Fund**") and as soon as practicable after receipt of the Litigation Proceeds (if any), Parent or Company will deposit seven hundred and fifty thousand dollars ($750,000) of the Litigation Proceeds (the "**Secondary Escrow Fund**," together with the Primary Escrow Fund are referred to as the "**Escrow Funds**") without any act of any Company shareholder, with U.S. Bank, N.A. as Escrow Agent to be governed by the terms set forth herein. The Parties agree that the cost and expense of operating the Escrow Funds will be paid by Parent. Pursuant to Section 3.8 hereof, Parent shall (i) withhold from the distribution of the Cash Merger Consideration and contribute to the Primary Escrow Fund an amount equal to ten percent (10%) of the Cash Merger Consideration, which the holders of Company Preferred Stock would otherwise be entitled to receive under Section 3.1 and (ii) withhold from the distribution of the Litigation Proceeds paid to Parent or Company and contribute to the Secondary Escrow Fund an amount equal to seven hundred and fifty thousand dollars ($750,000) of the Litigation Proceeds, which certain holders of Company Preferred Stock would otherwise be entitled to receive under Section 3.1.

(b) Indemnification. The shareholders of Company shall indemnify and hold harmless Parent and Merger Sub and each of their respective Affiliates (the "**Parent Indemnified Parties**") for, from and against, and the Primary Escrow Fund shall be available (and, except for fraud, the sole and exclusive remedy) to compensate the Parent Indemnified Parties for, any and all actions, suits, proceedings, hearings, investigations, charges, complaints, claims, demands, injunctions, judgments, orders, decrees, rulings, damages, dues, penalties, fines, costs, amounts paid in settlement, liabilities, obligations, taxes, liens, losses, diminutions in value, expenses, and fees, including court costs and reasonable attorneys' fees and expenses in connection with any action, suit or proceeding (collectively "**Losses**") that the Parent Indemnified Parties have incurred, suffered, or paid by reason of (i) any inaccuracy or breach by Company of any representations or warranties contained herein (including the Company Schedule) set forth in an

Officer's Certificate delivered by Parent during the 12 month period following the Effective Time or (ii) any breach or failure to perform by Company of any covenant or agreement of Company contained herein (including the Company Schedule). In addition, the holders of Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock of Company shall indemnify and hold harmless the Parent Indemnified Parties for, from and against, and the Secondary Escrow Fund shall be available (and, except for fraud, the sole and exclusive remedy) to compensate the Parent Indemnified Parties for, any and all Losses that the Parent Indemnified Parties have incurred, suffered, or paid by reason of any claim or action taken in connection with the matter set forth on Schedule 9.2(b) (the "**Scheduled Matter**"). In the event that a Parent Indemnified Party incurs, suffers or pays any Losses in respect to the Scheduled Matter (the "**Scheduled Losses**") and Parent or Company has not, as of the date of the Officer's Certificate, received any Litigation Proceeds, then the Primary Escrow Fund shall be available to compensate the Parent Indemnified Party for such Scheduled Losses. If Parent or Company later receives the Litigation Proceeds then an amount equal to the Scheduled Losses paid to the Parent Indemnified Parties out of the Primary Escrow Fund shall be redistributed from the Secondary Escrow Fund to the Primary Escrow Fund and the remaining portion of the Secondary Escrow Fund shall remain available until the end of the Escrow Period (as defined below) for any additional Scheduled Losses. After the Closing, resort to the Escrow Funds as set forth herein shall be the sole and exclusive remedy of the Parent Indemnified Parties against Company or any of its directors, officers, representatives, agents or shareholders for any such Losses; provided, however, that in the event of fraud, the shareholders of the Company shall be severally but not jointly liable and in no event for an amount in excess of any Merger Consideration actually received, except in the case of such shareholder's own fraud in which case there shall be no limitation of liability. The Parent Indemnified Parties may not receive any amounts from the Primary Escrow Fund unless and until indemnifiable Losses shall aggregate to more than $200,000, after which time the Parent Indemnified Parties may recover from the Primary Escrow Fund the total of their indemnifiable Losses, including the first $200,000. The amount of indemnifiable Losses required to be paid by the shareholders of Company to a Parent Indemnified Party from the Escrow Funds shall be reduced by the amount of (or if already paid to such Parent Indemnified Party, promptly repaid to such Escrow Fund in the amount of) (1) any tax benefit arising in connection with the payment of such Losses that accrues to such Parent Indemnified Party; provided that such tax benefit is a clear and immediate benefit to Parent rather than a potential benefit to Parent and (2) any recoveries actually received by such Parent Idemnified Party under insurance policies or via contribution or other related payments received from third parties; provided, that such amount shall be reduced by any amount of increase in Parent insurance premiums to be incurred as a result of Parent filing a claim in and any other expenses or costs incurred in connection with the Losses. In addition, the amount of indemnifiable Losses required to be paid by the shareholders of Company to a Parent Indemnified Party from the Escrow Funds shall be increased by the amount of any tax liability arising in connection with the payment of such Losses that accrues to such Parent Indemnified Party; provided that such tax liability is a clear and immediate liability to Parent rather than a potential liability to Parent.

(c) Escrow Period; Distribution upon Termination of Escrow Periods. Subject to the following requirements, the Escrow Funds shall remain in existence during the period following the Effective Time for twelve (12) months (the "**Escrow Period**").

(i) At the expiration of the six month anniversary of the Effective Time (the "**Early Release Date**"), a portion of the Primary Escrow Fund shall be released from the Escrow to the appropriate persons who, immediately prior to the Effective Time, were preferred shareholders of the Company, in an amount equal to fifty percent (50%) of the Primary Escrow Fund less an amount equal to the sum of (i) all amounts theretofore distributed out of the Primary Escrow Fund to the Parent Indemnified Parties pursuant to this Section 9 and (ii) an amount equal to such portion of the Primary Escrow Fund which is necessary to satisfy any unsatisfied claims specified in any Officer's Certificates theretofore delivered to the Escrow Agent prior to the Early Release Date. Upon expiration of the Escrow Period, a portion of the remaining Primary Escrow Fund shall be released from Escrow to the appropriate persons who, immediately prior to the Effective Time, were holders of Company Preferred Stock, in an amount equal to the remaining Primary Escrow Fund less an amount equal to such portion of the Primary Escrow Fund which is necessary to satisfy any unsatisfied claims specified in any Officer's Certificates theretofore delivered to the Escrow Agent prior to the end of the Escrow Period, which amount shall remain in the Primary Escrow Fund (and the Primary Escrow Fund shall remain in existence) until such claims have been resolved. As soon as any such claims have been resolved (such resolution to be evidenced by the written agreement of Parent and the Shareholders' Representative (as defined below) or the written decision of the arbitrators as described in Section 9.2(g)), the Escrow Agent shall deliver to the appropriate persons who, prior to the Effective Time, were holders of Company Preferred Stock the remaining portion of the Primary Escrow Fund not required to satisfy any remaining claims. Deliveries of Escrow Amounts to the shareholders of Company pursuant to this Section 9.2(b) shall be made in proportion to their respective original contributions to the Primary Escrow Fund, as calculated by the Shareholders' Representative (as defined below).

(ii) At the expiration of the Early Release Date, a portion of the Secondary Escrow Fund shall be released from the Escrow to the appropriate persons who, immediately prior to the Effective Time, were holders of Series B Preferred Stock, Series C Preferred Stock or Series D Preferred Stock of the Company, in an amount equal to fifty percent (50%) of the Secondary Escrow Fund less an amount equal to the sum of (i) all amounts theretofore distributed out of the Secondary Escrow Fund to the Parent Indemnified Parties pursuant to this Section 9 and (ii) an amount equal to such portion of the Secondary Escrow Fund which is necessary to satisfy any unsatisfied claims specified in any Officer's Certificates theretofore delivered to the Escrow Agent prior to the Early Release Date. In the event that the Litigation Proceeds are received by Parent or Company after the Early Release Date, then the aggregate amount of the Secondary Escrow Fund shall be $375,000. At the Expiration of the Escrow Period, a portion of the Secondary Escrow Fund shall be released from Escrow to the appropriate persons who, immediately prior to the Effective Time, were holders of Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock of Company, in an amount equal to the remaining Secondary Escrow Fund less an amount equal to such portion of the Secondary Escrow Fund which is necessary to satisfy any unsatisfied claims specified in any Officer's Certificates theretofore delivered to the Escrow Agent prior to the end of the Escrow Period, which amount shall remain in the Secondary Escrow Fund (and the Secondary Escrow Fund shall remain in existence) until such claims have been resolved. As soon as such claims have been resolved (such resolution to be evidenced by the written agreement of Parent and the Shareholders' Representative (as defined below) or the written decision of the arbitrators as described in Section 9.2(g)), the Escrow Agent shall deliver to the appropriate persons who, prior to the Effective Time, were holders of Series B Preferred Stock, Series C

Preferred Stock and Series D Preferred Stock of Company the remaining portion of the Secondary Escrow Fund not required to satisfy any remaining claims. Deliveries of Escrow Amounts to the holders of Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock of Company pursuant to this Section 9.2(b) shall be made in proportion to their pro rata ownership interests, as calculated by the Shareholders' Representative.

(d) Protection of Escrow Funds. The Escrow Agent shall hold and safeguard the Escrow Funds during the Escrow Period, shall treat such fund as a trust fund in accordance with the terms of this Agreement and not as the property of Parent and shall hold and dispose of the Escrow Funds only in accordance with the terms hereof. The Escrow Agent shall invest and reinvest moneys on deposit in the Escrow Funds at the joint written instructions received from Parent and the Shareholders' Representative, in any combination of the following: (i) readily marketable direct obligations of the government of the United States or any agency or instrumentality thereof or readily marketable obligations unconditionally guaranteed by the full faith and credit of the government of the United States, (ii) insured certificates of deposit of, or time deposits with, any commercial bank that: (1) is a member of the U.S. Federal Reserve System, (2) issues (or the parent of which issues) commercial paper rated as described in clause (iii), (3) is organized under the laws of the United States or any state thereof, and (4) has combined capital and surplus of at least $1 billion or (iii) commercial paper in an aggregate amount of no more than $1,000,000 per issuer outstanding at any time, issued by any corporation organized under the laws of any state of the United States, rated at least "Prime-1" (or the then-equivalent grade) by Moody's Investors Service, Inc. or "A-1" (or the then-equivalent grade) by Standard & Poor's Rating Services. In the absence of joint written instructions received from the Parent and the Shareholder's Representative, escrow funds shall be invested in a U.S. Bank business money market account, which is FDIC insured. Any interest or other income received on such investment or reinvestment of the Escrow Funds shall become part of the Escrow Funds.

(e) Distributions; Claims Upon Escrow Funds. Upon receipt by the Escrow Agent at any time on or before the last day of the Escrow Period of a certificate signed by any authorized officer of a Parent Indemnified Party (an "**Officer's Certificate**"): (A) stating that such Parent Indemnified Party has incurred or suffered and paid Losses, or in good faith reasonably concludes based on facts and circumstances then known relating to events that already have occurred that it is substantially likely to have to pay, incur or suffer Losses, (B) specifying in reasonable detail the individual items of Losses included in the amount so stated, the date each such item was incurred or suffered and paid, or the basis for such reasonably expected liability, and the nature of the misrepresentation, breach of warranty or claim or in the case of reasonably expected Losses reserved within, to which such item is related, and (C) indicating the amount of cash to be disbursed to such Parent Indemnified Party out of the Escrow Funds, the Escrow Agent shall, subject to the provisions of Section 9.2(f) hereof, deliver to Parent out of the Escrow Funds, as promptly as practicable, such amounts held in the Escrow Funds equal to such Losses.

(f) Objections to Claims. At the time of delivery of any Officer's Certificate to the Escrow Agent, a duplicate copy of such certificate shall be delivered to the Shareholders' Representative (as defined in Section 9.2(h)), and for a period of thirty (30) days after such delivery the Escrow Agent shall make no delivery to such Parent Indemnified Party of any Escrow Amount specified in such Officer's Certificate unless the Escrow Agent shall have received

written authorization from the Shareholders' Representative to make such delivery. After the expiration of such thirty (30) day period, the Escrow Agent shall make delivery of an amount from the Escrow Funds in accordance with such Officer's Certificate and Section 9.2(e) hereof, provided that no such payment or delivery may be made if the Shareholders' Representative shall object in a written statement to the claim made in the Officer's Certificate, and such statement shall have been delivered to the Escrow Agent (with a copy to such Parent Indemnified Party) prior to the expiration of such thirty (30) day period.

(g) Resolution of Conflicts; Arbitration.

(i) In case the Shareholders' Representative shall so object in writing to any claim or claims made in any Officer's Certificate, the Shareholders' Representative and the Parent Indemnified Party shall attempt in good faith to agree upon the rights of the respective parties with respect to each of such claims. If the Shareholders' Representative and such Parent Indemnified Party should so agree, a memorandum setting forth such agreement shall be prepared and signed by both parties and shall be furnished to the Escrow Agent. The Escrow Agent shall be entitled to rely on any such memorandum and distribute amounts from the Escrow Funds in accordance with the terms thereof.

(ii) If no such agreement can be reached after good faith negotiation, either Parent or the Shareholders' Representative may demand arbitration of the matter unless the amount of the damage or loss is at issue in pending litigation with a third party, in which event arbitration shall not be commenced until such amount is ascertained or both parties agree to arbitration; and in either such event the matter shall be settled by arbitration conducted by three (3) arbitrators. Parent and the Shareholders' Representative shall each select one (1) arbitrator, and the two (2) arbitrators so selected shall select a third arbitrator. Each arbitrator shall be an attorney and have at least ten (10) years experience. The arbitrators shall, within ten (10) business days after the last day of any hearings on any motion, issue a definitive ruling on such motion. The arbitrators shall also, within twenty (20) business days from the last day of any hearings regarding the imposition of sanctions or the issuance of any awards, issue a definitive ruling on the imposition of any such sanctions or the issuance of any such award in such arbitration. The arbitrators shall also establish procedures designed to reduce the cost and time for discovery while allowing the parties an opportunity, adequate in the sole judgment of the arbitrators, to discover relevant information from the opposing parties about the subject matter of the dispute. The arbitrators shall rule upon motions to compel or limit discovery and shall have the authority to impose sanctions, including attorneys fees and costs, to the same extent as a court of competent law or equity, should the arbitrators determine that discovery was sought without substantial justification or that discovery was refused or objected to without substantial justification. The arbitrators' decision shall relate solely to whether the Parent Indemnified Party is entitled to receive the contested amount (or a portion thereof) from the Escrow Funds pursuant to the applicable terms of this Agreement. The decision of a majority of the three (3) arbitrators as to the validity and amount of any claim in such Officer's Certificate shall be binding and conclusive upon the parties to this Agreement, and notwithstanding anything in Section 9.2(f) hereof, the Escrow Agent shall be entitled to act in accordance with such decision and make or withhold payments out of the Escrow Funds in accordance therewith. Such decision shall be written and shall be supported by written findings of fact and conclusions, which shall set forth the award, judgment, decree or order awarded by the arbitrators. In the event that the

Escrow Agent has not received evidence of resolution under either Section 9.2(g)(i) or this Section 9.2(g)(ii), Escrow Agent shall continue to hold the Escrow Funds in accordance herewith.

(iii) Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction. Any such arbitration shall be held in Wilmington, Delaware under the rules then in effect of the American Arbitration Association. The non-prevailing party of arbitration pursuant to this Section 9.2(g) shall pay the fees and expenses of each party to such arbitration, as well as the fees of each arbitrator and the administrative fee of the American Arbitration Association. Any liability of the shareholders of Company for such fees and expenses, to the extent that an amount equal to such fees and expenses is remaining in the Escrow Funds, will be paid by Parent and then be recovered by Parent out of the Escrow Funds pursuant to this Section 9.

(h) Shareholders' Representative; Power of Attorney.

(i) In the event that the Merger is approved by the shareholders of Company, effective upon such vote, and without further act of any shareholder, Carl Nichols is appointed as agent and attorney-in-fact (together, the "**Shareholders' Representative**") for and on behalf of shareholders of Company, to give and receive notices and communications, to authorize delivery to the Parent Indemnified Parties cash from the Escrow Funds in satisfaction of claims by such Parent Indemnified Parties, to object to such deliveries, to agree to, negotiate, enter into settlements and compromises of, and demand arbitration and comply with orders of courts and awards of arbitrators with respect to such claims, to take such action and to authorize such other persons as necessary to take such action for the prosecution of the Land Use Litigation pursuant to Section 3.10 hereof, and to take all actions necessary or appropriate in the judgment of Shareholders' Representative for the accomplishment of the foregoing. Such agency may be changed by the shareholders of Company from time to time upon not less than thirty (30) days' prior written notice to Parent and Escrow Agent; provided that the Shareholders' Representative may not be removed unless holders of a majority in interest of the Escrow Amount in the Escrow Funds agree to such removal and to the identity of the substituted agent. No bond shall be required of the Shareholders' Representative, and the Shareholders' Representative shall not receive compensation for his or her services. Notices or communications to or from the Shareholders' Representative shall constitute notice to or from each of the shareholders of Company.

(ii) The Shareholders' Representative shall at all times act in his or her capacity as Shareholders' Representative in a manner that the Shareholders' Representative believes to be in the best interest of the shareholders of Company. The Shareholders' Representative may consult with legal counsel, independent public accountants and other experts selected by it and shall not be liable for any action taken or omitted to be taken in good faith by it in accordance with the advice of such counsel, accountants or experts. The Shareholders' Representative shall not have any duty to ascertain or to inquire as to the performance or observance of any of the terms, covenants or conditions of this Agreement. As to any matters not expressly provided for in this Agreement, the Shareholders' Representative shall not exercise any discretion or take any action. The Shareholders' Representative shall have no ability to amend the terms of this Agreement.

(iii) The Shareholders' Representative shall not be liable for any act done or omitted hereunder as Shareholders' Representative while acting in good faith and in the exercise of reasonable judgment. With respect to matters pertaining to the Escrow Funds, the shareholders of Company on whose behalf the Escrow Amount was contributed to the Escrow Funds shall severally (but not jointly) indemnify the Shareholders' Representative and hold the Shareholders' Representative harmless against any loss, liability or expense incurred without negligence or bad faith on the part of the Shareholders' Representative and arising out of or in connection with the acceptance or administration of the Shareholders' Representative's duties hereunder, including the reasonable fees and expenses of any legal counsel retained by the Shareholders' Representative, and in the event there are any remaining funds in the Escrow Funds to be distributed to shareholders of Company at the termination of the Escrow Period, such funds shall first satisfy any such loss, liability, or expense incurred by the Shareholders' Representative and thereafter the Shareholders' Representative shall be entitled to recover any such expenses from the Escrow Funds prior to the distribution of funds to the shareholders. With respect to matters pertaining to the Land Use Litigation, the holders of Series B Preferred, Series C Preferred and Series D Preferred shall severally (but not jointly) indemnify the Shareholders' Representative and hold the Shareholders' Representative harmless against any loss, liability or expense incurred without negligence or bad faith on the part of the Shareholders' Representative and arising out of or in connection with the acceptance or administration of the Shareholders' Representative's duties pursuant to Section 3.10 and hereunder, including the reasonable fees and expenses of any legal counsel retained by the Shareholders' Representative. Notwithstanding the foregoing, in no event shall a shareholder be liable under this Section 9.2(h)(iii) for any amount in excess of any Merger Consideration actually received by such shareholder.

(i) Actions of the Shareholders' Representative. A decision, act, consent or instruction of the Shareholders' Representative shall constitute a decision of all the shareholders for whom a portion of the Escrow Amount otherwise issuable to them are deposited in the Escrow Funds and shall be final, binding and conclusive upon each of such shareholders, and the Escrow Agent and Parent may rely upon any such decision, act, consent or instruction of the Shareholders' Representative as being the decision, act, consent or instruction of each every such shareholder of Company. The Escrow Agent and Parent are hereby relieved from any liability to any person for any acts done by them in accordance with such decision, act, consent or instruction of the Shareholders' Representative.

(j) Third-Party Claims.

(i) If any third party shall notify a Parent Indemnified Party with respect to any matter (referred to as a "**Third Party Claim**"), which may give rise to a claim by such Parent Indemnified Party against the Escrow Funds, then such Parent Indemnified Party shall give notice to the Shareholders' Representative within thirty (30) days of becoming aware of any such Third Party Claim; provided, however, that no delay or failure on the part of such Parent Indemnified Party in notifying the Shareholders' Representative shall relieve the Shareholders' Representative and the shareholders of Company from any obligation hereunder unless the Shareholders' Representative and the shareholders of Company are thereby materially prejudiced (and then solely to the extent of such prejudice).

(ii) In case any Third Party Claim is asserted against a Parent Indemnified Party, and such Parent Indemnified Party notifies the Shareholders' Representative thereof pursuant to Section 9.2(j)(i) above, the Shareholders' Representative and the shareholders of Company will be entitled, if the Shareholders' Representative so elects by written notice delivered to such Parent Indemnified Party within thirty (30) days after receiving such Parent Indemnified Party's notice, to assume the defense thereof, at the expense of the shareholders of Company independent of the Escrow Funds, with counsel reasonably satisfactory to such Parent Indemnified Party so long as:

(1) such Parent Indemnified Party has reasonably determined that Losses which may be incurred as a result of the Third Party Claim do not exceed either individually, or when aggregated with all other Third Party Claims, the total dollar value of the Escrow Funds;

(2) the Third Party Claim involves only money damages and does not seek an injunction or other equitable relief; and

(3) settlement of, or an adverse judgment with respect to, the Third Party Claim is not, in the good faith judgment of such Parent Indemnified Party, likely to establish a precedential custom or practice adverse to the continuing business interests of such Parent Indemnified Party or to increase the tax liability of such Parent Indemnified Party.

If the Shareholders' Representative and the shareholders of Company so assume any such defense, the Shareholders' Representative and the shareholders of Company shall conduct the defense of the Third Party Claim actively and diligently. The Shareholders' Representative and the shareholders of Company shall not compromise or settle such Third Party Claim or consent to entry of any judgment in respect thereof without the prior written consent of such Parent Indemnified Party (which consent may not be unreasonably withheld).

(iii) In the event that the Shareholders' Representative assumes the defense of the Third Party Claim in accordance with Section 9.2(j)(ii) above, such Parent Indemnified Party may retain separate counsel and participate in the defense of the Third Party Claim, but the fees and expenses of such counsel shall be at the expense of such Parent Indemnified Party unless such Parent Indemnified Party shall reasonably determine that there is a material conflict of interest between or among such Parent Indemnified Party and the Shareholders' Representative and the shareholders of Company with respect to such Third Party Claim, in which case the reasonable fees and expenses of such counsel shall be borne by the Shareholders' Representative and the shareholders of the Company out of the Escrow Funds. Such Parent Indemnified Party will not consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim without the prior written consent of the Shareholders' Representative (which consent may not be unreasonably withheld). Such Parent Indemnified Party will cooperate in the defense of the Third Party Claim and will provide reasonable access to documents, assets, properties, books and records reasonably requested by Shareholders' Representative and material to the claim and to all officers, directors and employees reasonably requested by Shareholders' Representative for investigation, depositions and trial.

(iv) In the event that the Shareholders' Representative fails or elects not to assume the defense of such Parent Indemnified Party against such Third Party Claim, which the Shareholders' Representative had the right to assume under Section 9.2(j)(ii) above, such Parent Indemnified Party shall have the right to undertake the defense, and such Parent Indemnified Party shall not compromise or settle such Third Party Claim or consent to entry of any judgment in respect thereof without the prior written consent of the Shareholders' Representative (which consent may not be unreasonably withheld). In the event that the Shareholders' Representative is not entitled to assume the defense of such Parent Indemnified Party against such Third Party Claim pursuant to Section 9.2(j)(ii) above, such Parent Indemnified Party shall have the right to undertake the defense, consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim in any manner it may deem appropriate (and such Parent Indemnified Party need not consult with, or obtain any consent from, the Shareholders' Representative in connection therewith); provided, however, that except with the prior written consent of the Shareholders' Representative (which consent may not be unreasonably withheld), no settlement of any such claim or consent to the entry of any judgment with respect to such Third Party Claim shall alone be determinative of the validity of the claim against the Escrow Funds. In each case, such Parent Indemnified Party shall conduct the defense of the Third Party Claim actively and diligently, and the Shareholders' Representative and the shareholders of Company will cooperate with such Parent Indemnified Party in the defense of that claim and will provide reasonable access to documents, assets, properties, books and records reasonably requested by such Parent Indemnified Party and material to the claim and to make available all individuals reasonably requested by such Parent Indemnified Party for investigation, depositions and trial.

(k) Escrow Agent's Duties.

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

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

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

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

(v) The Escrow Agent may resign as Escrow Agent at any time with or without cause by giving at least thirty (30) days' prior written notice to each of Parent and the Shareholders' Representative, such resignation to be effective thirty (30) days following the date such notice is given. In addition, Parent and the Shareholders' Representative may jointly remove the Escrow Agent as escrow agent at any time, with or without cause, by an instrument (which may be executed in counterparts) given to the Escrow Agent, which instrument shall designate the effective date of such removal. In the event of any such resignation or removal, a successor escrow agent which shall be a bank or trust company having its principal executive offices in California or New York and having a combined capital and surplus of not less than $500,000,000, shall be appointed by Parent with the approval of the Shareholders' Representative, which approval shall not be unreasonably withheld. Any such successor escrow agent shall deliver to Parent and the Shareholders' Representative a written instrument accepting such appointment, and thereupon it shall succeed to all the rights and duties of the Escrow Agent hereunder and shall be entitled to receive the Escrow Funds. Thereafter, the predecessor Escrow Agent shall be discharged for any further duties and liabilities under this Agreement.

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

(vii) If any controversy arises between the parties to this Agreement, or with any other party, concerning the subject matter of this Agreement, the Escrow Agent will not be required to determine the controversy or to take any action regarding it. The Escrow Agent shall await the arbitrators' decision as specified in Section 9.2(g) and act to make or withhold payments out of the Escrow Funds in accordance with such decision.

(viii) Parent and the Stockholders and their respective successors and assigns shall severally (but not jointly) indemnify and hold Escrow Agent harmless against any and all losses, claims, damages, liabilities, and expenses, including reasonable costs of investigation,

counsel fees, and disbursements that may be imposed on Escrow Agent or incurred by Escrow Agent in connection with the performance of its duties under this Agreement; provided, however, that in no event shall a shareholder be liable for any amount in excess of any Merger Consideration actually received by such shareholder.

SECTION 10

10. Termination.

10.1 Termination of the Agreement. Certain of the Parties may terminate this Agreement at any time prior to the Effective Time as provided below:

(a) Parent and Company may terminate this Agreement as to all Parties by mutual written consent;

(b) Parent may terminate this Agreement by giving written notice to Company (i) in the event the Company has breached any representation, warranty, or covenant contained in this Agreement, or if the representation or warranty of the Company shall have become untrue, in either case such that the conditions set forth in 8.1(a) or 8.1(b) would not be satisfied as of the time of such breach or as of the time such representation and warranty shall have become untrue, provided that if such inaccuracy in the Company's representations and warranties or breach by the Company is curable by the Company through the exercise of its commercially reasonable efforts within twenty (20) business days after delivery of such notice (the **"Cure Period"**), then for so long as Company continues to exercise its commercially reasonable efforts Parent may not terminate this Agreement under Section 10.1(b) prior to the expiration of the Cure Period or (ii) if the Closing shall have failed to occur on or before December 31, 2002 (the "Termination Date") (unless the failure results primarily from Parent itself breaching any representation, warranty, or covenants contained in this Agreement);

(c) Parent may terminate this Agreement immediately if (i) the Board of Directors of Company shall have withdrawn or modified its recommendation of this Agreement or the Merger or shall have resolved to do any of the foregoing, or (ii) Company or any of its Affiliates have breached or otherwise failed to comply with any provision of Section 6.6, unless such breach or failure to comply is inadvertent and immaterial.

(d) Company may terminate this Agreement by giving written notice to Parent at any time prior to the Closing (i) in the event Parent has breached any representation, warranty, or covenant contained in this Agreement, or if any representation or warranty of Parent shall have become untrue, in either case such that the conditions set forth in Section 8.2(a) or 8.2(b) would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become untrue, provided, that if such inaccuracy in Parent's representations and warranties or breach by Parent is curable by Parent through the exercise of its commercially reasonable efforts within twenty (20) business days after delivery of such notice, then for so long as Parent continues to exercise its commercially reasonable efforts Company may not terminate this Agreement under this Section 10.2(e) prior to the expiration of the Cure Period or (ii) if the Closing

shall not have occurred on or before the Termination Date (unless the failure results primarily from Company breaching any representation, warranty, or covenants contained in this Agreement).

10.2 Effect of Termination. If any Party terminates this Agreement pursuant to Section 10.1 above, all rights and obligations of the Parties hereunder shall terminate without any liability of any Party to any other Party; provided, however, that each Party hereto shall remain liable for any willful breach of any representation, warranty, covenant or other provision of this Agreement that occurs prior to the Agreement's termination; and provided, further, that the provisions of Sections 6.4(a), 6.4(c), 10 and 11 shall survive termination.

10.3 Transaction Expenses. Whether or not the Merger is consummated, Parent will bear its own costs and expenses (including legal and accounting fees and expenses and any investment banking or advisory fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby (collectively, the "**Parent Transaction Expenses**"). If the Merger is not consummated, the Company will bear its own costs and expenses (including legal and accounting fees and expenses and any investment banking or advisory fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby (collectively, the "**Company Transaction Expenses**"). If the Merger is consummated, the Company Transaction Expenses shall become an obligation of Parent and the Surviving Corporation.

SECTION 11

11. Miscellaneous.

11.1 Press Releases and Public Announcements. No Party shall issue any press release or make any public announcement relating to the subject matter of this Agreement prior to the Closing without the prior written approval of Parent and Company; provided, however, that Parent may make any public disclosure it believes in good faith is required by applicable law or is reasonable to disclose to its stockholders, or is required by any listing or trading agreement concerning its publicly-traded securities (in which case Parent will use commercially reasonable efforts to advise the Company prior to making the disclosure), and Company may make any reasonable disclosures to Company's shareholders and optionholders as contemplated by this Agreement, including without limitation in connection with seeking required consents.

11.2 No Third-Party Beneficiaries. Except as contemplated by Sections 7.4, this Agreement shall not confer any rights or remedies upon any person other than the Parties and their respective successors and permitted assigns.

11.3 Entire Agreement. This Agreement (including the exhibits hereto) and the Nondisclosure Agreement constitute the entire agreement among the Parties and supersedes any prior understandings, agreements, or representations by or among the Parties, written or oral, to the extent they related in any way to the subject matter hereof.

11.4 Succession and Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties named herein and their respective successors and permitted assigns. No Party may assign either this Agreement or any of its rights, interests, or obligations hereunder

without the prior written approval of the other Parties; provided, however, that Parent may (i) assign any or all of its rights and interests hereunder to one or more of its wholly-owned subsidiaries and (ii) designate one or more of its wholly-owned subsidiaries to perform its obligations hereunder; provided, further, that Parent remains ultimately responsible for performance of its obligations hereunder.

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

11.6 Headings. The Section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

11.7 Notices. All notices and other communications required or permitted hereunder shall be in writing, shall be effective when given, and shall in any event be deemed to be given upon receipt or, if earlier, (a) five (5) days after deposit with the U.S. Postal Service or other applicable postal service, if delivered by first class mail, postage prepaid, (b) upon delivery, if delivered by hand, (c) one business day after the business day of deposit with Federal Express or similar overnight courier, freight prepaid or (d) on the same business day if receipt of facsimile transmission is confirmed, or one business day after the business day of facsimile transmission, if delivered by facsimile transmission, and shall be addressed to the intended recipient as set forth below:

If to Parent or Merger Sub:

1601 S. MoPac Expressway
Austin, Texas 78746
Attn: Tom Hogan, President and CEO
Facsimile No.: 512.741.4325

Copies to:

Wilson Sonsini Goodrich & Rosati
Professional Corporation
8911 Capital of Texas Highway
Westech 360, Suite 3350
Austin, Texas 78759-7247
Attention: Brian Beard, Esq.
Facsimile No: 512-338-5499

Wilson Sonsini Goodrich & Rosati,
Professional Corporation
One Market
Spear Tower, Suite 3300
San Francisco, CA 94105
Attention: Steve L. Camahort, Esq.

Facsimile No: 415-947-2099

If to Company:

The Landmark @ One Market
One Market Street
7th Floor
San Francisco, CA 94105
Attn: Michael Crosno, Chairman, President and CEO
Facsimile No.: 415.975.9801

Copy to:

Gunderson Dettmer Stough Villeneuve Franklin & Hachigian, LLP
155 Constitution Drive
Menlo Park, California 94025
Attention: Christopher D. Dillon, Esq.
Facsimile No: 650-321-2800

If to Shareholders' Representative:

Carl Nichols
Outlook Ventures
135 Main St. #1350
San Francisco, CA 94105
Telephone No.: 415-547-0000 ext. 231
Facsimile No.: 415-547-0010
Mobile: 415-264-7300

If to Escrow Agent:

U.S. Bank, N.A.
One California Street, Suite 2550
San Francisco, California 94111
Attention: Sheila Soares
Facsimile No: 415-273-4591

Any Party may change the address to which notices, requests, demands, claims, and other communications hereunder are to be delivered by giving the other Parties ten (10) days' advance written notice to the other parties pursuant to the provisions above.

11.8 Governing Law. Except to the extent that the Merger is mandatorily governed by California Law, this Agreement shall be governed by and construed in accordance with the domestic laws of the State of Delaware without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware.

11.9 Forum Selection; Consent to Jurisdiction. Subject to Section 9.2(g), all disputes arising out of or in connection with this Agreement shall be solely and exclusively resolved by a court of competent jurisdiction in the State of Delaware. The Parties hereby consent to the jurisdiction of the Delaware Chancery Court and waive any objections or rights as to forum nonconvenience, lack of personal jurisdiction or similar grounds with respect to any dispute relating to this Agreement.

11.10 Amendments and Waivers. No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by Parent and Company. No waiver by any Party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent occurrence.

11.11 Severability. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

11.12 Construction. The Parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement. Any reference to any federal, state, local, or foreign statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise. The word "including" shall mean including without limitation.

11.13 Incorporation of Exhibits and Schedules. The Exhibits and Schedules identified in this Agreement are incorporated herein by reference and made a part hereof.

11.14 Attorneys' Fees. If any legal proceeding or other action relating to this Agreement is brought or otherwise initiated, the prevailing party shall be entitled to recover reasonable attorneys fees, costs and disbursements (in addition to any other relief to which the prevailing party may be entitled).

11.15 Waiver of Jury Trial. EACH OF PARENT, COMPANY AND MERGER SUB HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE ACTIONS OF PARENT, COMPANY OR MERGER SUB IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT HEREOF.

11.16 Specific Performance. The Parties hereto agree that irreparable damage would occur in the event any provision of this Agreement was not performed in accordance with the terms hereof and that the parties shall be entitled to specific performance of the terms hereof, in addition to any other remedy at law or in equity.

[remainder of page intentionally left blank]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on as of the date first above written.

Company: EPICENTRIC, INC.

By: _____
Michael Crosno, President and CEO

Parent: VIGNETTE CORPORATION

By: _____
Tom Hogan, President and CEO

Merger Sub: ATHENS ACQUISITION CORP.

By: _____
Tom Hogan, President

Escrow Agent (for purposes of Section 9 only): U.S. BANK, N.A.

By: _____
Sheila Soares, _____

Shareholders' Representative (for purposes of Section 9 only): SHAREHOLDERS' REPRESENTATIVE

_____
Carl Nichols

MERGER AGREEMENT SIGNATURE PAGE

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Company: EPICENTRIC, INC.

By: _____
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Parent: VIGNETTE CORPORATION

By: _____
Tom Hogan, President and CEO

Merger Sub: ATHENS ACQUISITION CORP.

By: _____
Tom Hogan, President

Escrow Agent (for purposes of Section 9 only): U.S. BANK, N.A.

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By: _____
Michael Cromo, President and CEO

Parent: VIGNETTE CORPORATION

By: _____
Tom Hogan, President and CEO

Merger Sub: ATHENS ACQUISITION CORP.

By: _____
Tom Hogan, President

Escrow Agent (for purposes of Section 9 only): U.S. BANK N.A.

By: _____
Sheila [illegible], Assistant Vice President

Shareholders' Representative (for purposes of Section 9 only): SHAREHOLDERS' REPRESENTATIVE

_____
Carl Nichols

MERGER AGREEMENT SIGNATURE PAGE

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Michael Crosno, President and CEO

Parent: VIGNETTE CORPORATION

By: _____
Tom Hogan, President and CEO

Merger Sub: ATHENS ACQUISITION CORP.

By: _____
Tom Hogan, President

Escrow Agent (for purposes of Section 9 only): U.S. BANK, N.A.

By: _____
Sheila Soares, _____

Shareholders' Representative (for purposes of Section 9 only): SHAREHOLDERS' REPRESENTATIVE

_____
Carl Nichols

MERGER AGREEMENT SIGNATURE PAGE