FORM PTO-1595
1-31-92

04-17-2006

103221135

To the Honorable Commissioner of Patents and Trademarks. Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):

EJASENT, INC.

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

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

Name: VERITAS Operating Corporation

Street Address: 350 Ellis Street

City Mountain View State CA ZIP 94043

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

3. Nature of Conveyance:

- ☐ Assignment
- ☐ Merger
- ☐ Security Agreement
- ☐ Change of Name
- ☒ Other Agreement and Plan of Merger

Execution Date: January 5, 2004

4. Application number(s) or patent number(s):
If this document is being filed together with a new application, the execution date of this application is:

A. Patent Application No.(s)
10/703,683

B. Patent No.(s)

Additional numbers attached? ☐ Yes ☒ No

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

Name: B. Noël Kivlin

Internal Address: Meyertons, Hood, Kivlin, Kowert & Goetzel, P.C.

Street Address: P.O. Box 398

City Austin State TX ZIP 78767-0398

6. Total number of applications and patents involved: 1

7. Total fee (37 CFR 3.41): .....$ 40.00
☐ Fee Authorization Form Enclosed
☒ Authorized to be charged to deposit account

8. Deposit account number: 501505/5760-23601
(Attach a duplicate copy of this page if paying by deposit account)

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.

B. Noël Kivlin
Name of Person Signing
Reg. No. 33,929

Signature

4-6-06
Date

Total number of pages: 70

OMB No. 0651-011 (exp.4/94)

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EXECUTION COPY

AGREEMENT AND PLAN OF MERGER

dated as of

January 5, 2004

among

EJASENT, INC.,

VERITAS OPERATING CORPORATION,

VIKING MERGER CORPORATION,

JASON DONAHUE

and

DAVID SPRENG,
AS HOLDBACK PARTIES' REPRESENTATIVE

TABLE OF CONTENTS

PAGE

PAGE

PAGE

ARTICLE 8
COVENANTS OF THE PARTIES

ARTICLE 9
CONDITIONS TO THE MERGER

ARTICLE 10
SURVIVAL, INDEMNIFICATION

ARTICLE 11
TERMINATION

ARTICLE 12
MISCELLANEOUS

PAGE

INDEX TO EXHIBITS

INDEX TO ANNEXES

AGREEMENT AND PLAN OF MERGER

AGREEMENT AND PLAN OF MERGER (the "**Agreement**") dated as of January 5, 2004, among Ejasent, Inc., a California corporation (the "**Company**"), VERITAS Operating Corporation, a Delaware corporation ("**Parent**"), Viking Merger Corporation, a California corporation and a wholly-owned subsidiary of Parent ("**Merger Subsidiary**"), Jason Donahue (the "**CEO**") and David Spreng, as Holdback Parties' Representative.

WHEREAS, upon the terms and subject to the conditions of this Agreement and in accordance with California Law, Parent, Merger Subsidiary and the Company will enter into a business combination transaction pursuant to which Merger Subsidiary will merge with and into the Company (the "**Merger**"), all issued and outstanding shares of capital stock of the Company will be cancelled and converted into the right to receive the consideration set forth herein, and the Company will survive the Merger as a wholly-owned subsidiary of Parent.

WHEREAS, the Board of Directors of the Company has determined that the business combination transaction is in the best interests of the Company and its shareholders and has approved and adopted this Agreement and the transactions contemplated by this Agreement and has recommended the approval and adoption of this Agreement by the shareholders of the Company.

WHEREAS, concurrently with the execution of this Agreement, and as a condition and inducement to Parent's and Merger Subsidiary's willingness to enter into this Agreement, each of the individuals listed on Annex A hereto shall enter into an Inventions, Trade Secrets and Disclosures Agreement in the form attached hereto as Exhibit A (the "**Inventions, Trade Secrets and Disclosures Agreement**"), each of the individuals listed on Annex B hereto shall enter into an Employment and Non-Competition Agreement in the form attached hereto as Exhibit B (the "**Employment and Non-Competition Agreement**") and each of the holders of capital stock of the Company listed on Annex C shall enter into a Voting Agreement in the form attached hereto as Exhibit C (the "**Voting Agreement**").

WHEREAS, contemporaneously with the Merger, Parent shall pay certain funds to the CEO (as defined below) and as a condition and inducement to Parent's and Merger Subsidiary's willingness to enter into the Merger Agreement, the CEO shall contribute his Pro Rata Share of the Escrow Amount (as defined below) to the Escrow Property (as defined below);

WHEREAS, the Company, the CEO and the Holdback Parties' Representative, on the one hand, and Parent and Merger Subsidiary, on the other hand, desire to make certain representations, warranties, covenants and other agreements in connection with the Merger.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements herein contained, and intending to be legally bound hereby, the parties hereto hereby agree as follows:

ARTICLE 1
DEFINITIONS

Section 1.01. *Definitions.* (a) The following terms, as used herein, have the following meanings:

"Acquisition Proposal" means, other than the transactions contemplated by this Agreement, any offer, proposal or inquiry by a Third Party relating to, or any indication of interest by a Third Party in, (i) any acquisition or purchase, direct or indirect, of any amount in excess of 20% of the assets of the Company or any amount in excess of 20% of any class of equity or voting securities of the Company, (ii) a merger, consolidation, share exchange, business combination, sale of all or substantially all the assets of the Company, reorganization, recapitalization, liquidation, dissolution or other similar transaction involving the Company, or (iii) any other transaction the consummation of which would reasonably be expected to impede, interfere with, prevent or materially delay the Merger or that would reasonably be expected to dilute materially the benefits to Parent of the transactions contemplated hereby.

"Affiliate" means, with respect to any Person, any other Person directly or indirectly controlling, controlled by or under common control with such Person.

"Alliant Agreement" means the engagement letter dated September 23, 2003 between the Company and Alliant Partners.

"Business Day" means a day other than a Saturday, Sunday or any day on which commercial banks in San Francisco, California are authorized or required by law to close.

"California Law" means the California Corporations Code.

"CEO Base Salary" means $[redacted]

"CEO Employment Agreement" means the Amended and Restated Executive Employment Agreement dated as of October 29, 2003 between the Company and the CEO.

"CEO Escrow Amount" means [redacted] of the CEO Payment Amount.

"CEO Gross-Up" means the sum of all amounts payable by the Company, if any, to the CEO with respect to any Taxes imposed on any payments or benefits paid to the CEO in connection with this Agreement and the transactions contemplated hereby that may be deemed to constitute "parachute payments" with the meaning of Section 280G of

the Code, to the extent that the CEO shall not have waived or released his rights to any such amounts prior to the Effective Time.

"**CEO Payment Amount**" means, to the extent that the CEO is entitled to such amount in connection with this Agreement and the transactions contemplated hereby, (A) [redacted]% of the sum of (i) the CEO Base Salary *plus* (ii) the difference of [redacted] *minus* the Debt Repayment Amount *minus* the Warrant Termination Payment Amount *minus* the Change of Control Payment Amount *minus* the Transaction Expense Excess Amount, *minus* (B) the CEO Base Salary, *plus* (C) the CEO Gross-Up, as set forth on the Determination Certificate.

"**Change of Control Agreements**" means the Settlement Agreement, the D&T Agreement and the E*Trade Agreement.

"**Change of Control Payment Amount**" means the sum of all amounts payable in full satisfaction of the Change of Control Agreements, as set forth on the Determination Certificate.

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

"**Company Balance Sheet**" means the audited balance sheet of the Company as of December 31, 2002 and the footnotes thereto.

"**Company Balance Sheet Date**" means December 31, 2002.

"**Company Common Stock**" means the shares of Common Stock, no par value, of the Company.

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

"**Company Material Adverse Effect**" means a material adverse effect on the condition (financial or otherwise), business, assets or liabilities of the Company; *provided, however*, that none of the following shall be deemed, either alone or in combination, to constitute a Company Material Adverse Effect (i) any change or effect resulting from (A) the loss of any customers or strategic partners, or any termination or delay of any pending customer orders or of any agreement with a strategic partner or (B) any departure of less than four employees of the Company involved in research and development (or notification of any such departure), in either case, resulting from the announcement or pendency of this Agreement or the transactions contemplated hereby, (ii) any change or effect resulting from or arising out of changes in general economic conditions, except to the extent that such changes in general economic conditions have a disproportionate effect on the Company, and (iii) any change or effect resulting from or arising out of changes or conditions affecting the software industry, except to the extent that such changes or conditions in the software industry have a disproportionate effect on the Company.

"**Company Preferred Stock**" means the Series A Preferred Stock, the Series B Preferred Stock, the Series C Preferred Stock and the Series D Preferred Stock.

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

"**Company Stock**" means the Company Common Stock and the Company Preferred Stock.

"**Continuing Employee**" means each employee listed on Schedule 1.01(a) hereto.

"**Debt Agreements**" means (i) the Loan and Security Agreement, dated as of March 23, 2000, between the Company and Silicon Valley Bank ("**SVB**"), as amended December 31, 2001, as restructured June 30, 2002, as amended July 30, 2003, and as amended November 17, 2003 (the "**SVB Loan**"), and (ii) the Loan and Security Agreement, dated as of October 9, 2000, among the Company, GATX Ventures, Inc. ("**GATX**"; and together with SVB, the "**Lenders**") and SVB, as amended December 31, 2001, as restructured June 30, 2002, as amended July 30, 2003 and as amended November 17, 2003 (the "**SVB/GATX Loan**").

"**Debt Repayment Amount**" means the sum of all amounts payable in full satisfaction of all Indebtedness with respect to the Debt Agreements, as set forth on the Determination Certificate.

"**D&T Agreement**" means the Engagement Letters for audit and tax services dated as of 3/5/02 and 3/28/03 and dated as of 8/7/02 and 2/27/03 between the Company and Deloitte & Touche LLP.

"**Determination Date**" means the date two Business Days prior to the Closing Date.

"**E*Trade Agreement**" means the Equity Edge Software License Agreement dated as of July 24, 2000, between the Company and E*Trade, Inc.

"**Employee Bonus Pool**" means the distribution, pursuant to the CEO Employment Agreement, of the proceeds resulting from a change of control of the Company among certain Company employees (each an "**Employee Bonus Pool Payee**"), in the amounts set forth opposite the name of each such Employee Bonus Pool Payee on the Determination Certificate.

"**Employee Bonus Pool Payment Amount**" means [redacted]% of the difference of [redacted] *minus* the Debt Repayment Amount *minus* the Warrant Termination Payment Amount *minus* the Change of Control Payment Amount *minus* the Transaction Expense Excess Amount, as set forth on the Determination Certificate.

"**Environmental Laws**" means any federal, state, local or foreign law (including, without limitation, common law), treaty, judicial decision, regulation, rule, judgment,

order, decree, injunction, permit or governmental restriction or requirement or any agreement with any governmental authority or other Person, relating to human health and safety, the environment or to pollutants, contaminants, wastes or chemicals or any toxic, radioactive, ignitable, corrosive, reactive or otherwise hazardous substances, wastes or materials or to the effect of the environment on human health and safety.

"**Environmental Permits**" means all permits, licenses, franchises, certificates, approvals and other similar authorizations of governmental authorities relating to or required by Environmental Laws and affecting, or relating in any way to, the business of the Company as currently conducted.

"**ERISA**" means the Employee Retirement Income Security Act of 1974.

"**ERISA Affiliate**" of any entity means any other entity that, together with such entity, would be treated as a single employer under Section 414 of the Code.

"**Escrow Amount**" means [redacted]% of the sum of (A) the Merger Consideration Amount *plus* (B) the CEO Payment Amount.

"**Escrow Holdback**" means, with respect to a holder of Outstanding Company Stock, such holder's Pro Rata Share of the Escrow Amount.

"**Fox Agreement**" means the Consulting Services Agreement dated August 12, 2003 between the Company and Lorraine Fox.

"**Holdback Parties**" means the Shareholders and the CEO.

"**Holdback Parties' Representative**" means David Spreng, or any replacement thereof duly appointed pursuant to Section 10.05.

"**Indebtedness**" means, without duplication, (i) any indebtedness for borrowed money or issued in substitution for or exchange of indebtedness for borrowed money, (ii) any indebtedness evidenced by any note, bond, debenture or other debt security, (iii) any indebtedness for the deferred purchase price of property or services with respect to which a Person is liable, contingently or otherwise, as obligor or otherwise (other than trade payables and other current liabilities incurred in the ordinary course of business), (iv) any commitment by which a Person assures a creditor against loss (including contingent reimbursement obligations with respect to letters of credit, but excluding indemnity obligations with respect to purchase and sale contracts or other agreements entered into in the ordinary course of business), (v) any indebtedness guaranteed in any manner by a Person (including guarantees in the form of an agreement to repurchase or reimburse, but excluding the endorsement of checks or other negotiable instruments for deposit or collection), (vi) any obligations under capitalized leases with respect to which a Person is liable, contingently or otherwise, as obligor, guarantor or otherwise, or with respect to which obligations a Person assures a creditor against loss, (vii) any indebtedness secured by a Lien on a Person's assets, (viii) any outstanding letter of credit, sight draft, performance bond or similar surety obligation of a Person; provided that any such

obligation shall only be considered Indebtedness to the extent such obligation has actually been drawn (or circumstances exist which entitle the beneficiary to draw on) at or prior to the Closing Date, and (ix) any interest, principal, prepayment penalty, fees or expenses to the extent paid in respect of those items listed in clauses (i) through (viii) of this defined term.

"**Intellectual Property**" means (i) inventions, whether or not patentable, reduced to practice or made the subject of one or more pending patent applications, (ii) national and multinational statutory invention registrations, patents and patent applications (including all reissues, divisions, continuations, continuations-in-part, extensions and reexaminations thereof) registered or applied for in the United States and all other nations throughout the world, all improvements to the inventions disclosed in each such registration, patent or patent application, (iii) trademarks, service marks, trade dress, logos, domain names, trade names and corporate names (whether or not registered) in the United States and all other nations throughout the world, including all variations, derivations, combinations, registrations and applications for registration of the foregoing and all goodwill associated therewith, (iv) copyrights (whether or not registered) and registrations and applications for registration thereof in the United States and all other nations throughout the world, including all derivative works, moral rights, renewals, extensions, reversions or restorations associated with such copyrights, now or hereafter provided by law, regardless of the medium of fixation or means of expression, (v) rights in Software, (vi) rights in trade secrets and, to the extent protectable as trade secrets or proprietary information, business information (including pricing and cost information, business and marketing plans and customer and supplier lists) and know-how (including manufacturing and production processes and techniques and research and development information), (vii) rights in industrial designs (whether or not registered), (viii) rights in databases and data collections, (ix) rights in mask works, (x) all rights to obtain and rights to apply for patents, and to register trademarks and copyrights, (xi) all rights in all of the foregoing provided by treaties, conventions and common law and (xii) all rights of the Company to sue or recover and retain damages and costs and attorneys' fees incurred by the Company for past, present and future infringement or misappropriation by Third Parties of any of the foregoing.

"**Interim Balance Sheet**" means the unaudited balance sheet of the Company as of November 30, 2003.

"**Interim Balance Sheet Date**" means November 30, 2003.

"**Junior Preference Value**" means the sum of the Series A Preference Value *plus* the Series B Preference Value *plus* the Series C Preference Value.

"**Knowledge of the Company**" or "**Company's Knowledge**" means the actual knowledge of any of Jason Donahue, Kent Jarvi or Rajeev Bharadhwaj after making reasonable inquiry of the Company employees responsible for the relevant functional area.

"**Lien**" means, with respect to any property or asset, any mortgage, lien, pledge, charge, security interest, encumbrance or other adverse claim, limitation or restriction of any kind in respect of such property or asset other than (i) non-exclusive licenses of Intellectual Property Rights granted to end user customers by the Company in the ordinary course, (ii) Liens for Taxes not yet due and payable, and (iii) municipal and zoning ordinances, easements for public utilities and such imperfections of title and encumbrances, if any, that do not materially interfere with the present use of the Property. For purposes of this Agreement, a Person shall be deemed to own subject to a Lien any property or asset that it has acquired or holds subject to the interest of a vendor or lessor under any conditional sale agreement, capital lease or other title retention agreement relating to such property or asset.

"**Merger Consideration**" means the consideration payable to holders of Outstanding Company Stock pursuant to Section 2.02.

"**Merger Consideration Amount**" means the difference of [redacted] *minus* the Debt Repayment Amount *minus* the Warrant Termination Payment Amount *minus* the Change of Control Payment Amount *minus* the Transaction Expense Excess Amount *minus* the CEO Payment Amount *minus* the Employee Bonus Pool Payment Amount, as set forth on the Determination Certificate.

"**1934 Act**" means the Securities Exchange Act of 1934.

"**Officer**" of any Person means any executive officer of such Person within the meaning of Rule 3b-7 of the 1934 Act.

"**Outstanding Common**" means the shares of Company Common Stock issued and outstanding immediately prior to the Effective Time.

"**Outstanding Company Stock**" means the shares of Company Stock issued and outstanding immediately prior to the Effective Time.

"**Outstanding Series A Preferred**" means the shares of Series A Preferred Stock issued and outstanding immediately prior to the Effective Time.

"**Outstanding Series B Preferred**" means the shares of Series B Preferred Stock issued and outstanding immediately prior to the Effective Time.

"**Outstanding Series C Preferred**" means the shares of Series C Preferred Stock issued and outstanding immediately prior to the Effective Time.

"**Outstanding Series D Preferred**" means the shares of Series D Preferred Stock issued and outstanding immediately prior to the Effective Time.

"**Parent Material Adverse Effect**" means a material adverse effect on the condition (financial or otherwise), business, assets or results of operations of Parent and its Subsidiaries, taken as a whole other than any change or effect resulting from changes

in general economic conditions affecting the software industry generally but which do not disproportionately affect Parent or its Subsidiaries.

"**Person**" means an individual, corporation, partnership, limited liability company, association, trust or other entity or organization, including a government or political subdivision or an agency or instrumentality thereof.

"**Pro Rata Share of the Escrow Amount**" means (i) with respect to the CEO, the CEO Escrow Amount and (ii) with respect to a holder of shares of Company Stock, the product obtained by multiplying (A) the quotient obtained by dividing (x) the cash received by such holder pursuant to Section 2.02 *by* (y) the Merger Consideration Amount *by* (B) the difference of the Escrow Amount *minus* the CEO Escrow Amount.

"**Registered Intellectual Property**" means all United States, international and foreign: (i) patents and patent applications (including provisional applications); (ii) registered trademarks, registered service marks, applications to register trademarks or service marks, intent-to-use applications, or other registrations or applications related to trademarks or service marks; (iii) registered copyrights and applications for copyright registration; and (iv) any other Intellectual Property that is the subject of an application, certificate, filing, registration or other document issued, filed with, or recorded by any governmental or regulatory authority or instrumentality, foreign, domestic, or supranational.

"**Related Agreements**" means the Escrow Agreement, the Releases and the Voting Agreements.

"**Releases**" means the Debt Releases, the Warrant Releases, the CEO Release, the Employee Bonus Pool Releases, the Change of Control Releases and the Transaction Expense Releases.

"**Remaining Preference Amount**" means the difference of the Merger Consideration Amount *minus* the Series D Preference Amount.

"**Series A Cash Amount**" means the amount equal to the quotient obtained by dividing (A) the product of the Series A Preference Ratio *multiplied by* the Remaining Preference Amount *by* (B) the Outstanding Series A Preferred.

"**Series A Preference Ratio**" means the quotient obtained by dividing (A) the Series A Preference Value *by* (B) the Junior Preference Value.

"**Series A Preference Value**" means the amount equal to the product obtained by multiplying (A) the Outstanding Series A Preferred *by* (B) [redacted].

"**Series B Cash Amount**" means the amount equal to the quotient obtained by dividing (A) the product of the Series B Preference Ratio *multiplied by* the Remaining Preference Amount *by* (B) the Outstanding Series B Preferred.

"**Series B Preference Ratio**" means the quotient obtained by dividing (A) the Series B Preference Value *by* (B) the Junior Preference Value.

"**Series B Preference Value**" means the amount equal to the product obtained by multiplying (A) the Outstanding Series B Preferred *by* (B) $[redacted].

"**Series C Cash Amount**" means the amount equal to the quotient obtained by dividing (A) the product of the Series C Preference Ratio *multiplied by* the Remaining Preference Amount *by* (B) the Outstanding Series C Preferred.

"**Series C Preference Ratio**" means the quotient obtained by dividing (A) the Series C Preference Value *by* (B) the Junior Preference Value.

"**Series C Preference Value**" means the amount equal to the product obtained by multiplying (A) the Outstanding Series C Preferred *by* (B) $[redacted].

"**Series D Cash Amount**" means $[redacted].

"**Series D Preference Amount**" means the amount equal to the product obtained by multiplying (A) the Outstanding Series D Preferred *by* (B) $[redacted].

"**Settlement Agreement**" means the Settlement and Mutual Release effective as of January 4, 2004 between the Ejasent Parties (as defined therein) and Tim Unger, as furnished to Parent prior to the date hereof.

"**Software**" means computer software of any type and in any form, including source code, object code, firmware, operating systems, software engines and platforms, applications and utilities and all versions, updates, corrections, enhancements and modifications thereto, and all related documentation, developer notes, comments and annotations.

"**Subsidiary**" means, with respect to any Person, any entity of which securities or other ownership interests having ordinary voting power to elect a majority of the board of directors or other persons performing similar functions are at any time directly or indirectly owned by such Person.

"**Tax**" means (i) any tax, governmental fee or other like assessment or charge of any kind whatsoever (including, but not limited to, withholding on amounts paid to or by any Person), together with any interest, penalty, addition to tax or additional amount imposed by any governmental authority (a "**Taxing Authority**") responsible for the imposition of any such tax (domestic or foreign), and any liability for any of the foregoing as transferee, (ii) in the case of the Company, liability for the payment of any amount of the type described in clause (i) as a result of being or having been before the Effective Time a member of an affiliated, consolidated, combined or unitary group, or by virtue of applicable law or by virtue of any agreement or arrangement with a Taxing Authority that would impose liability on one Person for the payment of any Tax liability of another Person, and (iii) liability of the Company for the payment of any amount as a

result of being party to any Tax Sharing Agreement or with respect to the payment of any amount imposed on any person of the type described in (i) or (ii) as a result of any existing express or implied agreement or arrangement (including, but not limited to, an indemnification agreement or arrangement).

"**Tax Asset**" means any net operating loss, net capital loss, investment tax credit, foreign tax credit, charitable deduction or any other credit or tax attribute that could be carried forward or back to reduce Taxes (including without limitation deductions and credits related to alternative minimum Taxes).

"**Tax Return**" means any report, return, document, declaration or other information or filing required to be supplied to any Taxing Authority with respect to Taxes, including information returns, any documents with respect to or accompanying payments of estimated Taxes, or with respect to or accompanying requests for the extension of time in which to file any such report, return, document, declaration or other information.

"**Tax Sharing Agreements**" means all existing agreements or arrangements (whether or not written) binding the Company that provide for the allocation, apportionment, sharing or assignment of any item of income, gain, deduction, credit or loss or any Tax liability or benefit, in each case, for the purpose of determining any Person's Tax liability.

"**Terminating Warrants**" means (i) the Warrants held by GATX, dated July 22, 2002, to purchase [redacted] shares of Series D Preferred Stock and dated December 31, 2001, to purchase [redacted] shares of Series C Preferred Stock (the "**GATX Warrants**"), and (ii) the Warrants held by SVB, dated July 22, 2002, to purchase [redacted] shares of Series D Preferred Stock and dated December 31, 2001, to purchase [redacted] shares of Series C Preferred Stock (the "**SVB Warrants**").

"**Third Party**" means any Person other than Parent or any of its Affiliates.

"**Transaction Expense Agreements**" means the Alliant Agreement, the Fox Agreement and the professional engagement of Wilson Sonsini Rosati & Goodrich, Professional Corporation by the Company in connection with this Agreement and the transactions contemplated hereby.

"**Transaction Expense Amount**" means the sum of all amounts payable in full satisfaction of the Transaction Expense Agreements, as set forth on the Determination Certificate.

"**Transaction Expense Excess Amount**" means the difference of the Transaction Expense Amount *minus* [redacted] *provided*, that if such difference is a negative number, the Transaction Expense Excess Amount hereunder shall be deemed to be zero.

"Warrant Termination Payment Amount" means the sum of all amounts payable in full exercise, satisfaction and termination of the Terminating Warrants.

"Warrant Holder" means SVB and GATX.

"Warrants" means each unexpired and unexercised outstanding warrant to purchase Company Stock.

Any reference in this Agreement to a statute shall be to such statute, as amended from time to time, and to the rules and regulations promulgated thereunder.

(b) Each of the following terms is defined in the Section set forth opposite such term:

Term	Section
Agreement	Recitals
CEO Release	Section 2.03
Certificates	Section 2.03
Change of Control Payees	Section 8.07
Change of Control Releases	Section 8.07
Charges	Section 2.01
Closing	Section 2.01
Closing Date	Section 2.01
Company	Recitals
Company Disclosure Schedule	Article 4
Company Securities	Section 4.05
Company Shareholder Meeting	Section 6.02
Company Stock Option Plan	Section 2.05
Company Stock Options	Section 2.05
Confidentiality Agreement	Section 2.05
Damages	Section 10.02
Debt Releases	Section 8.07
Determination Certificate	Section 8.07
Effective Time	Section 2.01
Employee Agreements	Section 4.18
Employee Bonus Pool Payees	Section 8.07
Employee Bonus Pool Release	Section 8.07
Employee Plans	Section 4.15
Employment and Non-Competition Agreement	Recitals
End Date	Section 11.01
Escrow Account	Section 2.08
Escrow Agreement	Section 2.08
Escrow Property	Section 2.08
Exchange Agent	Section 2.03
GAAP	Section 4.07
Indemnified Person	Section 7.03
Inventions, Trade Secrets and Disclosures Agreement	Recitals

Term	Section
Lender	Section 1.01
Loan Agreement	Section 1.01
Material Agreement	Section 4.13
Merger	Recitals
Merger Subsidiary	Recitals
Multiemployer Plan	Section 4.15
Non-Plan Option Agreements	Section 2.05
Parent	Recitals
Parent Indemnified Party	Section 10.02
Payment Event	Section 12.03
Permits	Section 4.20
PTO	Section 4.18
Related Party	Section 4.08
Schedule	Article 4
Shareholder	Section 2.03
Surviving Corporation	Section 2.01
SVB Loan	Section 1.01
SVB/GATX Loan	Section 1.01
Taxing Authority	Section 4.14
Terminating Warrant	Section 1.01
Third Party Claim	Section 10.03
Transaction Expense Payees	Section 8.07
Transaction Expense Release	Section 8.07
WARN Act	Section 4.15
Warrant Holder	Section 1.01
Warrant Releases	Section 8.07
Warranty Breach	Section 10.02

ARTICLE 2
THE MERGER

Section 2.01. *Merger*. (a) At the Effective Time, Merger Subsidiary shall be merged with and into the Company in accordance with California Law, whereupon the separate existence of Merger Subsidiary shall cease, and the Company shall be the surviving corporation (the "**Surviving Corporation**").

(b) The closing of the Merger (the "**Closing**") will take place at 3:00 p.m., Pacific Time, on a date to be specified by the parties (the "**Closing Date**"), which shall be no later than three (3) Business Days after satisfaction or waiver (if permitted hereunder) of the conditions set forth in Article 9 (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver, if permitted hereunder, of those conditions), at the offices of Davis, Polk & Wardwell, 1600 El Camino Real, Menlo Park, California 94025, unless another time, date or place is agreed to by the parties hereto. On the Closing Date, the Company and Merger Subsidiary shall file an agreement of merger in customary form with the Secretary of State of the State of

California and make all other filings or recordings required by California Law in connection with the Merger. The Merger shall become effective at such time (the "**Effective Time**") as the agreement of merger is duly filed with the Secretary of State of the State of California.

(c) From and after the Effective Time, the Merger shall have the effect set forth under California Law, and without limiting the foregoing, from and after the Merger, the Surviving Corporation shall succeed without transfer to all rights and properties of the Company and Merger Subsidiary, and shall be subject to the debts and liabilities of the Company and Merger Subsidiary as if the Surviving Corporation had incurred such debts and liabilities, all as provided under California Law.

Section 2.02. *Conversion of Shares.* Subject to the terms and conditions of this Agreement, at the Effective Time, without any action on the part of Parent, Merger Subsidiary, the Company, or any holder of Company Stock and in accordance with the provisions of Article III, Section 2 of the Company's articles of incorporation (as in effect at the Effective Time):

(a) each share of Outstanding Series D Preferred shall be converted into the right to receive an amount of cash, without interest, equal to the Series D Cash Amount;

(b) each share of Outstanding Series C Preferred shall be converted into the right to receive an amount of cash, without interest, equal to the Series C Cash Amount;

(c) each share of Outstanding Series B Preferred shall be converted into the right to receive an amount of cash, without interest, equal to the Series B Cash Amount;

(d) each share of Outstanding Series A Preferred shall be converted into the right to receive an amount of cash, without interest, equal to the Series A Cash Amount;

(e) each share of Outstanding Common Stock shall be cancelled, and no payment shall be made with respect thereto; and

(f) each share of common stock, no par value, of Merger Subsidiary issued and outstanding immediately prior to the Effective Time shall be converted into one share of common stock, no par value, of the Surviving Corporation with the same rights, powers and privileges as the shares of the Surviving Corporation and shall constitute the only outstanding shares of capital stock of the Surviving Corporation.

Notwithstanding the foregoing, the parties hereto acknowledge and agree that the Shareholders' Pro Rata Share of the Escrow Amount shall be deducted from the Merger Consideration, as set forth in Section 2.08.

Section 2.03. *Surrender and Payment.* (a) Prior to the Effective Time, Parent shall appoint an exchange agent (the "**Exchange Agent**") for the purpose of exchanging certificates representing shares of Company Stock (the "**Certificates**") for the Merger Consideration. Immediately following the Effective Time, Parent will make available to

the Exchange Agent the Merger Consideration (less the Shareholders' Pro Rata Share of the Escrow Amount) to be paid in respect of the Certificates. Promptly after the Effective Time, Parent shall send, or shall cause the Exchange Agent to send, to each holder of Outstanding Company Stock with respect to which any Merger Consideration is payable (each such holder, a "**Shareholder**" and collectively, the "**Shareholders**") a letter of transmittal and instructions (which shall specify that the delivery shall be effected, and risk of loss and title shall pass, only upon proper delivery of the Certificates to the Exchange Agent) for use in such exchange.

(b) Each holder of Outstanding Company Stock that have been converted into the right to receive the Merger Consideration will be entitled to receive, upon surrender to the Exchange Agent of a Certificate, together with a properly completed letter of transmittal, the Merger Consideration payable for each share of Company Stock represented by such Certificate less the Escrow Holdback. All such funds shall be paid to the holders of Outstanding Company Stock by wire transfer to accounts specified in their respective letters of transmittal or, upon the request of any such holder, by check. Until so surrendered, each such Certificate shall represent, after the Effective Time, for all purposes, only the right to receive such Merger Consideration.

(c) If any portion of the Merger Consideration is to be paid to a Person other than the Person in whose name the surrendered Certificate is registered, it shall be a condition to such payment that the Certificate so surrendered shall be properly endorsed or otherwise be in proper form for transfer and that the Person requesting such payment shall pay to the Exchange Agent any transfer or other taxes required as a result of such payment to a Person other than the registered holder of such Certificate or establish to the satisfaction of the Exchange Agent that such tax has been paid or is not payable.

(d) After the Effective Time, there shall be no further registration of transfers of shares of Company Stock. If, after the Effective Time, Certificates are presented to the Surviving Corporation, they shall be canceled and exchanged for the Merger Consideration less the Escrow Holdback provided for, and in accordance with the procedures set forth in this Article 2.

(e) Any portion of the Merger Consideration (less the Shareholders' Pro Rata Share of the Escrow Amount) made available to the Exchange Agent pursuant to Section 2.03(a) (and any interest or other income earned thereon) that remains unclaimed by the holders of shares of Company Stock sixty (60) Business Days after the Effective Time shall be returned to Parent, upon demand, and any such holder who has not exchanged shares of Company Stock for the Merger Consideration less the Escrow Holdback in accordance with this Section 2.03 prior to that time shall thereafter look only to Parent for payment of the Merger Consideration less the Escrow Holdback in respect of such shares of Company Stock without any interest thereon. Notwithstanding the foregoing, Parent shall not be liable to any holder of shares of Company Stock for any amount paid to a public official pursuant to applicable abandoned property, escheat or similar laws. Immediately prior to such time when amounts remaining unclaimed by holders of shares of Company Stock would otherwise escheat to or become property of any governmental authority, such unclaimed amounts shall become, to the extent permitted by applicable

law, the property of Parent, free and clear of any claims or interest of any Person previously entitled thereto.

(f) Any portion of the Merger Consideration made available to the Exchange Agent pursuant to Section 2.03(a) to pay for shares of Company Stock for which dissenters' rights have been perfected shall be returned to Parent, upon demand.

Section 2.04. *Dissenting Shares.* Notwithstanding Section 2.02, shares of Company Stock outstanding immediately prior to the Effective Time and held by any holder of Company Stock who has not voted in favor of the Merger or consented thereto in writing and who has demanded appraisal for such shares of Company Stock in accordance with California Law shall not be converted into a right to receive the Merger Consideration, but the holder thereof shall only be entitled to such rights as are provided by California Law, unless such holder fails to perfect, withdraws or otherwise loses its right to appraisal. If, after the Effective Time, such holder fails to perfect, withdraws or loses its right to appraisal, such shares of Company Stock shall be treated as if they had been converted as of the Effective Time into a right to receive the Merger Consideration. The Company shall give Parent prompt notice of any demands received by the Company for appraisal of shares of Company Stock, and Parent shall have the right to participate in all negotiations and proceedings with respect to such demands. Except with the prior written consent of Parent, the Company shall not make any payment with respect to, or settle or offer to settle, any such demands.

Section 2.05. *Stock Options.* At the Effective Time, all options outstanding immediately prior to the Effective Time under the Company's 1999 Stock Option/Stock Issuance Plan (the "**Company Stock Option Plan**"), and any other stock option or compensation plan or other arrangement or agreement of the Company pursuant to which the Company has granted any stock options (all such stock options, collectively, the "**Company Stock Options**"), whether or not vested, shall fully accelerate and be terminated and extinguished, and the holders of such Company Stock Options shall have no further rights with respect to such Company Stock Options.

Section 2.06. *Adjustments.* If, during the period between the date of this Agreement and the Effective Time, any change in the outstanding shares of capital stock of the Company shall occur, including by reason of any reclassification, recapitalization, stock split or combination, exchange or readjustment of shares of Company Stock, or stock dividend thereon with a record date during such period, the Merger Consideration and any other amounts payable pursuant to this Agreement shall be appropriately adjusted.

Section 2.07. *Withholding Rights.* Each of the Surviving Corporation and Parent shall be entitled to deduct and withhold from the consideration otherwise payable to any Person pursuant to this Article 2 such amounts as it is required to deduct and withhold with respect to the making of such payment under any provision of federal, state, local or foreign tax law. If the Surviving Corporation or Parent, as the case may be, so withholds amounts, such amounts shall be treated for all purposes of this Agreement as having been

paid to the holder of the shares of Company Stock in respect of which the Surviving Corporation or Parent, as the case may be, made such deduction and withholding.

Section 2.08. *Escrow.* At the Effective Time, Parent shall withhold the Shareholders' Pro Rata Share of the Escrow Amount from the Merger Consideration otherwise deliverable with respect to shares of Company Stock. Such amount shall be allocated to each of the Shareholders based on such holder's Pro Rata Share of the Escrow Amount. Prior to or simultaneously with the Effective Time, the Holdback Parties' Representative and Parent shall enter into an escrow agreement (the "**Escrow Agreement**") substantially in the form of Exhibit D hereto, with an escrow agent selected by Parent and reasonably acceptable to the Holdback Parties' Representative (the "**Escrow Agent**"). Pursuant to the terms of the Escrow Agreement, at the Effective Time Parent shall deposit the Escrow Amount into an escrow account, which account is to be managed by the Escrow Agent (the "**Escrow Account**"). The Escrow Agent shall hold the Escrow Amount and all interest and other amounts earned thereon in escrow pursuant to the Escrow Agreement. For purposes of this Agreement, the "**Escrow Property**" means the funds contained in the Escrow Account. Distributions of any funds from the Escrow Account shall be governed by the terms and conditions of the Escrow Agreement.

Section 2.09. *Lost Certificates.* If any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such Certificate to be lost, stolen or destroyed and, if required by the Surviving Corporation, the posting by such Person of a bond in such reasonable amount as the Surviving Corporation may direct or, if required by the Surviving Corporation, the execution of an indemnification agreement or other form of indemnity against any claim that may be made against it with respect to such Certificate, the Exchange Agent will pay, in exchange for such lost, stolen or destroyed Certificate, the Merger Consideration (less the Escrow Holdback) to be paid in respect of the shares of Company Stock represented by such Certificate, as contemplated by this Article 2.

ARTICLE 3
THE SURVIVING CORPORATION

Section 3.01. *Articles of Incorporation.* The articles of incorporation of the Company in effect at the Effective Time shall be the articles of incorporation of the Surviving Corporation until amended in accordance with applicable law.

Section 3.02. *Bylaws.* The bylaws of Merger Subsidiary in effect at the Effective Time shall be the bylaws of the Surviving Corporation until amended in accordance with applicable law.

Section 3.03. *Directors and Officers.* From and after the Effective Time, until successors are duly elected or appointed and qualified in accordance with applicable law, (i) the directors of Merger Subsidiary at the Effective Time shall be the directors of the Surviving Corporation and (ii) the Officers of Merger Subsidiary at the Effective Time shall be the Officers of the Surviving Corporation.

ARTICLE 4
REPRESENTATIONS AND WARRANTIES OF THE COMPANY

The Company represents and warrants to Parent that each of the statements contained in this Article 4 are true and complete, except as otherwise provided herein and except as specifically disclosed in the schedules attached hereto (each, a "**Schedule**" and together, the "**Company Disclosure Schedule**"). Each exception set forth in the Company Disclosure Schedule and each other reference to this Agreement set forth in the Company Disclosure Schedule is identified by reference to, or has been grouped under a heading referring to, a specific individual section of this Agreement, and the disclosures in any Schedule shall qualify any other specific individual section of this Article 4 if and to the extent that it is readily apparent from a reading of the disclosure that such disclosure is applicable to such other section.

Section 4.01. *Corporate Existence and Power.* The Company is a corporation duly incorporated, validly existing and in good standing under the laws of the State of California and has all corporate powers and authority to carry on its business as now conducted. Schedule 4.01 contains a complete and accurate list of every jurisdiction in which the Company is qualified to do business. The Company is duly qualified to do business as a foreign corporation and is in good standing in each jurisdiction where failure to be so qualified would reasonably be expected to have a Company Material Adverse Effect. The Company has heretofore made available to Parent true and complete copies of the articles of incorporation and bylaws of the Company as currently in full force and effect. The Company is not in violation of any of the provisions of its articles of incorporation or bylaws.

Section 4.02. *Corporate Authorization.* (a) The execution, delivery and performance by the Company of this Agreement and the consummation by the Company of the transactions contemplated hereby are within the Company's corporate powers and have been duly authorized by all necessary corporate action on the part of the Company, subject only to the approval of this Agreement and the Merger by the holders of capital stock of the Company. The affirmative vote of the holders of (i) a majority of the outstanding shares of Company Common Stock and (ii) a majority of the outstanding shares of the Company Preferred Stock are the only votes of the holders of any of the Company's capital stock necessary in connection with the consummation of the Merger. This Agreement constitutes the valid and binding agreement of the Company.

(b) At a meeting duly called and held, the Company's Board of Directors has (i) unanimously determined that this Agreement is advisable, and that this Agreement and the Merger are fair to and in the best interests of the shareholders of the Company, (ii) unanimously approved and adopted this Agreement and the transactions contemplated hereby, and (iii) unanimously resolved to recommend approval and adoption of this Agreement by the shareholders of the Company.

Section 4.03. *Governmental Authorization.* The execution, delivery and performance by the Company of this Agreement and the consummation by the Company of the transactions contemplated hereby require no action on the part of the Company by

or in respect of, or filing with, any governmental body, agency or official, domestic, foreign or supranational, other than (i) the filing of the agreement of merger with the Secretary of State of the State of California, (ii) the filing of appropriate documents with the relevant authorities of other states in which the Company is qualified to do business and (iii) compliance with any applicable requirements of the HSR Act.

Section 4.04. *Non-Contravention.* The execution, delivery and performance by the Company of this Agreement and the consummation of the transactions contemplated hereby do not and will not (i) contravene, conflict with, or result in any violation or breach of any provision of the articles of incorporation or bylaws of the Company, (ii) assuming compliance with the matters referred to in Section 4.03, contravene, conflict with, or result in a violation or breach, in any material respect, of any provision of any applicable law, statute, ordinance, rule, regulation, judgment, injunction, order or decree, where such contravention, conflict, violation or breach would either (A) adversely affect the ability of the Company to consummate the Merger or the other transactions contemplated hereby or (B) have a Company Material Adverse Effect, (iii) require any consent or similar action by any Person under, constitute a default, or an event that, with or without notice or lapse of time or both, would constitute a default, under, or cause or permit the termination, cancellation, acceleration or other change of any right or obligation or the loss of any benefit to which the Company is entitled under any provision of any Material Agreement or any license, franchise, permit, certificate, approval or other similar authorization affecting, or relating in any way to, the assets or business of the Company and its Subsidiaries or (iv) result in the creation or imposition of any Lien on any asset of the Company.

Section 4.05. *Capitalization.* (a) The authorized capital stock of the Company consists of (i) [redacted] shares of Company Common Stock, (ii) [redacted] shares of Series A Preferred Stock, (iii) [redacted] shares of Series B Preferred Stock, (iv) [redacted] shares of Series C Preferred Stock, and (v) [redacted] shares of Series D Preferred Stock. There are issued and outstanding (i) [redacted] shares of Common Stock (ii) [redacted] shares of Series A Preferred Stock, (iii) [redacted] shares of Series B Preferred Stock, (iv) [redacted] shares of Series C Preferred Stock, and (v) [redacted] shares of Series D Preferred Stock. There are Warrants to purchase [redacted] shares of Series B Preferred Stock, [redacted] shares of Series C Preferred Stock, and [redacted] shares of Series D Preferred Stock.

(b) As of the date hereof, each share of Series A Preferred Stock is convertible into [redacted] shares (rounded to three decimals) of Company Common Stock, each share of Series B Preferred Stock is convertible into [redacted] shares (rounded to three decimals) of Company Common Stock, each share of Series C Preferred Stock is convertible into [redacted] shares (rounded to three decimals) of Company Common Stock, and each share of Series D Preferred Stock is convertible into one share of Company Common Stock. The Company Stock and Warrants are, as of the date of this Agreement, held by the Persons and in the amounts set forth on Schedule 4.05, with the latest known addresses of such Persons indicated thereon. All outstanding shares of capital stock of the Company have been duly authorized and validly issued and are fully paid and non-assessable and not subject to preemptive rights created by statute, the articles of incorporation or bylaws of

the Company or any agreement to which the Company is a party or by which it is bound and have been issued in compliance in all material respects with federal and state securities laws. Each Warrant was duly and validly issued and was issued in compliance in all material respects with federal and state securities laws, and the Company Stock issuable upon exercise of each Warrant has been duly reserved and, upon exercise, would be validly issued, fully paid and non-assessable. There are no declared or accrued unpaid dividends with respect to any shares of the Company Common Stock or the Company Preferred Stock.

(c) Schedule 4.05 hereto contains true and complete copies of the articles of incorporation (including any certificate of designations) and bylaws of the Company, each as amended to the date hereof (collectively, the "**Company Charter Documents**"), and the Company Charter Documents contain all of the rights, preferences and privileges of all outstanding capital stock of the Company with respect to any merger, consolidation, share exchange, business combination, sale of all or substantially all the assets or the equity or voting securities of the Company, reorganization, recapitalization, liquidation, dissolution or other similar transaction involving the Company.

(d) The Company has reserved [redacted] shares of Company Common Stock for issuance to employees, directors and consultants pursuant to the Company Stock Option Plan, of which [redacted] shares are subject to outstanding unexercised options as of the date hereof and all of the unvested options will be accelerated as a result of the transactions contemplated by this Agreement. All Company Stock Options to the extent not previously exercised may be terminated at or prior to the Effective Time, and no consent for such termination from any holder of any Company Stock Option or any employee of the Company is required under the Company Stock Option Plan or any other stock option or compensation plan or other arrangement or agreement of the Company. Except for the Company Stock Options, the Warrants and the Company Preferred Stock, there are no options, warrants, calls, rights, commitments or agreements of any character, written or oral, to which the Company is a party or by which it is bound obligating the Company to issue, deliver, sell, repurchase or redeem, or cause to be issued, delivered, sold, repurchased or redeemed, any of the Company Securities or obligating the Company to grant, extend, accelerate the vesting of, change the price of, otherwise amend or enter into any such option, warrant, call, right, commitment or agreement.

(e) There are [redacted] shares remaining available for future grant as of the date hereof. Schedule 4.05(d) of the Company Disclosure Schedule sets forth each Company Stock Option outstanding, the grant date and number of shares of Company Common Stock subject to such option and the exercise price of such option. The Company has provided to Parent the name and, to the Knowledge of the Company, address of the holder of each such option. There are no outstanding or authorized stock appreciation, dividend equivalent, phantom stock, profit participation, or other similar rights with respect to the Company or any of its securities. There are no voting trusts, proxies, or other agreements or understandings with respect to the voting stock of the Company or any other matters involving any of the Company Securities, other than the Voting Agreements. The Company has heretofore made available to Parent true and

complete copies of the Company Stock Option Plan and there are no outstanding Company Stock Options granted to any Person except as permitted thereunder.

(f) Except as set forth in this Section 4.05, there are no outstanding (i) shares of capital stock or voting securities of the Company, (ii) securities of the Company convertible into or exchangeable for shares of capital stock or voting securities of the Company or (iii) options, warrants or other rights to acquire from the Company or other obligation of the Company to issue, any capital stock, voting securities or securities convertible into or exchangeable for capital stock or voting securities of the Company (the items in clauses (i), (ii) and (iii) being referred to collectively as the "**Company Securities**"). There are no outstanding obligations of the Company to repurchase, redeem or otherwise acquire any of the Company Securities.

Section 4.06. *Subsidiaries.* The Company does not have, and has never had, any Subsidiaries, nor does it own any equity interest in any other Person.

Section 4.07. *Financial Statements.* The Company Balance Sheet and related audited statements of income and cash flows of the Company for the fiscal year ended December 31, 2002 and the Interim Balance Sheet and related unaudited statements of income and cash flows of the Company for the eleven months ended November 30, 2003, in each case, provided to Parent and attached hereto as Schedule 4.07, fairly present, in all material respects, and in conformity with United States generally accepted accounting principles ("**GAAP**") applied on a consistent basis, the financial position of the Company as of the dates thereof and its results of operations and cash flows for the periods then ended (subject only to normal year-end adjustments and an absence of footnotes in the case of any unaudited interim financial statements).

Section 4.08. *Absence of Certain Changes.* Since the Company Balance Sheet Date to the date hereof, except as expressly contemplated by this Agreement, the business of the Company has been conducted in the ordinary course consistent with past practices and there has not been:

(a) any event, occurrence, development or state of circumstances or facts that has had or would reasonably be expected to have, individually or in the aggregate, a Company Material Adverse Effect;

(b) any declaration, setting aside or payment of any dividend or other distribution with respect to any shares of capital stock of the Company, or any repurchase, redemption or other acquisition by the Company of any outstanding shares of capital stock or other securities of, or other ownership interests in, the Company (except pursuant to Company repurchase rights arising in connection with an employee's or other service provider's termination of employment or other relation with the Company);

(c) any amendment of any material term of any outstanding security of the Company;

(d) any incurrence, assumption or guarantee by the Company of any Indebtedness for borrowed money;

(e) any creation or other incurrence by the Company of any Lien on any material asset;

(f) any making of any loan, advance or capital contributions to or investment in any Person by the Company (other than travel and entertainment advances made in the ordinary course of business, consistent with past practice);

(g) any damage, destruction or other casualty loss (whether or not covered by insurance) affecting the business or any material assets of the Company;

(h) any transaction or commitment made, or any contract or agreement entered into, by the Company relating to its material assets or business (including the acquisition or disposition of its assets) or any relinquishment by the Company of any contract or other right, in either case, material to the Company, other than transactions and commitments contemplated by this Agreement;

(i) any change in any method of accounting, method of tax accounting or accounting principles or practice by the Company, except for any such change required by reason of a concurrent change in GAAP;

(j) any (i) grant of any severance or termination pay to (or amendment to any existing arrangement with) any director, Officer or employee of the Company, (ii) increase in benefits payable to any director, Officer or employee of the Company under any existing severance or termination pay policies or employment agreements, (iii) entering into any employment, deferred compensation or other similar agreement (or any amendment to any such existing agreement) with any director, Officer or employee of the Company, (iv) establishment, adoption or amendment (except as required by applicable law) of any collective bargaining, bonus, profit-sharing, thrift, pension, retirement, deferred compensation, compensation, stock option, restricted stock or other benefit plan or arrangement covering any director, Officer or employee of the Company, or (v) increase in compensation, bonus or other benefits payable to any director, Officer or employee of the Company;

(k) any labor dispute, or any activity or proceeding by a labor union or representative thereof to organize any employees of the Company, or any lockouts, strikes, slowdowns, work stoppages or threats thereof by or with respect to such employees;

(l) any material Tax election made or changed, any annual Tax accounting period changed, any material method of Tax accounting adopted or changed, any material amended Tax Returns or claims for Tax refunds filed, any closing agreement entered into, any Tax claim, audit or assessment settled, or any right to claim a Tax refund, offset or other reduction in Tax liability surrendered, in each case by the Company;

(m) any material change in practices relating to pricing or royalties set or charged by the Company to its customers or licensees or, any notification made to the Company of a material change in pricing or royalties set or charged by licensors to the Company;

(n) any capital expenditure, or commitment for a capital expenditure, for additions or improvements to property, plant and equipment by the Company;

(o) any agreement, commitment, arrangement or plan entered into by the Company with (i) any Shareholder or, to the Knowledge of the Company, any Affiliate thereof, (ii) any director or Officer of the Company or (iii) any "associates" or members of the "immediate family" (as such terms are respectively defined in Rule 12b-2 and Rule 16a-1 of the 1934 Act) of any Shareholder or any director or Officer of the Company (each such Person described in clauses (i) through (iii) above, a "**Related Party**");

(p) any payment, reimbursement, refund or other fund transfer by the Company to any Related Party, other than the payment of salaries to Officers or employees made in the ordinary course of business consistent with past practice;

(q) any agreement for the sale of products or for the furnishing of services entered into or modified by the Company, other than in the ordinary course of business, consistent with past practices;

(r) any agreement for the purchase of products or for the receipt of services entered into which requires the payment by the Company and/or any Subsidiary of more than $50,000 annually for any single contract; or

(s) any agreement by the Company or any Officer thereof or any written agreement by an employee of the Company in their capacities as such to do any of the things described in the preceding clauses (a) through (r).

Section 4.09. *No Undisclosed Liabilities.* There are no material liabilities or material obligations of the Company of any kind whatsoever, whether accrued, contingent, absolute, determined, determinable or otherwise, and there is no existing condition, situation or set of circumstances that the Company believes would reasonably be expected to result in such a liability or obligation, including as a result of the Merger or the other transactions contemplated hereby, other than:

(a) liabilities or obligations disclosed and provided for in the Company Balance Sheet or in the notes thereto;

(b) liabilities or obligations not exceeding $20,000 in the aggregate incurred in the ordinary course of business consistent with past practices since the Company Balance Sheet Date;

(c) liabilities or obligations set forth on the Determination Certificate; and

(d) liabilities or obligations of the Company under this Agreement or the transactions contemplated hereby.

Section 4.10. *Compliance with Laws and Court Orders.* The Company is not in violation of, and has not since its inception violated, and to the Knowledge of the Company is not under investigation with respect to and has not been threatened to be charged with or given notice of any material violation of, any applicable law, statute, ordinance, rule, regulation, judgment, injunction, order or decree, except for such violation(s) as, individually or in the aggregate, would not reasonably be expected to have a Company Material Adverse Effect.

Section 4.11. *Litigation.* There is no (i) action, suit or proceeding pending (or, to the Knowledge of the Company, any investigation pending or any reasonable basis for any action, suit or proceeding) against, or, to the Knowledge of the Company, threatened against or affecting, the Company, or to the Knowledge of the Company, pending or threatened against or affecting any present or former Shareholder, Officer, director or employee of the Company (in their capacity as such), nor (ii) any reasonable basis for any action, suit, investigation or proceeding by or on behalf of the Company, the holder of any Company Securities or any present or former employee or consultant of the Company, against or affecting the Company or any present or former Shareholder, Officer, director or employee of the Company (in their capacity as such), as a result of or in connection with the Merger or any of the other transactions contemplated hereby, in each case, which would reasonably be expected to result in a material liability to the Company or Parent or any of its Affiliates, or any of their respective properties, or which in any manner challenges or seeks to prevent, enjoin, alter or materially delay the Merger or any of the other transactions contemplated hereby, before any court or arbitrator or before or by any governmental body, agency or official, domestic, foreign or supranational.

Section 4.12. *Finders' Fees.* Except for Alliant Partners whose fee is set forth on Schedule 4.12, there is no investment banker, broker, finder or other intermediary that has been retained by or is authorized to act on behalf of the Company who might be entitled to any fee or commission from the Company or any of its Affiliates in connection with the transactions contemplated by this Agreement.

Section 4.13. *Agreements, Contracts and Commitments.* (a) Except as expressly contemplated by this Agreement, the Company is not a party to or bound by:

(i) any lease or sublease (whether of real or personal property) providing for annual rentals of $20,000 or more;

(ii) any agreement for the purchase or license of materials, supplies, goods, services, equipment or other tangible or intangible assets providing for either (A) annual payments by the Company of $20,000 or more or (B) aggregate payments by the Company of $50,000 or more;

(iii) any license, sales, distribution or other similar agreement providing for the sale or license by the Company of Software, materials, supplies, goods, services, equipment or other assets that provides for either (A) annual payments to the Company of $20,000 or more or (B) aggregate payments to the Company of $50,000 or more;

(iv) any partnership, joint venture, alliance, agency, marketing, distribution or other similar agreement or arrangement;

(v) any agreement or commitment relating to the acquisition or disposition of any business (whether by merger, sale of stock, sale of assets or otherwise);

(vi) any agreement relating to Indebtedness for borrowed money or the deferred purchase price of property (in either case, whether incurred, assumed, guaranteed or secured by any asset);

(vii) except for end-user licenses granted to customers by the Company in the ordinary course of business consistent with past practices, any option (other than employee stock options), license or franchise agreement;

(viii) any agreement that creates, or purports to create, any obligations of the Company with respect to the Company's Software programs or any derivative work thereof, or grants, or purports to grant, to any Person any rights to any immunity under the Company Intellectual Property or any proprietary rights in the Company's Software programs or any derivative work thereof, including under GNU's General Public License (GPL) or any similar such agreement;

(ix) any Software development agreement or other agreement for development or authorship of products and services for the Company other than agreements with employees and consultants entered into by Company in the ordinary course of business;

(x) any agreement that limits the freedom of the Company to compete in any line of business or with any Person or in any geographic area or which could reasonably be expected to so limit the freedom of the Company after the Effective Time;

(xi) any agreement with any Affiliate of the Company, with any director or Officer of the Company, or with any "associate" or any member of the "immediate family" (as such terms are respectively defined in Rules 12b-2 and 16a-1 of the 1934 Act) of any such director or Officer;

(xii) any agreement or plan, including, without limitation, any stock option plan, stock appreciation rights plan or stock purchase plan, any of the benefits of which will be increased, or the vesting of benefits of which will be

accelerated, as a result of the consummation of the Merger or the value of any of the benefits of which will be calculated on the basis of the Merger; or

(xiii) any other agreement, commitment, arrangement or plan involving an amount in excess of $50,000.

(b) Each agreement, contract, plan, lease, arrangement or commitment disclosed or required to be disclosed pursuant to this Section 4.13 is referred to as a "**Material Agreement**" and is a valid and binding agreement of the Company, and is in full force and effect with respect to the Company and, to the Knowledge of the Company, each other party thereto, and none of the Company or, to the Knowledge of the Company, any other party thereto is in default or breach in any material respect under the terms of any such Material Agreement, and, to the Knowledge of the Company, no event or circumstance has occurred that, with notice or lapse of time or both, would reasonably be expected to constitute a material event of default thereunder. True and complete copies of each such agreement, have been made available to Parent.

Section 4.14. *Tax Representations.* The Company represents and warrants to Parent as of the date hereof and as of the Effective Time that:

(a) All material Tax Returns required by applicable law to be filed with any Taxing Authority by, or on behalf of, the Company have been filed when due in accordance with all applicable laws as of the time of filing, all such Tax Returns were true and complete, and the Company has paid (or has had paid on its behalf) or has withheld and remitted to the appropriate Taxing Authority all Taxes due and payable, including any Taxes with respect to any payments pursuant to the Settlement Agreement.

(b) The charges, accruals and reserves for Taxes with respect to the Company reflected on the books of the Company (excluding any provision for deferred income taxes reflecting either differences between the treatment of items for accounting and income Tax purposes or carryforwards) are adequate to cover Tax liabilities accruing through the Interim Balance Sheet Date, and the since the Interim Balance Sheet Date, the Company has not incurred any liability for Taxes, other than in the ordinary course of business.

(c) The Company has not requested any extension of time within which to file any Tax Return that has not yet been filed, and has not granted any extension or waiver of the statute of limitations period applicable to any Tax Return, which period (after giving effect to such extension or waiver) has not yet expired. There is no claim, audit, action, suit, proceeding, or investigation now pending or threatened against or with respect to the Company in respect of any Tax or Tax Asset. No adjustment that would increase the Tax liability, or reduce any Tax Asset, of the Company has been made, proposed or threatened by a Taxing Authority during any audit of any Tax period which could reasonably be expected to be made, proposed or threatened in an audit of any subsequent Tax period. The Company has not filed any amended Tax Return, entered into any closing agreement, settled any Tax claim or assessment, or surrendered any right to claim a Tax refund, offset or other reduction in Tax liability.

(d) No claim has been made by a Taxing Authority in a jurisdiction where the Company does not file Tax Returns that the Company is or may be subject to taxation in that jurisdiction.

(e) The Company has not been a member of an affiliated, consolidated, combined or unitary group, or made any election or participated in any arrangement whereby any Tax liability or any Tax Asset of the Company was determined or taken into account for Tax purposes with reference to or in conjunction with any Tax liability or any Tax Asset of any other Person. The Company is not party to any Tax Sharing Agreement or to any other agreement or arrangement referred to in clause (ii) or (iii) of the definition of "Tax", and the Company has not entered into any agreement or arrangement with any Taxing Authority with regard to the Tax liability of the Company affecting any Tax period for which the applicable statute of limitations, after giving effect to extensions or waivers, has not expired.

(f) The Company is not a party to any understanding or arrangement described in Section 6111(d) or Section 6662(d)(2)(C)(iii) of the Code, and has not "participated" in a "reportable transaction" within the meaning of Treasury Regulations Section 1.6011-4; during the five-year period ending on the date hereof, the Company was not a distributing corporation or a controlled corporation in a transaction intended to be governed by Section 355 of the Code; and the Company has not participated in or cooperated with an international boycott within the meaning of Section 999 of the Code or has been requested to do so in connection with any transaction or proposed transaction.

(g) The Company will not be required to include any adjustment in taxable income for any Tax period ending after the Closing Date under Section 481(c) of the Code (or any similar provision of the Tax laws of any jurisdiction) as a result of a change in method of accounting made on or before the Closing Date and the Company does not have an overall foreign loss.

(h) The Company does not own an interest in real property in any jurisdiction in which a Tax is imposed, or the value of the interest is reassessed, on the transfer of an interest in real property and which treats the transfer of an interest in an entity that owns an interest in real property as a transfer of the interest in real property.

(i) The Company has not elected to be an S corporation pursuant to Section 1362(a) of the Code or any similar provision of Tax law.

Section 4.15. *Employee Matters and Employment Benefit Plans.* (a) Schedule 4.15(a) contains a correct and complete list identifying each "employee benefit plan", as defined in Section 3(3) of ERISA, each employment, severance or similar contract, plan, arrangement or policy and each other plan or arrangement (written or oral), other than standard employee offer letters, providing for compensation, bonuses, profit-sharing, stock option or other stock related rights or other forms of incentive or deferred compensation, vacation benefits, insurance (including any self-insured arrangements), health or medical benefits, employee assistance program, disability or sick leave benefits, workers' compensation, supplemental unemployment benefits, severance benefits and

post-employment or retirement benefits (including compensation, pension, health, medical or life insurance benefits) which is maintained, administered or contributed to by the Company or any of its Affiliates and covers any employee or former employee of the Company, or with respect to which the Company has any material liability. Copies of such plans (and, if applicable, related trust or funding agreements or insurance policies) and all amendments thereto and written interpretations thereof have been made available to Parent together with the most recent annual report (Form 5500 including, if applicable, Schedule B thereto) and tax return (Form 990) prepared in connection with any such plan or trust. Such plans are referred to collectively herein as the "**Employee Plans**".

(b) Neither the Company nor any ERISA Affiliate nor any predecessor thereof sponsors, maintains or contributes to, or has in the past sponsored, maintained or contributed to, any Employee Plan subject to Title IV of ERISA.

(c) Neither the Company nor any ERISA Affiliate nor any predecessor thereof contributes to, or has in the past contributed to, any multiemployer plan, as defined in Section 3(37) of ERISA (a "**Multiemployer Plan**").

(d) The form of each Employee Plan that is intended to be qualified under Section 401(a) of the Code has been determined by the Internal Revenue Service to be so qualified and to the Company's Knowledge, no event has occurred since the date of such determination that would adversely affect such qualification. The Company has made available to Parent copies of the most recent Internal Revenue Service determination or opinion letters with respect to each such Employee Plan. Each Employee Plan has been maintained in material 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 Employee Plan. No material events have occurred with respect to any Employee Plan that could result in payment or assessment by or against the Company of any material excise taxes under Sections 4972, 4975, 4976, 4977, 4979, 4980B, 4980D, 4980E or 5000 of the Code.

(e) The consummation of the transactions contemplated by this Agreement will not (either alone or together with any other event) entitle any current or former director, Officer, employee, consultant or independent contractor of the Company to severance pay, bonus or retirement, severance, job security or similar benefit or enhanced benefit (including any incentive award) or accelerate the time of payment or vesting or trigger any payment of funding (through a grantor trust or otherwise) of compensation or benefits under, increase the amount payable or trigger any other material obligation pursuant to, any Employee Plan or any other employment or benefit arrangement, except as set forth on Schedule 4.15(e). Schedule 4.15(e) sets forth all amounts payable and the relevant payee under each agreement, arrangement or commitment of the Company described in the foregoing sentence.

(f) There is no contract, plan or arrangement (written or otherwise) covering any employee or former employee of the Company that could give rise to the payment of any amount that would not be deductible pursuant to the terms of Section 280G or 162(m) of the Code.

(g) The Company does not have any liability in respect of post-employment or post-retirement health, medical or life insurance benefits for retired, former or current employees of the Company except as required under Section 4980B of the Code. No condition exists that would prevent the Company from amending or terminating any Employee Plan providing health or medical benefits in respect of any active employee of the Company.

(h) All contributions and payments accrued under each Employee Plan, determined in accordance with prior funding and accrual practices, as adjusted to include proportional accruals for the period ending as of the date hereof, have been discharged and paid on or prior to the date hereof except to the extent reflected as a liability on the Company Balance Sheet.

(i) There has been no amendment to, written interpretation or announcement (whether or not written) by the Company or any of its Affiliates relating to, or change in employee participation or coverage under, an Employee Plan which could increase materially the expense of maintaining such Employee Plan above the level of the expense incurred in respect thereof for the fiscal year ended December 31, 2002.

(j) The Company is not a party to or subject to, nor is currently negotiating in connection with entering into, any collective bargaining agreement or other contract or understanding with a labor union or organization.

(k) There is no action, suit, investigation, audit or proceeding pending against or involving or, to the Knowledge of the Company, threatened against or involving, any Employee Plan before any court or arbitrator or any state, federal or local governmental body, agency or official.

(l) The Company is in material compliance with all currently applicable laws respecting employment and employment practices, terms and conditions of employment and wages and hours, and is not engaged in any unfair labor practice. There is no unfair labor practice complaint pending or, to the Knowledge of the Company, threatened against the Company before the National Labor Relations Board.

(m) The Company has not engaged in any workforce reduction within the last 90 days which, alone or when aggregated with any other workforce reduction before or after the date hereof, would trigger obligations under the Worker Adjustment and Retraining Notification Act (the "**WARN Act**"), or any similar state or local laws regulating layoffs or employment terminations, with respect to its employees.

(n) The Company has made available to Parent a true and complete list of the names, titles (if applicable), annual salaries or wage rates and bonuses of all employees of the Company. The Company has no Knowledge that any of its Officers or any other key employee (as previously identified to Parent and listed on Schedule 4.15(n) hereto) of the Company currently intends to resign or retire as a result of the transactions contemplated by this Agreement.

Section 4.16. *Title of Properties; Absence of Liens; Condition of Equipment.* (a) The Company does not own any real property, and has never owned any real property. Schedule 4.16 sets forth a list of all real property currently leased by the Company, the name of the lessor and the date of the lease and each amendment thereto and, with respect to any current lease, the aggregate annual rental and/or other fees payable under any such lease and the term and renewal provisions of such lease. All such leases are in full force and effect, and are valid and enforceable by the Company in accordance with their respective terms, and there is not, under any of such leases, any existing default by the Company or, to the Knowledge of the Company, by the other party thereto or event of default (or event which with notice or lapse of time, or both, would constitute such a default). The Company has heretofore made available to Parent true and complete copies of all such leases.

(b) The Company has good and marketable title to, or, in the case of leased properties and tangible assets, valid leasehold interests in, all of the tangible assets shown on the Company Balance Sheet, free and clear of any Liens, except as reflected in the Company Balance Sheet.

(c) All material items of equipment included in such assets shown on the Company Balance Sheet are, in the aggregate and in all material respects, in good operating condition, regularly and properly maintained, subject to normal wear and tear.

Section 4.17. *Products.* Each of the products produced, sold or licensed by the Company is, and at all times up to and including the sale thereof, conforms in all material respects to any promises or affirmations of fact made in any license agreement or product manuals relating thereto. None of the Company's products that have been sold or otherwise made available to customers on a revenue basis contains any defect that would reasonably be expected to materially impair such product's functionality as described in any license agreement or product manuals relating thereto.

Section 4.18. *Intellectual Property.* (a) Schedule 4.18(a) sets forth, as of the date hereof, a true and complete list of each of the registrations and pending applications for registrations included in the Company Intellectual Property specifying, where applicable, the jurisdictions in which each such item of Company Registered Intellectual Property has been issued or registered. Schedule 4.18(a) also sets forth, as of the date hereof, all proceedings or actions before any court or tribunal (including the United States Patent and Trademark Office (the "**PTO**") or equivalent authority anywhere else in the world) related to any of the Company Registered Intellectual Property.

(b) The Company has sufficient rights to all the Intellectual Property necessary to, or used or held for use in, the conduct of the business of the Company as currently conducted and as currently proposed by the Company to be conducted. There exist no restrictions on the Company's disclosure, use, license or transfer of the Company Intellectual Property. The consummation of the transactions contemplated by this Agreement will not alter, encumber, impair or extinguish any Company Intellectual Property. No Company Intellectual Property owned by the Company nor, to the Knowledge of the Company, any Company Intellectual Property exclusively licensed to

the Company, is subject to any proceeding or outstanding order restricting in any manner the use, transfer, or licensing thereof by Company, or which may affect the validity, use or enforceability of such Company Intellectual Property.

(c) Each item of Company Registered Intellectual Property is valid and subsisting. All necessary registration, maintenance and renewal fees currently due in connection with the Company Registered Intellectual Property have been made and 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 prosecuting, maintaining or perfecting such Company Registered Intellectual Property.

(d) The Company has not given to any Person an indemnity in connection with any Intellectual Property, other than indemnities that, individually or in the aggregate, could not result in liability to the Company in excess of $20,000.

(e) Schedule 4.18(e) sets forth a list as of the date hereof of all actions that are required to be taken by the Company prior to April 1, 2004 with respect to any of the Company Registered Intellectual Property in order to maintain such registration.

(f) The Company holds all right, title and interest in and to all Company Intellectual Property that is owned by the Company, free and clear of any Lien. All Company Intellectual Property that is exclusively licensed to the Company is held by the Company free and clear of any Lien. In each case where a patent or patent application, trademark registration or trademark application, service mark registration or service mark application, or copyright registration or copyright application included in the Company Intellectual Property is held by assignment by a Person to the Company, the assignment has been duly recorded with the governmental authority from which the patent or registration issued or before which the application or application for registration is pending. The Company has taken all actions necessary to maintain and protect the Company Intellectual Property, including payment of applicable maintenance fees and filing of applicable statements of use.

(g) To the extent that any technology, Software or Intellectual Property has been developed or created independently or jointly with the Company by a Third Party for the Company, the Company has a written agreement with such Third Party with respect thereto and the Company either (i) has obtained ownership of the Third Party's Intellectual Property and the rights to use all Third Party's Intellectual Property without the Third Party's consent, or (ii) has obtained a license sufficient for the conduct of its business as currently conducted to all such Third Party's Intellectual Property in such work, material or invention by operation of law or by valid and enforceable agreement.

(h) The Company has not transferred ownership of, or granted any exclusive license with respect to, any Intellectual Property that is Company Intellectual Property, to any Third Party, or permitted the Company's rights in such Company Intellectual Property to lapse or enter the public domain.

(i) Other than widely available commercial end-user licenses available for less than $500 per seat, Schedule 4.18(i) sets forth a list as of the date hereof of all contracts, licenses and agreements to which the Company is a party (i) with respect to Company Intellectual Property licensed or transferred to any Third Party or (ii) pursuant to which a Third Party has licensed or transferred any Intellectual Property to the Company.

(j) All contracts relating to Company Intellectual Property are in full force and effect. The consummation of the transactions contemplated by this Agreement will neither violate nor result in the breach, modification, cancellation, termination, suspension of, or acceleration of any payments with respect to, such contracts. The Company is in material compliance with, and has not materially breached any term of any such contracts and, to the Knowledge of the Company, all other parties to such contracts are in compliance with, and have not materially breached any term of, such contracts. Following the Closing Date, the Surviving Corporation will be permitted to exercise all of the Company's rights under such contracts to the same extent the Company would have been able to had the transactions contemplated by this Agreement not occurred and without the payment of any additional amounts or consideration other than ongoing fees, royalties or payments which the Company would otherwise be required to pay (subject to the terms of any agreement, contracts, or arrangements to which Parent or Merger Subsidiary may be a party that would affect the rights or obligations of the Surviving Corporation under such contracts). Neither this Agreement nor the consummation of the transactions contemplated by this Agreement, including the assignment to Parent or Merger Subsidiary by operation of law or otherwise of any contracts or agreements to which the Company is a party, will result in any of the following to the extent that the following would not have occurred in the absence of this Agreement or the completion of the transactions contemplated by this Agreement and except to the extent any of the following would be affected by any agreement, contract, or arrangement to which Parent or Merger Subsidiary may be a party (A) either Parent's or the Merger Subsidiary's granting to any Third Party any right to or with respect to any Intellectual Property right owned by, or licensed to, either of them, (B) either Parent or Merger Subsidiary being bound by, or subject to, any non-compete or other restriction on the operation or scope of their respective businesses, or (C) either Parent or Merger Subsidiary being obligated to pay any royalties or other amounts to any Third Party in excess of those payable by Parent or Merger Subsidiary, respectively, prior to the Closing.

(k) The Company has not infringed, misappropriated or otherwise violated any Intellectual Property Right of any Person and the Company has secured all necessary licenses to distribute any third party code that is or has been distributed with the Company's Software products. There is no claim, action, suit, investigation or proceeding pending against, or, to the Knowledge of the Company, threatened against or affecting, the Company, or any present or former Officer, director or employee of the Company (i) based upon, or challenging or seeking to deny or restrict, the rights of the Company in any of the Company Intellectual Property, (ii) alleging that the use of the Company Intellectual Property or any services provided, processes used or products manufactured, used, imported or sold by the Company do or may conflict with,

misappropriate, infringe or otherwise violate any Intellectual Property of any Person or (iii) alleging that the Company has infringed, misappropriated or otherwise violated any Intellectual Property of any Person. Except as set forth on Schedule 4.18(k), the Company has not received from any Third Party an offer to license any Intellectual Property of such Third Party.

(l) To the Knowledge of the Company, no Person has infringed, misappropriated or otherwise violated any Company Intellectual Property.

(m) The Company has taken the reasonable steps necessary to maintain the confidentiality of all confidential Intellectual Property. None of the Intellectual Property of the Company that is material to the business or operation of the Company, as presently carried out or as presently proposed to be carried out, and the value of which to the Company is contingent upon maintaining the confidentiality thereof, has been disclosed other than to Persons who are bound by written confidentiality agreements or legal duties of confidentiality. Without limiting the foregoing, the Company has and enforces a policy requiring each employee and contractor to execute a proprietary information/confidentiality agreement and all employees and contractors of the Company have executed such an agreement, except where the failure to do so is not material to the Company.

(n) No government funding, facilities of a university, college, other educational institution or research center or funding from third parties was either used in the development of any Company Intellectual Property owned by the Company, or was, to the Knowledge of the Company, used in the development of any Company Intellectual Property exclusively licensed to the Company. None of the Software included in the Company Intellectual Property owned by the Company, and, to the Knowledge of the Company, none of the Software included in the Company Intellectual Property exclusively licensed to the Company, is based on or is a derivative work of any Software that originated or resulted from funds provided by any government or university.

(o) No parties other than the Company possess any current or contingent rights to any source code that is part of the Company Intellectual Property owned by the Company other than in connection with any Software escrow arrangement entered into between the Company and its customers in the ordinary course of business pursuant to a written agreement, in the form of or substantially similar to the Company's standard form of Software escrow agreement (the form of which has been provided to Parent). To the Knowledge of the Company, no parties other than the Company and the relevant licensor possess any current or contingent rights to any source code that is part of the Company Intellectual Property exclusively licensed to the Company.

(p) Except as set forth on Schedule 4.18(p), to the Knowledge of the Company, none of the Company's Software products contains any computer code (i) designed to harm in any manner the operation of such Software, or any other associated Software, firmware, hardware, computer system or network (sometimes referred to as "viruses" or "worms"), (ii) that would disable such Software or impair in any way its operation based on the elapsing of a period of time, advancement of a particular date (sometimes referred

to as "time bombs," "time locks," or "drop dead" devices), except where such code is used to enforce time-limited licenses to Third Parties in the ordinary course of business or (iii) that would permit the Company or any other Person to access such Software in circumvention of normal access protections or restrictions (sometimes referred to as "back doors.")

(q) (i) Except as set forth on Schedule 4.18(q), the Company Intellectual Property does not contain any Software code that contains, or is derived in any manner (in whole or in part) from, any Software that is distributed under any licenses or distribution models similar to any of the following: GNU's General Public License (GPL) or Lesser/Library GPL (LGPL). (ii) The Company, in its use of each of the items of Software set forth on Schedule 4.18(q)(i), has not breached any of the terms of the license under which it utilizes such Software, including, without limitation, by any unauthorized distribution of such Software. (iii) The Company has taken no action, including, without limitation, any act of modification of, or integration of the Company's Software with, any of the Software set forth on Schedule 4.18(q)(i), which would reasonably be expected to require the Company to distribute or license the Company's Software to Third Parties at no charge or require the Company to distribute or license any or all of its Software source code.

(r) The Company has taken the reasonable steps necessary to preserve and maintain reasonably complete notes and records relating to the Company Intellectual Property created or developed by or for the Company.

(s) All products sold by the Company or any licensee of the Company and covered by a patent, trademark or copyright included in the Company Intellectual Property have been marked with applicable notice of proprietary rights in accordance with normal industry practice.

Section 4.19. *Insurance Coverage.* Schedule 4.20 contains a complete and accurate list of, and the Company has made available to Parent true and complete copies of, all insurance policies relating to the assets, business, operations, employees, Officers or directors of the Company. There is no claim by the Company pending under any of such policies as to which coverage has been denied or disputed by the underwriters of such policies. All premiums payable under all such policies have been timely paid and the Company has otherwise complied in all material respects with the terms and conditions of all such policies. Such policies of insurance (or other policies providing substantially similar insurance coverage) are in full force and effect. The Company has no Knowledge of any threatened termination of, material premium increase with respect to, or material alteration of coverage under, any of such policies. The Company shall after the Effective Time continue to have coverage under such policies and bonds with respect to events occurring prior to the Effective Time.

Section 4.20. *Licenses and Permits.* Schedule 4.20 correctly describes each license, franchise, permit, certificate, approval or other similar authorization of any governmental authority affecting, or relating in any way to, the assets or business of the Company (collectively, the "**Permits**") , including without limitation any Permits

required for import or export of Software products or services, together with the name of the government agency or entity issuing such Permit. The Permits are valid and in full force and effect. The Company is not in material default under, and no condition exists that with notice or lapse of time or both would reasonably be expected to constitute a material default under, the Permits. None of the Permits will be terminated or impaired or become terminable, in whole or in part, as a result of the transactions contemplated hereby.

Section 4.21. *Receivables.* (a) The Company has made available to Parent a list of all accounts receivable of the Company as of November 30, 2003, along with a statement of days elapsed since invoice.

(b) All accounts, notes receivable and other receivables arising out of or relating to the business of the Company as of the Company Balance Sheet Date or Interim Balance Sheet Date have been included in the Company Balance Sheet and Interim Balance Sheet, as the case may be, and all reserves for doubtful accounts reflected thereon were taken in accordance with GAAP applied on a consistent basis. No person has any Lien on any such accounts receivable and, to the Company's Knowledge, no request or agreement for deduction or discount has been made with respect to any such accounts receivable.

Section 4.22. *Environmental Matters.* (a) No notice, notification, demand, request for information, citation, summons or order has been received, no complaint has been filed, no penalty has been assessed, and no investigation, action, claim, suit, proceeding or review is pending or, to the Knowledge of the Company, is threatened by any governmental entity or other Person relating to or arising out of any Environmental Law.

(b) The Company is and has been in compliance in all material respects with all Environmental Laws and all Environmental Permits.

(c) There are no liabilities of or relating to the Company of any kind whatsoever, whether accrued, contingent, absolute, determined, determinable or otherwise arising under or relating to any Environmental Law, and to the Knowledge of the Company there are no facts, conditions, situations or set of circumstances that could reasonably be expected to result in or be the basis for any liability arising under or relating to any Environmental Law.

(d) There has been no environmental investigation, study, audit, test, review or other analysis conducted of which the Company has Knowledge in relation to the current or prior business of the Company or any property or facility now or previously owned or leased by the Company that has not been delivered to Parent at least five (5) Business Days prior to the date hereof.

(e) For purposes of this Section 4.22, the term "Company" shall include any entity that is, in whole or in part, a predecessor of the Company.

Section 4.23. *Certain Interests.* (a) To the Knowledge of the Company, no Related Party:

(i) has been an Officer, director or shareholder of any significant supplier or customer of the Company, or of any company which holds, directly or indirectly, 50% or more of the outstanding shares of any such supplier or customer, *provided, however*, that the ownership of securities representing not more than 1% of the outstanding voting power of any supplier or customer, and which are listed on any national securities exchange or traded actively in the national over-the-counter market, shall not be deemed to be a "shareholder" as long as the person owning such securities has no other significant connection or relationship with such supplier or customer;

(ii) is a party to or has a direct or indirect material financial interest in any license, partnership or alliance agreement with the Company other than pursuant to the Company's sales, bonus or other compensation plan;

(iii) owns, directly or indirectly, in whole or in part, or has any other interest in any material tangible or intangible property which the Company owns (except for any such ownership or interest resulting from the ownership of securities in a public company or pursuant to its normal rights as a shareholder of the Company); or

(iv) has any Indebtedness to the Company.

(b) Except as set forth on Schedule 4.24, the Company does not have any liability or any other material obligation of any nature whatsoever to any Related Party.

Section 4.24. *Customers.* Schedule 4.24 sets forth the names of the customers (by dollar amount of sales) of the Company for each of the calendar year ended December 31, 2002 and the period from January 1, 2003 through November 30, 2003, and the dollar amount of sales for each such customer during such periods.

Section 4.25. *No Indebtedness.* Except as set forth on Schedule 4.25, the Company has no Indebtedness. Schedule 4.25 sets forth the lender or party owed, the outstanding principal, any accrued and unpaid interest, any other amounts (including any fees, penalties or other amounts) payable with respect to all Indebtedness of the Company, including as a result of the Merger and the other transactions contemplated hereby.

Section 4.26. *Books and Records.* The books of account and other financial records of the Company have been maintained in all material respects in accordance with sound business practices, including the maintenance of an adequate system of internal controls to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; and (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP. The minute books of the Company contain records of all corporate action taken by the

shareholders, the Board of Directors and any committees of the Board of Directors of the Company. At the Closing, all of those books and records will be in the possession of the Company or their attorneys. The Company has made available all of these books, records and accounts to Parent or its representatives.

Section 4.27. *Antitakeover Statutes and Rights Agreement.* No antitakeover or similar statute or regulation applies or purports to apply to any of the transactions contemplated by this Agreement. No other "control share acquisition," "fair price," "moratorium" or other antitakeover laws or regulations enacted under U.S. state or federal laws apply to this Agreement or any of the transactions contemplated hereby.

ARTICLE 5
REPRESENTATIONS AND WARRANTIES OF PARENT

Parent represents and warrants to the Company that:

Section 5.01. *Corporate Existence and Power.* Each of Parent and Merger Subsidiary is a corporation duly incorporated, validly existing and in good standing under the laws of its jurisdiction of incorporation and has all corporate powers and all material governmental licenses, authorizations, permits, consents and approvals required to carry on its business as now conducted, except for those licenses, authorizations, permits, consents and approvals the absence of which would not have, individually or in the aggregate, a Parent Material Adverse Effect. Since the date of its incorporation, Merger Subsidiary has not engaged in any activities other than in connection with or as contemplated by this Agreement or in connection with arranging any financing required to consummate the transactions contemplated hereby. Merger Subsidiary is a wholly-owned direct subsidiary of Parent.

Section 5.02. *Corporate Authorization.* The execution, delivery and performance by Parent and Merger Subsidiary of this Agreement and the consummation by Parent and Merger Subsidiary of the transactions contemplated hereby are within the corporate powers of Parent and Merger Subsidiary and have been duly authorized by all necessary corporate action. This Agreement constitutes the valid and binding agreement of Parent and Merger Subsidiary.

Section 5.03. *Governmental Authorization.* The execution, delivery and performance by Parent and Merger Subsidiary of this Agreement and the consummation by Parent and Merger Subsidiary of the transactions contemplated hereby require no action by or in respect of, or filing with, any governmental body, agency or official, domestic, foreign or supranational, other than (i) the filing of an agreement of merger with respect to the Merger with the Secretary of State of the State of California and the filing of appropriate documents with the relevant authorities of other states in which Parent is qualified to do business and (ii) any actions or filings the absence of which could not be reasonably expected to have, individually or in the aggregate, a Parent Material Adverse Effect or materially to impair the ability of Parent and Merger Subsidiary to consummate the transactions contemplated by this Agreement.

Section 5.04. *Non-Contravention.* The execution, delivery and performance by Parent and Merger Subsidiary of this Agreement and the consummation by Parent and Merger Subsidiary of the transactions contemplated hereby do not and will not (i) contravene, conflict with, or result in any violation or breach of any provision of the certificate of incorporation or bylaws of Parent or Merger Subsidiary or (ii) assuming compliance with the matters referred to in Section 5.03, contravene, conflict with, or result in any violation or breach of any provision of any law, rule, regulation, judgment, injunction, order or decree, except for such violations referred to in clause (ii) that would not be reasonably expected to have, individually or in the aggregate, a Parent Material Adverse Effect or materially to impair the ability of Parent and Merger Subsidiary to consummate the transactions contemplated by this Agreement.

Section 5.05. *Finders' Fees.* There is no investment banker, broker, finder or other intermediary that has been retained by or is authorized to act on behalf of Parent who might be entitled to any fee or commission from the Company or any of its Affiliates upon consummation of the transactions contemplated by this Agreement.

Section 5.06. *Financing.* Parent has sufficient cash, available lines of credit or other sources of immediately available funds to enable it to complete the transactions contemplated by this Agreement and to pay all related fees and expenses pursuant to the Merger.

ARTICLE 6
COVENANTS OF THE COMPANY

The Company agrees that:

Section 6.01. *Conduct of the Company.* From the date hereof until the Effective Time, the Company shall, except to the extent that Parent shall otherwise consent in writing (which consent shall not be unreasonably withheld), conduct its business in the ordinary course consistent with past practice and in compliance in all material respects with all applicable laws and regulations, pay its debts and Taxes when due subject to good faith disputes over such debts or Taxes, pay or perform other material obligations when due, and use commercially reasonable efforts to (i) preserve intact its present business organization, (ii) maintain its properties in good operating condition, (iii) keep available the services of its present Officers, employees and independent contractors and (iv) preserve its relationships with customers, suppliers, licensors, licensees and other third parties with which it has business dealings. In addition, during such period, the Company shall manage its working capital in the ordinary course of business, consistent with past business practices or as otherwise mutually determined by Parent and the Company. Without limiting the generality of the foregoing, from the date hereof until the Effective Time, except as set forth on Schedule 6.01 and as contemplated by this Agreement, the Company shall not without the prior written consent of Parent:

(a) adopt or propose any change to its articles of incorporation or bylaws;

(b) sell, lease, license or otherwise dispose of any of its material assets, securities or property;

(c) issue or sell any Company Stock, capital stock, notes, bonds or other securities, or any option, warrant or other right to acquire the same (other than pursuant to the exercise or conversion of outstanding Company Securities);

(d) declare, make or pay any dividends or other distribution (whether in cash, securities or other property) or otherwise distribute cash or cash equivalents for or redeem, purchase, repurchase or otherwise acquire, directly or indirectly, any of the Company Stock (except pursuant to Company repurchase rights arising in connection with an employee's or other service provider's termination of employment or other relation with the Company);

(e) merge or consolidate with any other Person, or acquire a material amount of the stock or assets of any Person;

(f) incur any Indebtedness other than accounts payable in the ordinary course consistent with past practice;

(g) make any loan to, guarantee any Indebtedness of or otherwise incur any Indebtedness on behalf of any Person;

(h) fail to pay any creditor any amount owed to such creditor when due unless disputed in good faith by appropriate proceedings;

(i) hire, employ, contract or enter into any agreement with any new employees or independent contractors;

(j) (A) amend any Company Stock Option Plan or any other stock option or compensation plan or other arrangement or agreement pursuant to which the Company has granted any options, (B) grant any increase, or announce any increase, in the wages, salaries, compensation, bonuses, incentives, pension or other benefits payable or to become payable to its Officers or employees, (C) establish or increase or promise to increase any benefits under the Company's 401(k) Plan, or (D) grant any severance or termination pay to, or enter into any employment or severance agreement or arrangement with, any director, Officer, employee or shareholder of the Company (or with any relative, beneficiary, spouse or Affiliate of such Persons);

(k) amend, modify or consent to the termination of any material contract or the Company's rights thereunder;

(l) transfer, license or sub-license to any Person any Company Intellectual Property, or otherwise extend, amend or modify in any material respect any agreement in relation to any Company Intellectual Property, other than in the ordinary course of business consistent with past practice, or take any other action which would materially alter the value of the Company Intellectual Property;

(m) enter into any lease, contract or agreement with regard to real property;

(n) enter into any non-compete agreement or other material restriction on any of its businesses following the Effective Time;

(o) permit any insurance policy naming it as a beneficiary or a loss payee to be cancelled or terminated;

(p) enter into any agreement, commitment, arrangement or plan with any Related Party;

(q) make any payment, reimbursement, refund or other fund transfer to any Related Party, other than the payment of salaries to Officers or employees made in the ordinary course of business consistent with past practice;

(r) take any action that would reasonably be expected to make any representation and warranty of the Company hereunder inaccurate in any material respect at, or as of any time prior to, the Effective Time or omit to take any action reasonably expected to be necessary to prevent any such representation or warranty from being inaccurate in any material respect at any such time; or

(s) agree or commit to do any of the foregoing.

Section 6.02. *Shareholder Approval.* The Board of Directors of the Company shall recommend approval and adoption of this Agreement and the transactions contemplated hereby by the shareholders of the Company and shall not withdraw or modify in an adverse manner to Parent such recommendation. As promptly as practicable after the date hereof, the Company shall cause a meeting of its shareholders (the "**Company Shareholder Meeting**") to be duly called and held as soon as reasonably practicable for approval and adoption of this Agreement and the Merger. In connection with such meeting, the Company will (i) promptly prepare and thereafter mail to the holders of Company Stock as promptly as reasonably practicable a proxy statement and all other proxy materials required by law for such meeting, (ii) take all other actions necessary or advisable to obtain all necessary approvals by the holders of Company Stock of this Agreement and the transactions contemplated hereby, and (iii) otherwise comply with all applicable legal requirements. The Company may, in lieu of holding the Company Shareholder Meeting, obtain the requisite approval of its shareholders by written consent.

Section 6.03. *No Solicitation; Other Offers.* The Company shall not, and the Company shall not authorize or permit any of its Affiliates, Officers, directors, employees, investment bankers, attorneys, accountants, consultants or other agents or advisors to, directly or indirectly, (i) solicit, initiate or take any action to knowingly facilitate or knowingly encourage the submission of any Acquisition Proposal, (ii) enter into or participate in any discussions or negotiations with, furnish any information relating to the Company or afford access to the business, properties, assets, books or records of the Company to, or otherwise cooperate in any way with, or knowingly assist,

participate in, facilitate or encourage any effort by any Third Party in connection with an Acquisition Proposal, (iii) approve, endorse or recommend any Acquisition Proposal, (iv) grant any waiver or release under any standstill or similar agreement with respect to any class of equity securities of the Company, or (v) enter into any agreement with respect to an Acquisition Proposal.

Section 6.04. *Access to Information.* From the date hereof until the Effective Time and subject to applicable law, the Company shall (i) give Parent, its counsel, financial advisors, auditors and other authorized representatives reasonable access to the offices, properties, books, contracts and records of the Company, (ii) furnish to Parent, its counsel, financial advisors, auditors and other authorized representatives such financial and operating data and other information as such Persons may reasonably request and (iii) instruct the employees, counsel, financial advisors, auditors and other authorized representatives of the Company to cooperate with Parent in its investigation of the Company. No information obtained by Parent in any investigation pursuant to this Section shall affect or be deemed to modify any representation, warranty or agreement given or made by the Company hereunder.

Section 6.05. *Tax Matters.* (a) The Company shall not make or change any material Tax election, change any annual tax accounting period, adopt or change any method of tax accounting, file any material amended Tax Returns or claims for Tax refunds, enter into any closing agreement, surrender any Tax claim, audit or assessment, surrender any right to claim a Tax refund, offset or other reduction in Tax liability surrendered, consent to any extension or waiver of the limitations period applicable to any Tax claim or assessment or take or omit to take any other action, if any such action or omission would have the effect of materially increasing the Tax liability or reducing any Tax Asset of the Company.

(b) Prior to the Effective Time, the Company shall submit to the holders of Outstanding Company Stock a proposal for approval by 75% of the disinterested the holders of Outstanding Company Stock of any payments or benefits in connection with this Agreement and the transactions contemplated hereby that may be deemed to constitute "parachute payments" within the meaning of Section 280G of the Code, and shall use commercially reasonable efforts to obtain the approval in such a manner that any and all such payments and benefits shall not be deemed to constitute "parachute payments" under Section 280G of the Code.

Section 6.06. *401(k).* Effective as of the day immediately preceding the Effective Time, the Company shall terminate any and all 401(k) plans sponsored or maintained by the Company, unless Parent provides written notice to the Company prior to the Effective Time that any such 401(k) plan shall not be terminated. At the Closing, Parent shall receive from the Company evidence that the Company's 401(k) plan(s) have been terminated pursuant to resolutions of the Company's or any of its Subsidiaries' Board of Directors (the form and substance of such resolutions shall be subject to review and reasonable approval of Parent), effective on or before the day immediately preceding the Effective Time.

Section 6.07. *Consents.* The Company shall use its commercially reasonable efforts to obtain the consents, waivers, assignments and approvals as may be required from third parties in connection with this Agreement and the transactions contemplated hereby, including without limitation those consents listed on Schedule 6.07.

Section 6.08. *Intellectual Property.* From the date hereof until the Effective Time:

(a) the Company will make payments and take such other actions as are reasonably necessary or advisable to maintain pending all patents, registered copyrights and copyright applications, registered trademarks and service marks and trademark or service mark applications and any Company Registered Intellectual Property, including the payment of any registration, maintenance or renewal fees or the filing of any responses to office actions by the patent, copyright, trademark or other authorities in the United States or foreign jurisdictions, documents, applications or certificates reasonably necessary for the purposes of obtaining, maintaining, perfecting or preserving or renewing any Company Registered Intellectual Property; and

(b) the Company will provide information, or updates with respect to information previously provided to Parent prior to the date hereof, to Parent about the status of any pending applications for Company Registered Intellectual Property and, subject to compliance with any anti-trust or other legal requirements, allow Parent to select counsel and control the prosecution of such applications.

ARTICLE 7
COVENANTS OF PARENT

Parent agrees that:

Section 7.01. *Obligations of Merger Subsidiary.* Parent will take all action necessary to cause Merger Subsidiary to perform its obligations under this Agreement and to consummate the Merger on the terms and conditions set forth in this Agreement.

Section 7.02. *Employee Benefit Plans.* (a) As of and from the Closing Date, the Continuing Employees shall be provided with employee benefits (including salary, bonus and equity compensation) that, in the aggregate, are substantially comparable to those provided to employees of Parent who are similarly situated.

(b) Parent shall arrange for each Continuing Employee (including without limitation all dependents) who becomes a Parent employee (or an employee of any Parent Subsidiary or Affiliate) to the extent permitted by law, the current terms of Parent's plans and applicable tax qualification requirements, and subject to any applicable break in service or similar rule, to receive credit for all purposes including, without limitation, eligibility to participate, matching contributions, and vesting under Parent employee benefit plans for years of service with the Company (and its subsidiaries and predecessors) prior to the Closing Date. If applicable and to the extent permitted by the

applicable Parent plan, Parent shall cause any and all pre-existing condition (or actively at work or similar) limitations, eligibility waiting periods and evidence of insurability requirements under any Parent employee benefit plan to be waived with and in respect to such Continuing Employee and their eligible dependents and shall use reasonable efforts to cause them to be provided with credit for any co-payments, deductibles, and offsets (or similar payments) made during the plan year including the Closing Date for the purposes of satisfying any applicable deductible, out-of-pocket or similar requirements under any Parent employee benefit plan in which they are eligible to participate after the Closing Date.

Section 7.03. *Director and Officer Liability.* Parent shall cause the Surviving Corporation, and the Surviving Corporation hereby agrees, to do the following:

(a) For a period six (6) years from and after the Effective Time, Parent shall cause the Surviving Corporation to fulfill and honor in all respects the obligations of the Company under any indemnification agreements set forth on Schedule 7.03 between the Company and its directors and Officers in effect immediately prior to the Effective Time (collectively, the "**Indemnified Persons**") and any indemnification provisions under the Company's articles of incorporation and bylaws in effect immediately prior to the Effective Time to the maximum extent permitted by applicable law. For a period six (6) years from and after the Effective Time, the articles of incorporation of the Surviving Corporation shall contain provisions with respect to exculpation and indemnification that are at least as favorable to the Indemnified Persons as those contained in the Company's articles of incorporation and bylaws in effect immediately prior to the Effective Time, which provisions, for such period, shall not be amended, repealed or otherwise modified in any manner that would adversely affect the rights thereunder of individuals who, immediately prior to the Effective Time, were directors, officers, employees or agents of the Company, unless such modification is required by applicable law. For the avoidance of doubt, no Holdback Party who is a director or Officer of the Company shall be entitled to indemnification from the Surviving Corporation with respect to any liability of such Holdback Party to any Parent Indemnified Party under Article 10 or in connection with any Holdback Party Breach (as such term is defined in the Escrow Agreement) by such Holdback Party arising out of this Agreement or the transactions contemplated hereby. Notwithstanding the foregoing, the CEO shall be entitled to indemnification under this Section 7.03(a) if and to the extent that the CEO shall be liable for any claim to indemnification under Article 10 as a result of a Warranty Breach in connection with Section 4.05 or 4.25 which is attributable to facts or circumstances occurring prior to the date of the CEO Employment Agreement, in which event, the CEO shall not be liable to the Parent Indemnified Parties for any amount of Damages under Article 10 with respect to the amount of any such indemnification provided to the CEO by the Surviving Corporation pursuant to this sentence.

(b) For a period of six (6) years from and after the Effective Time. Parent or the Surviving Corporation to maintain in effect, if available, directors' and officers' liability insurance covering those Persons who are currently covered by the Company's directors' and officers' liability insurance policy in an amount and on terms no less advantageous, when taken as a whole, to those applicable to the current directors and officers of the

Company; provided, however, that in no event shall Parent or the Surviving Corporation be required to expend an annual premium for such coverage in excess of 200% of the annual premium currently paid by the Company under its directors' and officer's liability insurance policy in effect as of the date hereof, and if the cost for such coverage is in excess of such amount, the Surviving Corporation shall only be required to maintain such coverage as is available for such amount; and provided further, however, that notwithstanding the foregoing, Parent may fulfill its obligations under this Section 7.03(b) by purchasing a policy of directors' and officers' insurance approved in advance by the Company, or a "tail" policy under the Company's existing directors' and officers' insurance policy, in either case which (i) has an effective term of six (6) years from the Effective Time, (ii) covers only those persons who are currently covered by the Company's directors' and officers' insurance policy in effect as of the date hereof and only for actions and omissions occurring on or prior to the Effective Time and (iii) contains terms and conditions (including, without limitation, coverage amounts) that are no less advantageous, when taken as a whole, to those applicable to the current directors and officers of the Company.

(c) If Parent, the Surviving Corporation or any of its 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 7.03.

(d) The rights of each Indemnified Person under this Section 7.03 shall be in addition to any rights such Person may have under the articles of incorporation or bylaws of the Company, or under California Law or any other applicable laws or under any agreement of any Indemnified Person with the Company. These rights shall survive consummation of the Merger and are intended to benefit, and shall be enforceable by, each Indemnified Person.

ARTICLE 8
COVENANTS OF THE PARTIES

The parties hereto agree that:

Section 8.01. *Reasonable Efforts.* Subject to the terms and conditions of this Agreement, each of the Company and Parent will use their respective commercially reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate the transactions contemplated by this Agreement by the End Date. Parent and the Company agree, and Parent, after the Effective Time, agrees to cause the Surviving Corporation, to execute and deliver such other documents, certificates, agreements and other writings and to take such other actions as may be necessary or

desirable in order to consummate or implement expeditiously the transactions contemplated by this Agreement.

Section 8.02. *Certain Filings.* The Company and Parent shall cooperate with one another (i) in determining whether any action by or in respect of, or filing with, any governmental body, agency, official, or authority is required, or any actions, consents, approvals or waivers are required to be obtained from parties to any material contracts, in connection with the consummation of the transactions contemplated by this Agreement and (ii) in using their respective commercially reasonable efforts to take such actions or make any such filings, furnishing information required in connection therewith and seeking timely to obtain any such actions, consents, approvals or waivers.

Section 8.03. *Public Announcements.* Parent and the Company will consult with each other before issuing any press release or making any public statement with respect to this Agreement or the transactions contemplated hereby and, except as may be required by applicable law, order of a court of competent jurisdiction, or any listing agreement with any national securities exchange or association, will not issue any such press release or make any such public statement prior to such consultation.

Section 8.04. *Further Assurances.* At and after the Effective Time, the Officers and directors of the Surviving Corporation will be authorized to execute and deliver, in the name and on behalf of the Company or Merger Subsidiary, any deeds, bills of sale, assignments or assurances and to take and do, in the name and on behalf of the Company or Merger Subsidiary, any other actions and things to vest, perfect or confirm of record or otherwise in the Surviving Corporation any and all right, title and interest in, to and under any of the rights, properties or assets of the Company acquired or to be acquired by the Surviving Corporation as a result of, or in connection with, the Merger.

Section 8.05. *Notices of Certain Events.* The Company and Parent shall promptly notify the other of any of the following between the date hereof and the Effective Time:

(a) any notice or other communication from any Person alleging that the consent of such Person is or may be required in connection with the transactions contemplated by this Agreement;

(b) any notice or other communication from any governmental or regulatory agency or authority in connection with the transactions contemplated by this Agreement; and

(c) any actions, suits, claims, investigations or proceedings commenced or, to its Knowledge, threatened against, relating to or involving or otherwise affecting the Company that, if pending on the date of this Agreement, would have been required to have been disclosed pursuant to Section 4.10, 4.11, 4.12, 4.14, 4.15, 4.16, 4.18, 4.20, 4.22 or 4.25, as the case may be, or that relate to the consummation of the transactions contemplated by this Agreement.

Section 8.06. *Confidentiality.* Prior to the Effective Time and after any termination of this Agreement, each of Parent and the Company shall hold, and shall use commercially reasonable efforts to cause its Affiliates, Officers, directors, employees, accountants, counsel, consultants, advisors and agents to hold, in confidence, unless compelled to disclose by judicial or administrative process or by other requirements of law, all confidential documents and information concerning the other party furnished to it or its Affiliates in connection with the transactions contemplated by this Agreement, except to the extent that such information can be shown to have been (i) previously known on a nonconfidential basis by such party, (ii) in the public domain through no fault of such party or (iii) later lawfully acquired by such party from sources other than the other party; *provided* that each of Parent and the Company may disclose such information to its Officers, directors, employees, accountants, counsel, consultants, advisors and agents in connection with the transactions contemplated by this Agreement so long as such party informs such Persons of the confidential nature of such information and directs them to treat it confidentially. Notwithstanding any other provision of this Agreement and the Related Agreements, each of Parent and the Company may disclose the tax treatment and tax structure of the transactions contemplated by this Agreement (including any materials, opinions or analyses relating to such tax treatment or tax structure, but without disclosure of identifying information or, except to the extent relating to such tax structure or tax treatment, any nonpublic commercial or financial information) on and after the earliest to occur of the date of (i) public announcement of discussions relating to the transactions, (ii) public announcement of the transactions or (iii) execution of a definitive agreement (with or without conditions) to enter into the transactions. Moreover, notwithstanding any other provision of this Agreement or the Related Agreements, there shall be no limitation on any party's ability to consult any tax adviser, whether or not independent from the parties, regarding the tax treatment or tax structure of the transactions. Each of Parent and the Company shall satisfy its obligation to hold any such information in confidence if it exercises the same care with respect to such information as it would take to preserve the confidentiality of its own similar information. If this Agreement is terminated, each of Parent and the Company shall, and shall use its best efforts to cause its Officers, directors, employees, accountants, counsel, consultants, advisors and agents to, destroy or deliver to the other party, upon request, all documents and other materials, and all copies thereof, that it or its Affiliates obtained, or that were obtained on their behalf, from the other party in connection with this Agreement and that are subject to such confidence.

Section 8.07. *Payment of Existing Debt and Other Company Obligations.* (a) On the Determination Date, the Company shall deliver to Parent a certificate executed for and on behalf of the Company by the Chief Financial Officer of the Company (the "**Determination Certificate**") in the form set forth on Schedule 8.07(a), setting forth (i) the Debt Repayment Amount allocated with respect to each Lender and Debt Agreement, (ii) the Warrant Termination Payment Amount allocated with respect to each Warrant Holder and Terminating Warrant, (iii) the CEO Payment Amount, (iv) the Employee Bonus Pool Payment Amount allocated with respect to each payee thereunder (the "**Employee Bonus Pool Payees**"), (v) the Change of Control Payment Amount allocated with respect to each Change of Control Agreement and each payee thereunder (the

"**Change of Control Payees**") and (vi) the Transaction Expense Amount allocated with respect to each Transaction Expense Agreement and each payee thereunder (the "**Transaction Expense Payees**"); in each case determined as of the Closing Date. The Determination Certificate shall include the bank account (if any) designated by each payee referred to in clauses (i)-(iii), (v) and (vi) above for purposes of the payment by the Parent under Section 8.07(c) and the address of each Employee Bonus Pool Payee..

(b) Within ten (10) days after the Closing, Parent shall, on behalf of the Surviving Corporation, pay (or cause the Surviving Corporation to pay) by check to the Employee Bonus Pool Payees, in exchange for a release executed by each such Employee Bonus Pool Payee, reasonably satisfactory in form to Parent (each, an "**Employee Bonus Pool Release**", and collectively, the "**Employee Bonus Pool Releases**") an amount equal, in the aggregate, to the Employee Bonus Pool Amount (net of any applicable withholding taxes, which Parent shall withhold and remit to the appropriate Taxing Authority) in full satisfaction of all rights of the Employee Bonus Pool Payees under the Employee Bonus Pool.

(c) On the Closing Date, Parent shall, on behalf of the Surviving Corporation, pay (or cause the Surviving Corporation to pay) by wire transfer or check to:

(i) the Lenders, in exchange for a release executed by the Lender party to each Debt Agreement, reasonably satisfactory in form to Parent (each, a "**Debt Release**", and collectively, the "**Debt Releases**") an amount equal, in the aggregate, to the Debt Repayment Amount (net of any applicable withholding taxes, which Parent shall withhold and remit to the appropriate Taxing Authority), in full satisfaction of all Indebtedness with respect to the Debt Agreements;

(ii) the Warrant Holders, in exchange for a release executed by the holder of each Terminating Warrant, reasonably satisfactory in form to Parent (each, a "**Warrant Release**", and collectively, the "**Warrant Releases**") an amount equal, in the aggregate, to the Warrant Termination Payment Amount (net of any applicable withholding taxes, which Parent shall withhold and remit to the appropriate Taxing Authority), in full satisfaction of all rights of the Warrant Holders under the Terminating Warrants;

(iii) the CEO, in exchange for a release executed by the CEO, reasonably satisfactory in form to Parent (the "**CEO Release**") an amount equal the CEO Payment Amount *plus* the CEO Base Salary *plus* an amount equal to the CEO's reasonably documented unpaid business expenses and accrued vacation entitlement, as set forth on the Determination Certificate (*minus* the CEO Escrow Amount which shall be deposited into the Escrow Account in accordance with Section 2.08) (such aggregate amount, net of any applicable withholding taxes, which Parent shall withhold and remit to the appropriate Taxing Authority), in satisfaction of those rights of the CEO under the CEO Employment Agreement, as contemplated by the CEO Release;

(iv) Deloitte & Touche LLP and E*Trade, Inc., in exchange for a release executed by each such Change of Control Payee, reasonably satisfactory in form to Parent (each, a "**Change of Control Release**", and collectively, the "**Change of Control Releases**") an amount equal to the portion of the Change of Control Payment Amount attributable thereto as set forth in the Determination Certificate (net of any applicable withholding taxes, which Parent shall withhold and remit to the appropriate Taxing Authority), which amount shall be in full satisfaction of all rights of such Change of Control Payees under the applicable Change of Control Agreements; and

(v) to Alliant Partners and Lorraine Fox, in exchange for a release by each such Transaction Expense Payee, reasonably satisfactory in form to Parent, (each, a "**Transaction Expense Release**", and collectively, the "**Transaction Expense Releases**") an amount equal to the portion of the Transaction Expense Amount attributable thereto as set forth in the Determination Certificate (net of any applicable withholding taxes, which Parent shall withhold and remit to the appropriate Taxing Authority), which amount shall be in full satisfaction of all rights of such Transaction Expense Payees under the applicable Transaction Expense Agreements.

ARTICLE 9
CONDITIONS TO THE MERGER

Section 9.01. *Conditions to Obligations of Each Party.* The obligations of each party to this Agreement to consummate the Merger are subject to the satisfaction at or prior to the Effective Time of the following conditions:

(a) This Agreement and the Merger shall have been approved and adopted by the holders of the capital stock of the Company at the Company Shareholder Meeting (or any adjournment thereof) or by written consent in lieu of the Company Shareholder Meeting, in accordance with California Law and the Company's articles of incorporation and bylaws and such approval shall not have been revoked or otherwise withdrawn in any respect.

(b) No provision of any applicable law or regulation and no judgment, injunction, order or decree shall be in effect that has the effect of prohibiting the consummation of the Merger.

(c) All actions by or in respect of, or filings with, any governmental body, agency, official or authority, domestic, foreign or supranational, required to permit the consummation of the Merger shall have been taken, made or obtained.

Section 9.02. *Conditions to the Obligations of Parent and Merger Subsidiary.* The obligations of Parent and Merger Subsidiary to consummate the Merger are subject to the satisfaction of the following further conditions, any of which may be waived, in writing, exclusively by Parent:

(a) The representations and warranties of the Company set forth in this Agreement and in any certificate or other writing delivered by the Company pursuant hereto, disregarding all qualifications and exceptions contained therein relating to materiality or Company Material Adverse Effect, shall be true and correct at and as of the Effective Time as if made at and as of such time (except that those representations and warranties which address matters only as of a particular date shall have been true and correct only on such date), except where the failure of such representations and warranties to be true and correct would not, singly or in the aggregate, reasonably be expected to have a Company Material Adverse Effect. Parent and Merger Subsidiary shall have received a certificate executed for and on behalf of the Company by the Chief Executive Officer and the Chief Financial Officer of the Company to the foregoing effect.

(b) The Company shall have performed or complied with all agreements and covenants required to be performed by it under this Agreement at or prior to the Closing Date that are qualified as to a Company Material Adverse Effect and shall have performed or complied in all material respects with all other agreements and covenants required to be performed by it under this Agreement at or prior to the Closing Date that are not so qualified, and Parent and Merger Subsidiary shall have received a certificate executed for and on behalf of the Company by the Chief Executive Officer and the Chief Financial Officer of the Company to such effect.

(c) There shall not have been instituted or pending any action or proceeding (or any investigation or other inquiry that might result in such action or proceeding) challenging or seeking to make illegal, to delay materially or otherwise directly or indirectly to restrain or prohibit the consummation of the Merger, seeking to obtain material damages or otherwise directly or indirectly relating to the Merger or the other transactions contemplated hereby, (i) by any government or governmental authority or agency, domestic, foreign or supranational, or (ii) by any other Person, before any court or governmental authority or agency, domestic, foreign or supranational that, in the case of this clause (ii), would be reasonably likely to have a Company Material Adverse Effect or a Parent Material Adverse Effect. There shall not have been any action taken, or any statute, rule, regulation, injunction, order or decree proposed, enacted, enforced, promulgated, issued or deemed applicable to the Merger, by any court, government or governmental authority or agency, domestic, foreign or supranational, that, in the judgment of Parent, is likely, directly or indirectly, to result in any of the foregoing consequences.

(d) Parent shall have received an opinion of Wilson Sonsini Goodrich & Rosati, Professional Corporation, counsel to the Company, dated as of the Closing Date in substantially the form attached hereto as Exhibit E.

(e) Each of (i) the Inventions, Trade Secrets and Disclosures Agreements shall have been executed and delivered to Parent by the individuals listed on Annex A hereto, (ii) the Employment and Non-Competition Agreements shall have been executed and delivered to Parent by the individuals listed on Annex B hereto, and (iii) the Releases shall have been executed by the releasing parties thereto, and each of the foregoing

agreements and releases and the Settlement Agreement shall be in full force and effect immediately prior to the Effective Time.

(f) The Company shall have delivered a certification pursuant to Treasury Regulations Sections 1.897-2(h) and 1.1445-2(c), signed by the Company and dated not more than 30 days prior to the Effective Time to the effect that the Company is not nor has it been within five (5) years of the date of the certification a "United States real property holding corporation" as defined in Section 897 of the Code.

(g) No Company Material Adverse Effect shall have occurred since the date hereof and be continuing.

(h) Parent shall have received all documents it may have reasonably requested relating to the existence and good standing of the Company and the authority of the Company to execute this Agreement, all in form and substance reasonably satisfactory to Parent.

(i) The Company shall have received each of the consents listed on Schedule 9.02(i).

(j) Parent shall have received the Determination Certificate, reasonably satisfactory in form and substance to Parent, on or prior to the Determination Date.

(k) Holders of not more than 10% of the outstanding shares of Company Stock shall have exercised, and not failed to have perfected, withdrawn or otherwise lost dissenters' rights under California Law with respect to the transactions contemplated by this Agreement.

Section 9.03. *Conditions to Obligations of the Company.* The obligation of the Company to consummate the Merger is subject to the satisfaction of the following further conditions, any of which may be waived, in writing, exclusively by the Company:

(a) The representations and warranties of Parent and Merger Subsidiary set forth in this Agreement and in any certificate or other writing delivered by Parent and Merger Subsidiary pursuant hereto, disregarding all qualifications and exceptions contained therein relating to materiality or Parent Material Adverse Effect, shall be true and correct at and as of the Effective Time as if made at and as of such time, except where the failure of such representations and warranties to be true and correct would not, singly or in the aggregate, reasonably be expected to have a Parent Material Adverse Effect. The Company shall have received a certificate executed for and on behalf of Parent by a duly authorized Officer of Parent to the foregoing effect.

(b) Parent shall have performed or complied with all agreements and covenants required to be performed by it under this Agreement at or prior to the Closing Date that are qualified as to a Parent Material Adverse Effect and shall have performed or complied in all material respects with all other agreements and covenants required to be performed by it under this Agreement at or prior to the Closing Date that are not so qualified, and

the Company shall have received a certificate executed for and on behalf of Parent by a duly authorized Officer of Parent to such effect.

ARTICLE 10
SURVIVAL, INDEMNIFICATION

Section 10.01. *Survival.* The representations and warranties of the Company and the Holdback Parties contained in this Agreement, the Related Agreements or in any certificate delivered pursuant hereto or in connection herewith shall survive the Effective Time until the first anniversary of the Effective Time; *provided* that the representations and warranties of the Company contained in Section 4.05(a), (c), (d) and (f) and Section 4.25 of this Agreement and of certain Shareholders contained in Section 2.05 of the Voting Agreement shall survive until the expiration of the statute of limitations applicable to the matters covered thereby (giving effect to any waiver, mitigation or extension thereof). Notwithstanding the preceding sentence, if written notice of a claim has been given prior to the expiration of the applicable representations and warranties by a party hereto to another party hereto (which notice shall indicate with reasonable specificity the amount and nature of the claim and the representation on which it is based), then the relevant representations and warranties shall survive as to such claim until such claim has been finally resolved. All of Parent's representations and warranties contained herein or in any instrument delivered pursuant to this Agreement shall terminate at the Effective Time.

Section 10.02. *Indemnification.* (a) Subject to the limitations and qualifications in this Section 10.02, each of the Holdback Parties hereby (whether or not such Holdback Party has consented to the Merger or consented to the provisions of this section or made any representations and warranties in this Agreement), severally but not jointly, indemnifies Parent and its Affiliates and as of the Effective Time, without duplication, the Surviving Corporation (collectively, the "**Parent Indemnified Parties**"), against and agrees to hold each of them harmless from any and all damage, loss, liability and expense (including, without limitation, reasonable expenses of investigation and reasonable attorneys' fees and expenses in connection with any action, suit or proceeding, including proceedings between the parties hereto) ("**Damages**") incurred or suffered by Parent or any Affiliate arising out of (w) any breach of representation or warranty (determined without regard to any materiality qualification contained in any representation or warranty giving rise to the claim for indemnity hereunder) made by the Company or such Holdback Party contained in this Agreement, the Related Agreements or in any certificate delivered pursuant hereto or in connection herewith (each such breach of representation or warranty a "**Warranty Breach**"), (x) a breach of covenant or agreement to be performed by the Company (prior to the Effective Time) or such Holdback Party (at any time) pursuant to this Agreement or any Related Agreement, (y) any difference between the aggregate amount paid by Parent in exchange for the Outstanding Company Stock and the Merger Consideration Amount, as a result of the exercise of dissenters' rights under California Law or (z) any action, suit, investigation or proceeding by or on behalf of the Company, the holder of any of the Company Securities or any present or former

director, Officer, employee, or consultant of the Company, as a result of or in connection with the Merger or any of the other transactions contemplated hereby, before any court or arbitrator or before or by any governmental body, agency or official, domestic, foreign or supranational; *provided* that with respect to indemnification by the Holdback Parties for any of the matters described in clauses (w) – (z) above, (i) no Parent Indemnified Party shall be entitled to indemnification unless Damages with respect to Warranty Breaches exceed $10,000 for each claim or any group of reasonably related claims and together exceed in the aggregate $150,000, in which case such Parent Indemnified Party shall be entitled to recover all Damages so identified, and (ii) other than with respect to any Warranty Breach in connection with Section 4.05(a), (c), (d) and (f) and Section 4.25 and Section 2.05 of the Voting Agreement, the aggregate amount of Damages for which the Parent Indemnified Parties may receive indemnification from each Holdback Party shall not exceed, such Holdback Party's Pro Rata Share of the Escrow Amount *plus* such Holdback Party's Percentage Interest (as such term is defined in the Escrow Agreement) of the aggregate income received on the Escrow Property; *provided, further*, that, the aggregate amount of Damages for which the Parent Indemnified Parties may receive indemnification from each Holdback Party for any Warranty Breach in connection with Section 4.05(a), (c), (d) and (f) and Section 4.25 and Section 2.05 of the Voting Agreement shall not exceed, the difference of (A) with respect to each Shareholder the amount equal to the Merger Consideration payable to such Shareholder and, with respect to the CEO, subject to Section 7.03(a), the amount equal to the CEO Payment Amount, *minus* (B) the aggregate amount of all other Damages, if any, for which the Parent Indemnified Parties have received indemnification from such Holdback Party under this Article 10.

(b) After the Effective Time, the indemnification provisions set forth in this Article 10 will provide the exclusive remedy of Parent against any Holdback Party for any misrepresentation, breach of warranty, covenant or other agreement or other claim arising out of this Agreement and the Voting Agreements (other than Section 4.03, 4.04 and 4.05 of the Voting Agreement), except with respect to a claim based on fraud, willful misconduct or intentional misrepresentation.

(c) Parent hereby agrees that all claims brought against any Holdback Party hereunder, prior to the termination of the Escrow Agreement in accordance with its terms, shall first be made by resort to the Escrow Property, in accordance with the provisions of the Escrow Agreement (including, without limitation, Section 6 of the Escrow Agreement).

Section 10.03. *Procedures.* (a) Parent agrees to give prompt notice to the Holdback Parties' Representative and the Escrow Agent of the assertion of any claim, or the commencement of any suit, action or proceeding in respect of which indemnity may be sought under Section 10.02 and shall provide the Holdback Parties' Representative such information with respect thereto that the Holdback Parties' Representative may reasonably request. The failure to so notify the Holdback Parties' Representative shall not relieve the Holdback Parties of their obligations hereunder, except to the extent such failure shall have materially adversely prejudiced the Holdback Parties.

(b) Parent will be entitled (with expenses of such Indemnified Party constituting Damages) to exercise full control of the defense, compromise or settlement of any claim asserted by any Third Party (a "**Third Party Claim**") unless the Holdback Parties' Representative, within a reasonable time after the giving of the notice by Parent of the Third Party Claim in accordance with Section 10.03, (i) notifies Parent in writing of the Holdback Parties' Representative's intention to assume such defense, (ii) retains legal counsel reasonably satisfactory to Parent to conduct the defense of such Third Party Claim and (iii) the sum of (A) the full amount of the Third Party Claim and (B) all other claims by the Parent Indemnified Parties under this Agreement is less than the amounts remaining in the Escrow Account; *provided* that such action shall be deemed an admission by the Holdback Parties of liability to the Parent Indemnified Parties for the full amount of the Third Party Claim under this indemnity; *provided further* that the Holdback Parties' Representative shall not be entitled to assume or maintain control of the defense of any Third Party Claim if (v) the Third Party Claim is in respect of Taxes, (w) the Third Party Claim relates to or arises in connection with any criminal proceeding, action, indictment, allegation or investigation, (x) Parent reasonably believes an adverse determination with respect to the Third Party Claim would be materially detrimental to any Parent Indemnified Party's reputation or future business prospects, (y) the Third Party Claim seeks an injunction or equitable relief against any Parent Indemnified Party or (z) the Holdback Parties' Representative has failed or is failing to prosecute or defend vigorously the Third Party Claim. The other party will cooperate with the party assuming the defense, compromise or settlement of any such Third Party Claim in accordance with this Agreement in any manner that such party reasonably may request. If the Holdback Parties' Representative so assumes the defense of any such Third Party Claim, the Parent Indemnified Parties will have the right, to employ separate counsel and to participate in the defense, compromise or settlement of the Third Party Claim.

(c) No Parent Indemnified Party shall settle or compromise any such Third Party Claim for which it is entitled to indemnification under this Agreement without the prior written consent of the Holdback Parties' Representative (which shall not be unreasonably withheld). The Holdback Parties' Representative, if it shall assume control of the defense of any Third Party Claim in accordance with this Section 10.03, shall not settle or compromise any such Third Party Claim without the prior written consent of Parent (which shall not be unreasonably withheld), unless the settlement or compromise expressly unconditionally releases the Parent Indemnified Parties from all liabilities and obligations with respect to such Third Party Claim.

(d) Each party shall cooperate, and cause their respective Affiliates to cooperate, in the defense or prosecution of any Third Party Claim and shall furnish or cause to be furnished such records, information and testimony, and attend such conferences, discovery proceedings, hearings, trials or appeals, as may be reasonably requested in connection therewith.

Section 10.04. *Purchase Price Adjustment.* Any amounts paid under this Article 10 will be treated as an adjustment to the aggregate consideration paid to the Shareholders.

Section 10.05. *Holdback Parties' Representative.*

(a) Effective upon and by virtue of the vote of the shareholders of the Company approving this Agreement and the transactions contemplated hereby, and without any further act of any Holdback Party, the Holdback Parties' Representative shall be hereby appointed as the Holdback Parties' representative and as the attorney-in-fact and agent for and on behalf of each Holdback Party with respect to any claims by any Parent Indemnified Party against the Escrow Property under this Article 10 and any amendments to the Escrow Agreement; *provided, however*, that any amendment of the Escrow Agreement that shall adversely affect the rights or obligations of any Holdback Party under the Escrow Agreement (other than any required change in a Holdback Party's Percentage Interest, as defined therein) or this Article 10 shall require the prior written consent of such adversely affected Holdback Party. The Holdback Parties' Representative hereby accepts such appointment. The Holdback Parties' Representative will take any and all actions and make any decisions required or permitted to be taken by the Holdback Parties' Representative under the Escrow Agreement and this Agreement, including the exercise of the power to (i) agree to, negotiate, enter into settlements and compromises of, commence any suit, action or proceeding, and comply with orders of courts with respect to, claims for Damages, (ii) litigate, resolve, settle or compromise any Contested Claim made pursuant to Article 10 of the Merger Agreement, and (iii) take all actions necessary in the judgment of the Holdback Parties' Representative for the accomplishment of the foregoing. The Holdback Parties' Representative will have authority and power to act on behalf of each Holdback Party with respect to the disposition, settlement or other handling of all claims against the Escrow Property under this Article 10 and all related rights or obligations of the Holdback Parties arising under this Article 10. The Holdback Parties' Representative will also have authority and power to act on behalf of each Holdback Party with respect to any amendments to the Escrow Agreement. The Holdback Parties' Representative shall use commercially reasonable efforts based on contact information available to the Holdback Parties' Representative to keep the Holdback Parties reasonably informed with respect to actions of the Holdback Parties' Representative pursuant to the authority granted the Holdback Parties' Representative under this Agreement. Each Holdback Party shall promptly provide written notice to the Holdback Parties' Representative of any change of address of such Holdback Party

(b) A decision, act, consent or instruction of the Holdback Parties' Representative hereunder shall constitute a decision, act, consent or instruction of all

Holdback Parties and shall be final, binding and conclusive upon each of such Holdback Parties, and the Escrow Agent and Parent may rely upon any such decision, act, consent or instruction of the Holdback Parties' Representative as being the decision, act, consent or instruction of each and every such Holdback Party. The Escrow Agent and Parent shall be relieved from any liability to any Person for any acts done by them in accordance with such decision, act, consent or instruction of the Holdback Parties' Representative.

(c) The Holdback Parties' Representative shall have the right to recover from the Escrow Property, prior to any distribution to the Holdback Parties (but after any disbursement from the Escrow Property to the Escrow Agent pursuant to Section 10(g) of the Escrow Agreement), Holdback Parties' Representative's reasonable expenses (the "**Charges**"). In the event the Escrow Property is insufficient to satisfy the Charges, then each Holdback Party will be obligated to pay a percentage of the Charges in excess of the Escrow Property proportionate to that Holdback Party's interest in the Escrow Property.

(d) The Holdback Parties' Representative will incur no liability with respect to any action taken or suffered by any party in reliance upon any notice, direction, instruction, consent, statement or other document believed by such Holdback Parties' Representative to be genuine and to have been signed by the proper person (and shall have no responsibility to determine the authenticity thereof), nor for any other action or inaction, except his own gross negligence, bad faith or willful misconduct. In all questions arising under the Merger Agreement or the Escrow Agreement, the Holdback Parties' Representative may rely on the advice of outside counsel, and the Holdback Parties' Representative will not be liable to anyone for anything done, omitted or suffered in good faith by the Holdback Parties' Representative based on such advice. Except as expressly provided herein, the Holdback Parties' Representative will not be required to take any action involving any expense unless the payment of such expense is made or provided for in a manner satisfactory to such Holdback Parties' Representative.

(e) The Holdback Parties shall severally but not jointly indemnify the Holdback Parties' Representative and hold the Holdback Parties' Representative harmless against any loss, liability or expense incurred without gross negligence, bad faith or willful misconduct, to the extent permitted by applicable law, on the part of the Holdback Parties' Representative and arising out of or in connection with the acceptance or administration of the Holdback Parties' Representative's duties hereunder, including the reasonable fees and expenses of any legal counsel retained by the Holdback Parties' Representative.

(f) At any time during the term of the Escrow Agreement, a majority-in-interest of Holdback Parties may, by written consent, appoint a new representative as the Holdback Parties' Representative. Notice together with a copy of the written consent appointing such new representative and bearing the signatures of holders of a majority-in-interest of the Holdback Parties must be delivered to Parent and the Escrow Agent not less than ten (10) calendar days prior to such appointment. Such appointment will be effective upon the later of the date indicated in the consent or the date such consent is received by Parent and the Escrow Agent. For the purposes of this Section 10.05, a "majority-in-interest of Holdback Parties" shall mean Holdback Parties holding in

aggregate over 50% of the percentage interests in the Escrow Property as set forth on Schedule A to the Escrow Agreement, as amended.

(g) In the event that the Holdback Parties' Representative becomes unable or unwilling to continue in his or its capacity as Holdback Parties' Representative, or if the Holdback Parties' Representative resigns as a Holdback Parties' Representative, a majority-in-interest of Holdback Parties may, by written consent, appoint a new representative as the Holdback Parties' Representative. Notice and a copy of the written consent appointing such new representative and bearing the signatures of the holders of a majority-in-interest of the Holdback Parties must be delivered to Parent and the Escrow Agent. Such appointment will be effective upon the later of the date indicated in the consent or the date such consent is received by Parent and the Escrow Agent.

ARTICLE 11
TERMINATION

Section 11.01. *Termination.* This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time:

(a) by mutual written agreement of the Company and Parent;

(b) by either the Company or Parent, if:

(i) the Closing shall not have occurred by 5:00 p.m., California time, on January 30, 2004 (the "**End Date**"), or such later date as the Company and Parent may agree; *provided* that, if (A) the Effective Time has not occurred by the End Date by reason of the non-satisfaction of any of the conditions set forth in Section 9.01(c) and (B) all other conditions in Article 9 have theretofore been satisfied or (to the extent legally permissible) waived or are then capable of being promptly satisfied, the End Date shall be March 15, 2004, *provided, further*, that the right to terminate this Agreement under this Section 11.01(b)(i)shall not be available to any party whose breach of any provision of this Agreement results in the failure of the Merger to be consummated by such time; or

(ii) there shall be (A) any law or regulation that makes consummation of the Merger illegal or otherwise prohibited or (B) any judgment, injunction, order or decree of any court or governmental body having competent jurisdiction enjoining Merger Subsidiary, the Company or Parent from consummating the Merger and such judgment, injunction, order or decree shall have become final and nonappealable;

(c) by Parent, if (i) a breach of or failure to perform any representation, warranty, covenant or agreement on the part of the Company set forth in this Agreement shall have occurred that would cause the condition set forth in Section 9.02(a) or Section 9.02(b) not to be satisfied, and such condition is incapable of being satisfied by the End Date; *provided* that, before Parent may terminate this Agreement under this Section

11.01(c) it shall deliver notice to the Company specifying such breach in reasonable detail and shall give the Company a period of 30 days following receipt of such notice in which to cure such breach, regardless of whether such 30-day period extends beyond the End Date, or (ii) the Company shall have willfully and materially breached its obligations under Section 6.02 or Section 6.03; or

(d) by the Company, if a breach of or failure to perform any representation, warranty, covenant or agreement on the part of the Parent or Merger Subsidiary set forth in this Agreement shall have occurred that would cause the conditions set forth in Section 9.03(a) or Section 9.03(b) to not to be satisfied, and such condition is incapable of being satisfied by the End Date; *provided* that, before the Company may terminate this Agreement under this Section 11.01(d) it shall deliver notice to Parent specifying such breach in reasonable detail and shall give Parent a period of 30 days following receipt of such notice in which to cure such breach, regardless of whether such 30-day period extends beyond the End Date.

Any party desiring to terminate this Agreement pursuant to this Section 11.01 (other than pursuant to Section 11.01(a)) shall give written notice of such termination to the other parties hereto, which notice shall state with reasonable detail the factual basis for such termination and the provision of this Section 11.01(a) pursuant to which this Agreement is being terminated.

Section 11.02. *Effect of Termination.* If this Agreement is terminated pursuant to Section 11.01, this Agreement shall become void and of no effect with no liability on the part of any party (or any shareholder, director, Officer, employee, agent, consultant or representative of such party) to the other party hereto, *provided* that, if such termination shall result from the willful failure of either party to fulfill a condition to the performance of the obligations of the other party or perform a covenant hereof, such party shall be fully liable for any and all liabilities and damages incurred or suffered by the other party as a result of such failure. The provisions of this Section 11.02 and Sections 8.03, 8.06, 12.01, 12.02, 12.03, 12.04, 12.05, 12.06, 12.07 and 12.09 shall survive any termination hereof pursuant to Section 11.01.

ARTICLE 12
MISCELLANEOUS

Section 12.01. *Notices.* All notices, requests and other communications to any party hereunder shall be in writing (including facsimile transmission) and shall be given or made:

if to Parent or Merger Subsidiary, to:

VERITAS Operating Corporation
350 Ellis Street
Mountain View, CA 94043
Attention: General Counsel
Fax: (650) 527-8000

with a copy to:

Davis Polk & Wardwell
1600 El Camino Real
Menlo Park, California 94025
Attention: Alan F. Denenberg
Fax: (650) 752-2111

if to the Company, to:

Ejasent, Inc.
2490 E. Charleston Road
Mountain View, California 94043
Attention: Chief Executive Officer
Fax: (650) 320-6464

with a copy to:

Wilson Sonsini Goodrich & Rosati,
Professional Corporation
650 Page Mill Road
Palo Alto, California 94306
Attention: Rob Kornegay
Fax: (650) 493-6811

if to the Holdback Parties' Representative, to:

Crescendo Ventures
480 Cowper Street, Suite 300
Palo Alto, CA 94301
Attention: David Spreng
Fax: (650) 470-1201

with a copy to:

Robins, Kaplan, Miller & Ciresi L.L.P.
800 LaSalle Avenue, Suite 2250
Minneapolis, MN 55042
Attention: Kevin Spreng

Fax: (612) 339-4181

if to the CEO, to:

Jason Donahue
726 Partridge Avenue
Menlo Park, CA 94025
Fax: (612) 607-2801

with a copy to:

Proskauer Rose LLP
1585 Broadway
New York, NY 10036
Attention: Michael S. Sirkin
Fax: (212) 969-2900

or such other address or facsimile number as such party may hereafter specify for the purpose by notice to the other parties hereto. All such notices, requests and other communications shall be deemed received on the date of receipt by the recipient thereof if received prior to 5:00 p.m. in the place of receipt and such day is a Business Day in the place of receipt. Otherwise, any such notice, request or communication shall be deemed not to have been received until the next succeeding Business Day in the place of receipt.

Section 12.02. *Amendments; No Waivers.* (a) Any provision of this Agreement may be amended or waived prior to the Effective Time if, but only if, such amendment or waiver is in writing and is signed, in the case of an amendment, by each party to this Agreement or, in the case of a waiver, by each party against whom the waiver is to be effective.

(b) No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided shall be cumulative and not exclusive of any rights or remedies provided by law.

Section 12.03. *Expenses.* All costs and expenses incurred in connection with this Agreement shall be paid by the party incurring such cost or expense; *provided*, however, that Parent shall pay the Transaction Expense Amount.

Section 12.04. *Binding Effect; Benefit; Assignment.* (a) The provisions of this Agreement shall be binding upon and, except as provided in Section 7.03, shall inure to the benefit of the parties hereto and their respective successors and assigns. Except as provided in Section 7.03, no provision of this Agreement is intended to confer any rights, benefits, remedies, obligations or liabilities hereunder upon any Person other than the parties hereto and their respective successors and assigns.

(b) No party may assign, delegate or otherwise transfer any of its rights or obligations under this Agreement without the consent of each other party hereto, except that Parent or Merger Subsidiary may transfer or assign, in whole or from time to time in part, to one or more of their Affiliates, the right to enter into the transactions contemplated by this Agreement, but any such transfer or assignment shall not relieve Parent or Merger Subsidiary of its obligations hereunder.

Section 12.05. *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of California, without regard to the conflicts of law rules of such state.

Section 12.06. *Jurisdiction.* Any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby may be brought in any federal court located in the Northern District of the State of California or any California state court located in Santa Clara County, California, and each of the parties hereby consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding brought in any such court has been brought in an inconvenient form. Process in any such suit, action or proceeding may be served on any party anywhere in the world, whether within or without the jurisdiction of any such court. Without limiting the foregoing, each party agrees that service of process on such party as provided in Section 12.01 shall be deemed effective service of process on such party.

Section 12.07. *WAIVER OF JURY TRIAL.* EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

Section 12.08. *Counterparts; Effectiveness.* This Agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument. This Agreement shall become effective when each party hereto shall have received counterparts hereof signed by all of the other parties hereto.

Section 12.09. *Entire Agreement.* This Agreement and the Related Agreements constitute the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes all prior agreements and understandings, both oral and written, between the parties with respect to the subject matter of this Agreement and the Related Agreements.

Section 12.10. *Captions.* The captions herein are included for convenience of reference only and shall be ignored in the construction or interpretation hereof.

Section 12.11. *Severability*. If any term, provision, covenant or restriction of this Agreement is held by a court of competent jurisdiction or other authority to be invalid, void, unenforceable, the remainder of the terms, provisions, covenants and restrictions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party. Upon such a determination, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the fullest extent possible.

Section 12.12. *Specific Performance*. The parties hereto agree that irreparable damage would occur if any provision of this Agreement were not performed in accordance with the terms hereof and that the parties shall be entitled to an injunction or injunctions to prevent breaches of this Agreement or to enforce specifically the performance of the terms and provisions hereof in any federal court located in the Northern District of the State of California or any California state court located in Santa Clara County, California in addition to any other remedy to which they are entitled at law or in equity.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement and Plan of Merger to be duly executed by their respective authorized Officers as of the day and year first above written.

EJASENT, INC.

By: _____
Name: Jason Donahue
Title: President and CEO

VERITAS OPERATING CORPORATION

By: _____
Name:
Title:

VIKING MERGER CORPORATION

By: _____
Name:
Title:

JASON DONAHUE

By: _____
Jason Donahue

DAVID SPRENG, AS HOLDBACK PARTIES' REPRESENTATIVE

By: _____
David Spreng

(MP) 21357/011/AGT/merger.agreement.doc

IN WITNESS WHEREOF, the parties hereto have caused this Agreement and Plan of Merger to be duly executed by their respective authorized Officers as of the day and year first above written.

EJASENT, INC.

By: _____
Name:
Title:

VERITAS OPERATING CORPORATION

By: _____
Name: Gary L. Bloom
Title: President & CEO

VIKING MERGER CORPORATION

By: _____
Name: Gary L. Bloom
Title: President & CEO

JASON DONAHUE

By: _____
Jason Donahue

DAVID SPRENG, AS HOLDBACK PARTIES' REPRESENTATIVE.

By: _____
David Spreng

Schedule 4.18

Intellectual Property

Section 4.18(a)

Patent application filings with the U.S. Patent and Trademark Office:

1. "Snapshot Restore of Application Chains and Applications" (09/680,847). Office Actions: All claims were denied in action dated 09/04/03. Response was due 12/15/03, but is automatically extended to 03/15/04.
2. "Snapshot Virtual-Templating" (09/684,373). Office Actions: None
3. "Dynamic Symbolic Link Resolution" (09/680,560). Office Actions: None
4. "Virtual Resource ID-Mapping" (09/680,563). Office Actions: None
5. "Virtual Port Multiplexing" (09/684,457). Office Actions: None
6. "IP Virtualization" (09/680,559). Office Actions: None
7. "Virtual Network Environment" (09/680,567). Office Actions: None
8. "Virtual Endpoints" (09/684,593). Office Actions: None
9. "Method and Apparatus for Providing a Pay-Per-Use, Distributed Computing Capacity" (09/950,559). Office Actions: None
10. "Sustaining TCP Connections" (60/386,995). Office Actions: None
11. "TCP Connection Migration" (60/386,994). Office Actions: None
12. "Overlay Filesystem" (10/625,219). Office Actions: None
13. "Rule-Based Dynamic Application and Server Management in a Resource-Shared Data Center" (2643US). Office Actions: None.
14. "Method for End-to-End Flow of Data Center Resource Consumption and Cost Information." (60/402,995). The Company filed this provisional application relating to its MicroMeasure product in August 2002 but allowed the application to expire due to the evolution of MicroMeasure in a manner different than described in the application. The Company intends to re-file an application with respect to MicroMeasure.

Copyrights Registered with the U.S. Copyright Office:

1. Source Code registered to Apera Inc. (the Company's former name) effective 12/07/99.

Registered Trademarks:

See trademark report attached as Schedule 4.18(a)-1.

Domain Names:

Ejasent.com
Ejasent.net
Edgepoint.com