

FORM PTO-1595  
1-31-92



5-15-06

05-18-2006



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copy thereof.

To the Honorable Commissioner of Patents and Trader

1. Name of conveying party(ies):

GEODESIC SYSTEMS, INC.

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

3. Nature of Conveyance:

- ☐ Assignment  
☐ Merger  
☐ Security Agreement  
☐ Change of Name  
☒ Other Asset Purchase Agreement

Execution Date: July 30, 2003

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

Name: VERITAS Software Corporation

Street Address: 1600 Plymouth Street

City Mountain View State CA ZIP 94043

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

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)

**11/091,602**

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: 501505/5760-21905  
(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

13  
Signature

5-12-06  
Date

Total number of pages: 70

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**ASSET PURCHASE AGREEMENT**

**between**

**GEODESIC SYSTEMS, INC.  
as Seller**

**and**

**VERITAS SOFTWARE CORPORATION  
as Purchaser**

**Dated as of July 30, 2003**

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**EXHIBITS**

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| Exhibit A      | Form of Non-Competition and Non-Solicitation Agreement |
| Exhibit 1.1(a) | Form of Assumption Agreement                           |
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| Exhibit 3      | Seller Disclosure Schedule                             |
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## ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (this "**Agreement**") dated as of July 30, 2003, is made by and between Geodesic Systems, Inc., a Delaware corporation ("**Seller**") and VERITAS Software Corporation, a Delaware corporation ("**Purchaser**").

### WITNESSETH:

WHEREAS, Seller and its subsidiaries are engaged in the business of developing, making, selling and providing application reliability management software and solutions to customers at various locations in the United States and other countries (the "**Business**");

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

WHEREAS, concurrent with the execution and delivery of this Agreement and as a condition and inducement to Purchaser's willingness to enter into this Agreement, Stockholders of Seller holding a majority of (a) Seller's outstanding common stock and Series D Convertible Participating Preferred Stock, voting together as a single class, and (b) Seller's outstanding Series D Convertible Participating Preferred Stock, have irrevocably approved this Agreement and the transactions contemplated hereby, including the indemnification obligations of the Stockholders set forth in Article IX hereof, and have acknowledged the provisions set forth in Section 5.12 and Section 5.13 hereof; and

WHEREAS, certain Stockholders of Seller have entered into non-competition and non-solicitation agreements substantially in the form attached hereto as Exhibit A with Seller, effective upon consummation of the transactions contemplated hereby (collectively, the "**Non-Competition and Non-Solicitation Agreements**"), as an inducement to Purchaser to enter into this Agreement.

NOW, THEREFORE, in consideration of the premises set forth above and the mutual agreements and covenants hereinafter set forth, and intending to be legally bound hereby, Purchaser and Seller (on behalf of itself and its subsidiaries) hereby agree as follows:

ARTICLE I  
DEFINITIONS

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

**"Acquired Real Property"** shall have the meaning specified in Section 2.1(a)(xii).

**"Acquisition Documents"** shall mean this Agreement, the Ancillary Agreements, and any certificate, report or other document delivered pursuant to this Agreement or the transactions contemplated hereby.

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

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

**"Agreement" or "this Agreement"** shall mean this Asset Purchase Agreement, dated as of July 30, 2003, between Seller and Purchaser (including the Exhibits hereto and the Disclosure Schedule) and all amendments, modifications or supplements hereto made in accordance with the provisions of Section 11.9.

**"Ancillary Agreements"** shall mean the Bill of Sale and the Assumption Agreement.

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

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

**"Assumption Agreement"** shall mean the Assumption Agreement to be executed by Purchaser and Seller and any subsidiary of Seller that owns any Assets on the Closing Date substantially in the form of Exhibit 1.1(a).

**"Benefit Plan"** shall mean any plan, program, policy, practice, contract, agreement or other arrangement providing for compensation, severance, termination pay, deferred compensation, performance awards, stock or stock-related awards, fringe benefits or other employee benefits or remuneration of any kind, whether written or unwritten or otherwise, funded or unfunded, including without limitation, each "employee benefit plan," within the meaning of Section 3(3) of ERISA which is or has been maintained, contributed to, or required to be contributed to, by Seller or any ERISA Affiliate for the benefit of any current, former or retired employee, consultant or director of Seller or any ERISA Affiliate, or with respect to which Seller or any ERISA Affiliate has or may have any liability or obligation.



**"Bill of Sale"** shall mean the General Conveyance, Transfer, Assignment and Bill of Sale to be executed by Seller and any subsidiary of Seller that owns any Assets on the Closing Date substantially in the form of Exhibit 1.1(b).

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

**"Business Day"** shall mean any day that is not a Saturday, a Sunday or other day on which banks are required or authorized by Law to be closed in The City of New York.

**"Business Facility"** shall mean any property including the land, the improvements thereon, the groundwater thereunder and the surface water thereon, that is or at any time has been owned, operated, occupied, controlled or leased by the Seller in connection with the operation of the Business.

**"Business Intellectual Property"** shall mean any and all Intellectual Property used in or necessary to conduct the Business, in the manner currently conducted and as it is currently contemplated to be conducted, including, without limitation, the design, development, manufacture, use, import, sale, licensing or other exploitation of the Transferred Products and Services and the Seller Products. Notwithstanding the foregoing, Business Intellectual Property shall not include trade names, logos, common law trademarks and service marks, trademark and service mark registrations, commercial "off-the-shelf" software, Domain Names and related goodwill and applications therefor throughout the world.

**"Business Revenue"** shall mean any revenue based on fixed amounts agreed upon by Purchaser and Seller and generated from (i) each sale, if any, of stand-alone Transferred Products and Services, whether bundled with any Purchaser Product or not, (ii) each sale, if any, of any Purchaser Product which includes, incorporates, or is based in substantial part on any Transferred Product and Services, and (iii) the DARPA Agreement, to the extent such revenue is recognizable by Purchaser in accordance with U.S. GAAP.

**"Closing"** shall have the meaning specified in Section 2.4.

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

**"Closing Advance"** shall have the meaning specified in Section 5.14(a).

**"COBRA"** shall mean the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

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

**"Confidentiality Agreement"** shall mean the Confidential Disclosure Agreement dated as of March 28, 2003 between Seller and Purchaser.

**"Contingent Consideration"** shall have the meaning specified in Section 2.7(a).

**"Contract"** shall mean any agreement, joint venture agreement, partnership agreement, assignment, lease, sublease or other occupancy agreement, license, sublicense, settlement agreement, consent decree, stipulation, promissory note, evidence of indebtedness, loan agreement, credit agreement, indenture, security agreement, loan document, insurance policy, purchase order or other contract, arrangement, understanding or conduct giving rise to any binding commitment (whether written or oral); including any amendments, supplements or modifications thereto.

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

**"DARPA Agreement"** shall mean Contract No. F30602-99-C-0160 issued by Air Force Research Laboratory for Statement of Work entitled A Binary Agent Technology for COTS Software Integrity dated June 24, 1999, as modified on July 13, 2001, May 2, 2002 and June 26, 2003, and as it may subsequently be modified based on the continuation or renewal of previous and existing DARPA programs.

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

**"Employee"** means any person that is, or, where applicable has been an employee or consultant of Seller or any of its subsidiaries that directly or indirectly provides or has provided services primarily used in or necessary to conduct the Business.

**"Employment Liabilities"** means all claims, debt, liabilities, commitments and obligations relating to, arising from, or incurred in connection with (i) any Benefit Plan, or (ii) Seller's or any Affiliate's employment of or termination of any current or former employee, consultant or director, whether fixed, contingent or absolute, matured or unmatured, liquidated or unliquidated, accrued or unaccrued, known or unknown, whenever or however arising, including all costs and expenses relating thereto, and including those debts, liabilities and obligations arising under Law, action or proceeding before any court or regulatory agency or administrative agency, order or consent decree or any award of any arbitrator of any kind, and those arising under contract, commitment or undertaking.

**"Employment Offer"** shall have the meaning specified in Section 6.1.

**"Encumbrance"** shall mean any security interest, pledge, mortgage, lien (including, without limitation, environmental and tax liens), charge, encumbrance, adverse claim, preferential

arrangement, or restriction of any kind, including, without limitation, any restriction on the use, voting, transfer, receipt of income or other exercise of any attributes of ownership.

**"Environmental Permits"** shall have the meaning specified in Section 3.13(a).

**"Environmental Laws"** shall mean any Law, now or hereafter in effect and as amended, and any judicial or administrative interpretation thereof, including any judicial or administrative order, consent decree or judgment, which prohibits, regulates or controls any Hazardous Material or any Hazardous Material Activity or which relates to the environment, health, or safety.

**"Environmental Liabilities"** shall mean any Liability, obligation, judgment, penalty, fine, cost or expense, (including reasonable attorneys' fees and environmental consultant costs) of any kind or nature, or the duty to indemnify, defend or reimburse any Person with respect to: (i) the presence on or before the Closing Date of any Hazardous Material in the soil, groundwater, surface water, air or building materials of any Business Facility, or known to be migrating to a Business Facility as of the Closing Date (**"Pre-Existing Contamination"**); (ii) the migration at any time prior to or after the Closing Date of Pre-Existing Contamination to any other real property, or the soil, groundwater, surface water, air or building materials thereof; (iii) the exposure of any Person to Pre-Existing Contamination or to Hazardous Materials in the course of or as a consequence of any activities of the Business, without regard to whether any health effect of the exposure has been manifested as of the Closing Date; (iv) the violation of any Environmental Laws by the Seller or its agents, employees, predecessors in interest, contractors, invitees or licensees prior to the Closing Date or in connection with the operation of the Business prior to the Closing Date; (v) any actions or proceedings brought or threatened by any third party with respect to any of the foregoing; and (vii) any of the foregoing to the extent they continue after the Closing Date.

**"ERISA"** shall mean the Employee Retirement Income Security Act of 1974, as amended.

**"ERISA Affiliate"** shall mean any other person or entity under common control with Seller within the meaning of Section 414(b), (c), (m) or (o) of the Code and the regulations issued thereunder.

**"Excess Cash"** shall mean cash accounts of Seller to the extent such cash exceeds Seller's accounts payable and accrued Liabilities as of the Closing Date.

**"Excluded Assets"** shall have the meaning specified in Section 2.1(b).

**"Excluded Liabilities"** shall have the meaning specified in Section 2.2(b).

**"Financial Statements"** shall have the meaning specified in Section 3.5(a)(i).

**"Governmental Authority"** shall mean any U.S. or foreign, national, federal, state, municipal or local or other government, governmental, regulatory or administrative authority, agency or commission or any court, tribunal, or judicial or arbitral body.

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

**"Hazardous Materials"** shall mean (a) petroleum and petroleum products, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation, transformers or other equipment that contain polychlorinated biphenyls, toxic mold, and radon gas, (b) any other chemicals, materials or substances that is prohibited or regulated by any Environmental Law or that has been designated by any Governmental Authority to be radioactive, toxic, hazardous or otherwise a danger to health, reproduction or the environment.

**"Hazardous Materials Activity"** shall mean the transportation, transfer, recycling, storage, use, treatment, manufacture, removal, remediation, release, exposure of others to, sale or distribution of any Hazardous Material or any product containing a Hazardous Material.

**"Indemnification Claim"** shall mean any matter that an Indemnified Party has determined has given rise to a right of indemnification under this Agreement.

**"Indemnified Party"** shall have the meaning specified in Section 9.2(a).

**"Intellectual Property"** shall mean any or all of the following and all worldwide common law and statutory rights in, including the rights to sue for past damages for, arising out of, or associated therewith: (i) United States and foreign patents and utility models and applications therefor and all reissues, divisions, reexaminations, renewals, extensions, provisionals, continuations and continuations-in-part thereof ("**Patents**"); (ii) inventions (whether patentable or not), improvements, trade secrets, proprietary information, know-how, and any rights in technology, invention disclosures, technical data and customer lists, and all documentation relating to any of the foregoing; (iii) copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto throughout the world; (iv) domain names, uniform resource locators ("**URLs**"), other names and locators associated with the Internet, and applications or registrations therefor ("**Domain Names**"); (v) industrial designs and any registrations and applications therefor; (vi) trade names, logos, common law trademarks and service marks, trademark and service mark registrations, related goodwill and applications therefor throughout the world ("**Trademarks**"); (vii) all rights in databases and data collections; (viii) all moral and economic rights of authors and inventors, however denominated; and (ix) any similar or equivalent rights to any of the foregoing (as applicable).

**"Intellectual Property Contracts"** shall have the meaning specified in Section 3.15(a)(iii).

**"Interim Financial Statements"** shall have the meaning specified in Section 3.5(a)(ii).

**"International Employee Plan"** shall mean each Benefit Plan that has been adopted or maintained by Seller or any ERISA Affiliate, whether informally or formally; or with respect to which Seller or any ERISA Affiliate will or may have any liability for the benefit of current, former or retired employees, consultants or directors of Seller or any Affiliate who perform services outside the United States.

**"Inventories"** shall mean all inventory, merchandise, finished goods, raw materials, work in process, packaging and supplies related to the Business, maintained, held or stored by or for Seller and its subsidiaries on the Closing Date and any prepaid deposits for any of the same.

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

**"Knowledge"** – an individual will be deemed to have Knowledge of a particular fact or other matter if: (i) that individual is actually aware of that fact or matter; or (ii) a prudent individual would reasonably be expected to discover or otherwise become aware of that fact or matter in the course of conducting a reasonably comprehensive investigation regarding the accuracy of such fact or matter.

Seller or its subsidiaries will be deemed to have Knowledge of a particular fact or matter if any individual who is serving, or who has at any time served, as a director or officer of Seller (or in any similar capacity) is, or at any time was, actually aware of that fact or matter after conducting a reasonably comprehensive internal investigation within Seller's operations or Business regarding the accuracy of such fact or matter.

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

**"Liability"** or **"Liabilities"** shall mean any and all debts, liabilities and obligations, whether accrued or fixed, absolute or contingent, matured or unmatured or determined or determinable, including, without limitation, those arising under any Law (including, without limitation, any Environmental Law), Action or Governmental Order and those arising under any contract, agreement, arrangement, commitment or undertaking.

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

**"Mainframe Agreements"** shall mean all agreements whereby Seller has licensed and/or agreed to provide maintenance and support services for Seller's Examiner, Traceback for CICS or Abend Analyzer products.

**"Material Adverse Effect"** shall mean any circumstance, change in, or effect on, the Business or Seller and its subsidiaries that, individually or in the aggregate with any other circumstances, changes in, or effects on, Seller and its subsidiaries or the Business (i) is, or is reasonably likely to be, materially adverse to the business, operations, assets or liabilities (including, without limitation, contingent liabilities), employee relationships, customer or supplier relationships, prospects, results of operations or the condition (financial or otherwise) of the Business or (ii) is

reasonably likely to materially adversely affect the ability of Purchaser to operate or conduct the Business in the manner in which it is currently operated or conducted by Seller and its subsidiaries, other than any such circumstance, change or effect resulting from the failure to convey any Excluded Asset.

**"Material Contracts"** shall have the meaning specified in Section 3.14(a).

**"Measurement Period"** shall mean the eighteen-month period beginning with the first day of the first calendar quarter following the Closing Date.

**"Objection Notice"** shall have the meaning specified in Section 9.2(b).

**"Offered Employees"** shall have the meaning specified in Section 6.1.

**"Officer's Certificate"** shall have the meaning specified in Section 9.2(b).

**"Pension Plan"** shall refer to each Seller Benefit Plan which is an "employee pension benefit plan," within the meaning of Section 3(2) of ERISA.

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

**"Precise"** means Precise Software Solutions Ltd., a wholly owned subsidiary of Purchaser.

**"Post Closing Advance"** shall have the meaning specified in Section 5.14(b).

**"Precise Lien"** shall mean the security interest held by Precise in the assets of Seller, which shall be assigned to Purchaser at or prior to Closing.

**"Precise Loan"** shall mean the Loan Agreement dated as of November 14, 2002, as amended, pursuant to which Precise has loaned Seller US [REDACTED], in aggregate principal amount as of the date hereof.

**"Precise Merger Agreement"** shall mean the Agreement and Plan of Merger dated November 26, 2002, made by and among Precise, GS Acquisition Corporation, a Delaware corporation and a wholly owned subsidiary of Precise, Seller and certain of the Stockholders.

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

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

**"Purchaser Products"** shall mean the VERITAS Foundations products and any products acquired from or substantially derived from any products of Precise.

**"Purchaser's Accountants"** shall mean KPMG LLP, independent accountants of Purchaser.

**"Receivables"** shall mean any and all accounts receivable, notes and other amounts receivable from customers arising from the conduct of the Business by Seller and its subsidiaries before the Closing Date, whether or not in the ordinary course, together with any unpaid financing charges accrued thereon.

**"Registered Intellectual Property"** means all United States, international and foreign: (i) Patents, including applications therefor, whether or not abandoned or allowed to lapse; (ii) registered Trademarks, applications to register Trademarks, including intent-to-use applications, or other registrations or applications related to Trademarks, whether or not abandoned or allowed to lapse; (iii) copyright registrations and applications to register copyrights, whether or not abandoned or allowed to lapse; (iv) registered mask works and applications to register mask works, whether or not abandoned or allowed to lapse; (v) Domain Name registrations, whether or not abandoned or allowed to lapse; and (vi) any other Intellectual Property that is the subject of an application, certificate, filing, registration or other document issued by, filed with, or recorded by, any private, state, government or other public or quasi-public legal authority at any time, whether or not abandoned or allowed to lapse.

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

**"Restricted Business"** shall have the meaning specified in Section 5.8(b).

**"Restricted Territory"** shall have the meaning specified in Section 5.8(a).

**"Returns"** shall have the meaning specified in Section 7.2.

**"Seller"** shall have the meaning specified in the recitals to this Agreement.

**"Seller COBRA Employees"** shall have the meaning specified in Section 6.4.

**"Seller Computation"** shall have the meaning specified in Section 2.7(c).

**"Seller End-User Agreements"** shall mean all license or support and maintenance agreements entered into in the ordinary course of business whereby Seller or its subsidiaries have granted object code end-user licenses that permit use of software products without a right to modify, distribute or sublicense the same, or have agreed to support and/or maintain such software products.

**"Seller Owned Intellectual Property"** shall mean all Business Intellectual Property that is owned by, or exclusively licensed to, Seller or any of its direct and indirect subsidiaries.

**"Seller Product" or "Seller Products"** shall have the meaning specified in Section 3.15(a)(i).

**"Seller Registered Intellectual Property"** shall mean all of the Registered Intellectual Property owned by, or filed in the name of, Seller or any of its subsidiaries that is Business Intellectual Property.

**"Seller's Accountants"** shall mean Grant Thornton, LLP, independent accountants of Seller.

**"Selling Group"** shall have the meaning specified in Section 6.4.

**"Service Receivables"** shall mean all Receivables relating to maintenance or support services provided by Seller.

**"Stockholder Agent"** shall have the meaning specified in Section 9.5.

**"Stockholders"** shall mean any holder of shares of Seller capital stock issued and outstanding immediately prior to the Closing.

**"subsidiaries"** shall mean any and all corporations, partnerships, joint ventures, associations and other entities controlled by the applicable Person directly or indirectly through one or more intermediaries including in the case of Seller.

**"Subsidiary COBRA Employees"** shall have the meaning specified in Section 6.4.

**"Survival Period"** shall have the meaning specified in Section 9.1.

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

**"Third Party Claims"** shall have the meaning specified in Section 9.2(b).

**"Threshold"** shall have the meaning specified in Section 9.3(a).

**"Trade Accounts Payables"** shall have the meaning specified in Section 2.2(a)(i).



"Transferred Employee" shall have the meaning specified in Section 6.1.

"Transferred Products and Services" shall mean all products and technology embodied in Seller's Runtime Solutions Product Suite and any products developed after Closing resulting from the combined research and development efforts between persons who were formerly employees of Seller and Precise.

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

## ARTICLE II

### PURCHASE AND SALE

#### SECTION 2.1. Assets to Be Sold.

(a) On the terms and subject to the conditions of this Agreement, Seller and its subsidiaries shall, on the Closing Date, sell, assign, transfer, convey and deliver to Purchaser or cause to be sold, assigned, transferred, conveyed and delivered to Purchaser, and Purchaser shall purchase from Seller and its subsidiaries, on the Closing Date, all the assets, properties and business of every kind and description and wherever located, whether tangible or intangible, real, personal or mixed, directly or indirectly owned by Seller and its subsidiaries or to which it is directly or indirectly entitled and, in any case, belonging to or used or intended to be used in the Business, as set forth below (the assets to be purchased by Purchaser being referred to as the "Assets"):

(i) all Inventories;

(ii) all of Seller's and its subsidiaries' right, title and interest in, to and under the Seller Owned Intellectual Property, and all proprietary rights agreements pursuant to which employees of the Seller and its subsidiaries, including Transferred Employees, have transferred all inventions, proprietary rights and Intellectual Property used in and necessary to the Business to the Seller and its subsidiaries;

(iii) all furniture, equipment, computers, machinery and other tangible personal property set forth on Schedule 2.1(a)(iii);

(iv) all rights of Seller and its subsidiaries under all Contracts and Seller End-User Agreements listed on Schedule 2.1(a)(iv) together with all contracts entered into after the date hereof in accordance with Section 5.1 of this Agreement;

(v) all claims, causes of action, choses in action, rights of recovery and rights of set-off of any kind (including rights to insurance proceeds, rights under and pursuant to all warranties, representations and guarantees made by suppliers of products, materials or equipment, or components thereof, and rights to past, present and future damages for breach, infringement or

misappropriation), pertaining to or arising out of the Assets, and inuring to the benefit of Seller and its subsidiaries;

(vi) to the extent not otherwise included in clauses (ii) and (iv) above, all rights of Seller and its subsidiaries under all Contracts relating to the design, manufacture, supply, marketing or sale of Transferred Products and Services;

(vii) all customer, distributor, supplier and other mailing or contact lists and other sales-related, distribution-related and supply-related materials owned, used, associated with or employed by Seller and its subsidiaries at the Closing Date;

(viii) all labels, signs, packaging materials, promotional materials, point-of-purchase displays, sales literature, advertising, brochures, user manuals, graphics, artwork (in each case, in paper and electronic format), UPC codes and all other items relating to the sale of Transferred Products and Services;

(ix) all books of account, financial, and personnel records, invoices, shipping, purchasing and sales records, correspondence and other documents, records and files and all computer software and programs and any rights thereto (in each case in paper or electronic format) owned, associated with or employed by Seller or its subsidiaries or in Seller's or its subsidiaries' care, custody, or control used in, or relating to, the Business at the Closing Date, other than organization documents, general ledgers, tax records and tax returns, minute and stock record books and the corporate seal of Seller (it being understood that Purchaser shall be entitled to make copies of the general ledgers and tax records of Seller to the extent Purchaser deems necessary);

(x) all Service Receivables;

(xi) all municipal, state and federal franchises, permits, licenses, agreements, waivers and authorizations held or used by Seller and its subsidiaries in connection with, or required for, the conduct of the Business, to the extent transferable;

(xii) all of the real property, leaseholds and other interests in real property of Seller or its subsidiaries, listed on Schedule 2.1(a)(xii), together with all ownership, leasehold or other interests in all buildings and other structures, facilities or improvements currently or hereafter located thereon which are owned or leased by Seller or its subsidiaries, all fixtures, systems, equipment and items of personal property of Seller and its subsidiaries attached or appurtenant thereto which are owned or leased by Seller or its subsidiaries, and all easements, licenses, rights and appurtenances relating to the foregoing (the "Acquired Real Property");

(xiii) all Trademarks;

(xiv) all rights under any non-competition and non-disclosure agreements executed by current and former employees and consultants of Seller; and

(xv) all Excess Cash and Excess Cash equivalents.

To the extent any Contracts are included in the Assets, such Contracts shall be assumed by Purchaser free and clear of any Excluded Liabilities related thereto, including any inter-company Liabilities that arise out of events occurring prior to the Closing.

(b) The Assets shall exclude the following assets owned by Seller and its subsidiaries (the "Excluded Assets"):

- (i) goodwill associated with the Business and the Purchased Assets;
- (ii) Domain Names and related goodwill and applications therefor throughout the world;
- (iii) all Receivables, other than the Service Receivables;
- (iv) all furniture, equipment, computers, machinery and other tangible personal property used, owned or held for use by Seller and its subsidiaries at the Closing Date for use in the conduct of the Business, except as set forth on Schedule 2.1(a)(iii);
- (v) except for the Acquired Real Property, all of the real property owned or leased by Seller and its subsidiaries, together with all buildings and other structures, facilities or improvements currently or hereafter located thereon, all fixtures, systems, equipment and items of personal property of Seller and its subsidiaries attached or appurtenant thereto and all easements, licenses, rights and appurtenances relating to the foregoing;
- (vi) the capital stock of each subsidiary of Seller; except for the Assets, all Seller's right, title and interest on the Closing Date in, to and under all other assets, rights and claims of every kind and nature used or intended to be used in the operation of, or residing with, the Business;
- (vii) all rights and obligations of Seller under its Strategic Partnering Agreement with Stratagem Partnering, Inc., dated as of January 3, 2001; and
- (viii) all rights of Seller under this Agreement and the Ancillary Agreements.

## **SECTION 2.2. Assumption and Exclusion of Liabilities.**

(a) On the terms and subject to the conditions of this Agreement, Purchaser shall, on the Closing Date, assume and shall pay, perform and discharge when due the following, and only the following, Liabilities of Seller and its subsidiaries (the "Assumed Liabilities"):

- (i) all of the trade accounts payables of Seller incurred in the ordinary course of business as of the Closing Date ("Trade Accounts Payables");
- (ii) any Liabilities to be paid or performed after the Closing Date that arise from or out of the performance or non-performance by Purchaser after the Closing Date of any

Contracts included in the Assets and disclosed on Schedule 2.1(a)(iv) or entered into after the date hereof in accordance with the terms hereof, including under any such extended warranty, customer support, upgrade or product delivery Contracts for Transferred Products and Services, other than any Liabilities arising from or out of a breach by Seller or any of its subsidiaries;

(iii) the Precise Loan;

(iv) any Liabilities relating to Transferred Employees that arise from or out of Purchaser's employment or termination of the Transferred Employees after the Closing Date;

(v) any Liabilities incurred, arising from or out of, in connection with or as a result of claims made by or against Purchaser or Seller or any of its subsidiaries with respect to the operation of the Business by or on behalf of Purchaser that arise out of events occurring on or after the Closing;

(vi) Liability for the provision of COBRA to Subsidiary COBRA Employees; and

(vii) any Liabilities associated with deferred revenue of Seller or its subsidiaries as of the Closing Date.

(b) Except for the Assumed Liabilities specifically set forth in Section 2.2(a) above, the Assumed Liabilities expressly exclude, Seller and its subsidiaries shall retain, and shall be responsible for paying, performing and discharging when due, and Purchaser shall not assume or have any responsibility for, all Liabilities of Seller and its subsidiaries as of the Closing Date, whether known or unknown, fixed or contingent (the "**Excluded Liabilities**"), including, without limitation:

(i) all Taxes now or hereafter owed by Seller or any Affiliate of Seller, or attributable to the Assets or the Business relating to any period, or any portion of any period, ending on or prior to the Closing Date (as provided in Section 7.1);

(ii) any Contracts relating to Excluded Assets or which are (x) not disclosed on Schedule 2.1(a)(iv) entered into after the date hereof other than in accordance with the terms hereof, in each case including under any real property other than for the Acquired Real Property;

(iii) any Liabilities incurred, arising from or out of, in connection with or as a result of claims made against Purchaser or Seller or any of its subsidiaries with respect to the operation of the Excluded Assets by or on behalf of Seller or any of its subsidiaries, including any severance Liabilities for employees (including Offered Employees who do not accept Purchaser's offer of employment) who are terminated, and any Liabilities related to the dissolution of any corporate entity associated with the Business;

(iv) any Liabilities incurred, arising from or out of, in connection with or as a result of claims made against Purchaser or Seller or any of its subsidiaries with respect to the operation of the Business by or on behalf of Seller or any of its subsidiaries that arise out of events occurring prior to the Closing, including any claims relating to license fees, royalties, customer returns, marketing development fund obligations, rebates or other payments related to product sales for periods prior to the Closing;

(v) any Liability to indemnify any person by reason of the fact that such person was a director, officer, employee or agent of Seller or its subsidiaries prior to the Closing;

(vi) any inter-company loans, payables or Liabilities between or among Seller and any of its subsidiaries;

(vii) all Employment Liabilities whether incurred before, on or after the Closing other than Liability for the provision of COBRA to Subsidiary COBRA Employees;

(viii) any Liability of Seller, or any Affiliate of Seller, as a result of any legal or equitable action or judicial or administrative proceeding initiated at any time caused by any action that occurred or condition that existed on or prior to the Closing Date and in respect of anything done, suffered to be done, or omitted to be done by Seller, or any Affiliate of Seller, or any of their directors, officers, employees or agents, except for such actions or proceedings arising from or directly related to those specific Liabilities constituting Assumed Liabilities;

(ix) Environmental Liabilities retained by Seller;

(x) all Mainframe Agreements and any Liabilities incurred, arising from or out of, or in connection with such agreements;

(xi) the Settlement Agreement dated November 26, 2002, by and among InCert Software Corporation, Seller and MMC/GATX Partnership No. 1; and

(xii) any Liabilities of Seller under this Agreement and the Ancillary Agreements, and the transactions contemplated hereby, including all costs and expenses, including, without limitation, fees and disbursements of counsel, financial advisors and accountants, incurred by Seller and any of its subsidiaries.

### **SECTION 2.3. Purchase Price; Allocation of Purchase Price.**

(a) **Purchase Price.** The purchase price for the Assets and for the covenants contained in Section 5.8 of this Agreement shall be (i) the amount of the Assumed Liabilities, payable by Purchaser's assumption of the Assumed Liabilities; plus, (ii) an amount of cash equal to the value of the Contingent Consideration (subject to the provisions of Article IX hereof) if, when and to the extent earned as provided herein; plus (iii) the non-refundable Closing Advance provided to Seller pursuant to Section 5.14(a); plus (iv) the non-refundable Post Closing Advance provided to Seller pursuant to Section 5.14(b), if any (clauses (i) through (iv) together, the "Purchase Price").

(b) **Allocation**. Purchaser will allocate the Purchase Price among the Assets after the Closing Date in accordance with the principles set forth on Schedule 2.3(b). Any subsequent adjustments to the Purchase Price shall be reflected in the allocation hereunder in a manner consistent with Section 1060 of the Code and the regulations thereunder. For all Tax purposes, Purchaser and Seller agree to report the transactions contemplated in this Agreement in a manner consistent with the terms of this Agreement, including the allocation under Schedule 2.3(b), and that none of them will take any position inconsistent therewith in any Tax return, in any refund claim, in any litigation, or otherwise.

**SECTION 2.4. Closing**. Subject to the terms and conditions of this Agreement, the sale and purchase of the Assets and the assumption of the Assumed Liabilities contemplated by this Agreement shall take place at a closing (the "**Closing**") to be held at the offices of Wilson Sonsini Goodrich & Rosati, Professional Corporation, One Market Street, Spear Tower, San Francisco, California 94105 at a time and on a date to be designated by the parties, which shall be no later than the third Business Day following the satisfaction or waiver of all other conditions to the obligations of the parties set forth in Article VIII (other than those conditions which by their terms are to be satisfied or waived as of the Closing), or at such other place or at such other time or on such other date as Seller and Purchaser may mutually agree upon in writing (the day on which the Closing takes place being the "**Closing Date**").

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

(a) executed counterparts of the Bill of Sale from Seller and its subsidiary and such other instruments, in form and substance satisfactory to Purchaser, as may be requested by Purchaser to transfer the Assets to Purchaser or evidence such transfer on the public records;

(b) an executed counterpart of the Assumption Agreement; and

(c) the opinions, certificates and other documents required to be delivered pursuant to

Section 8.2.

**SECTION 2.6. Closing Deliveries by Purchaser**. At the Closing, Purchaser shall deliver to Seller:

(a) an executed counterpart of the Bill of Sale;

(b) an executed counterpart of the Assumption Agreement;

(c) the Closing Advance; and

(d) the certificates and other documents required to be delivered pursuant to

Section 8.1.

## SECTION 2.7. Contingent Consideration.

(a) Amount of Contingent Consideration. Purchaser shall pay to Seller an aggregate amount equal to [REDACTED] multiplied by the Business Revenue in excess of US\$ [REDACTED] generated by Seller during the Measurement Period, subject to the terms and conditions of Section 2.7(b) below (the "**Contingent Consideration**"); *provided, however*, that if the Business Revenue is less than US\$ [REDACTED] the Contingent Consideration shall be [REDACTED] dollars (US\$ [REDACTED]). Notwithstanding the foregoing, the Contingent Consideration shall not exceed US\$ [REDACTED]. Subject to the provisions of Section 2.7(b) and Article IX hereof, Purchaser shall deliver the Contingent Consideration, if any, to Seller at the end of the first full fiscal quarter ending after the Measurement Period (the "**Contingent Consideration Payment Date**").

(b) Application of Contingent Consideration. Prior to the payment of the Contingent Consideration to Seller, Purchaser (i) shall reduce the Contingent Consideration, if any, by the amount of the Post Closing Advance, if any, and (ii) may set off any amount to which Purchaser reasonably believes constitutes a claim for indemnification under Article IX hereof against the remaining amount of the Contingent Consideration, if any. Purchaser shall not deliver the Contingent Consideration to Seller until any disputes regarding Purchaser's right of set off described above have been finally resolved. Neither the exercise of nor the failure to exercise such right of setoff will constitute an election of remedies or limit Purchaser in any manner in the enforcement of any other remedies that may be available to it.

(c) Determination of Contingent Consideration; Dispute Resolution. No later than forty-five (45) days following the end of the each three calendar month period during the Measurement Period, Purchaser shall deliver to Seller a schedule setting forth Purchaser's good faith computation of the portion of the Business Revenue relating to such quarter and a copy of the financial information used in making such computation. Prior to delivering the Contingent Consideration to the Seller under this Section 2.7, Purchaser shall deliver to Seller no later than thirty (30) days prior to the Contingent Consideration Payment Date, a schedule setting forth the computation of the Contingent Consideration and a copy of the financial information used in making such computation. Purchaser's computation of any payment under this Section 2.7(c) shall be conclusive and binding upon the parties hereto unless, within thirty (30) days following Purchaser's delivery of the payment information, Seller notifies Purchaser in writing that it disagrees with Purchaser's computation of the Contingent Consideration. Such notice shall include a schedule setting forth Seller's computation of the payment together with a copy of any information, other than that previously provided by Purchaser, used in making such computation (the "**Seller Computation**").

If Purchaser disagrees with the Seller Computation, the parties shall attempt in good faith to reach a resolution of such disagreement. If such disagreement is not resolved within fifteen (15) days after delivery of the Seller Computation, Purchaser's Accountants shall compute the amount of the Contingent Consideration as promptly as practicable and such computation shall be binding upon the parties hereto. The expenses of the Purchaser's Accountants in connection with the calculation of the Contingent Consideration in response to a Seller Computation shall be borne equally by

Purchaser and Seller (which amount shall be subtracted from the Contingent Consideration otherwise payable).

Purchaser shall not be required to deliver the Contingent Consideration, or any portion thereof, to Seller until the period during which Seller may object to the amount of the Contingent Consideration has lapsed or, if properly contested in accordance with the provisions hereof, the amount of the Contingent Consideration has been agreed upon by the parties or calculated by Purchaser's Accountants.

### ARTICLE III

#### REPRESENTATIONS AND WARRANTIES OF SELLER

As an inducement to Purchaser to enter into this Agreement, Seller hereby represents and warrants to Purchaser, subject to such exceptions as are set forth in the Seller Disclosure Schedule attached hereto as Exhibit 3 (the "**Disclosure Schedule**"), as follows:

##### **SECTION 3.1. Organization, Authority and Qualification of Seller.**

(a) Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, and each subsidiary of Seller is a corporation duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation. Seller and its subsidiaries have all necessary corporate power and authority to enter into this Agreement and the Ancillary Agreements, to carry out their respective obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. Seller and its subsidiaries are duly licensed or qualified to do business and are in good standing in each jurisdiction in which the properties owned or leased by them or the operation of the Business makes such licensing or qualification necessary, except to the extent that the failure to be so licensed or qualified would not adversely affect (i) the ability of Seller and its subsidiaries to carry out their respective obligations under, and to consummate the transactions contemplated by, this Agreement and the Ancillary Agreements and (ii) the ability of Seller and its subsidiaries to conduct the Business.

(b) The execution and delivery of this Agreement and the Ancillary Agreements by Seller and its subsidiaries, the performance by Seller and its subsidiaries of their respective obligations hereunder and thereunder and the consummation by Seller and its subsidiaries of the transactions contemplated hereby and thereby have been duly authorized by all requisite action on the part of Seller and its subsidiaries and no other corporate proceedings on the part of Seller are necessary to authorize this Agreement or the Ancillary Agreements, or to consummate the transactions contemplated hereby and thereby, except the approval and adoption of this Agreement by the Stockholders in accordance with Section 8.2(a) hereof, including Stockholders holding at least a majority of (a) the outstanding shares of Seller's common stock and the outstanding shares of Seller's Series D Convertible Participating Preferred Stock, voting together as a single class, and (b) the outstanding shares of Seller's Series D Convertible Participating Preferred Stock. As of the date hereof, holders of a sufficient number of shares to approve this Agreement and the transactions



contemplated hereby have irrevocably approved this Agreement and the transactions contemplated hereby. This Agreement has been, and upon their execution the Ancillary Agreements will be, duly executed and delivered by Seller and any subsidiary of Seller party thereto, and (assuming due authorization, execution and delivery by Purchaser) this Agreement constitutes, and upon their execution the Ancillary Agreements will constitute, legal, valid and binding obligations of Seller and its subsidiaries enforceable against Seller and its subsidiaries in accordance with their respective terms.

**SECTION 3.2. Subsidiaries; Conduct of Business.** Except as set forth in Section 3.2 of the Disclosure Schedule, Seller does not own and has never owned any subsidiaries. Seller beneficially owns, directly or indirectly, all of the outstanding securities of the subsidiaries.

**SECTION 3.3. No Conflict.** Except as set forth in Section 3.3 of the Disclosure Schedule, the execution, delivery and performance of this Agreement and the Ancillary Agreements by Seller and its subsidiaries do not and will not (i) violate, conflict with or result in the breach of any provision of the charter or by-laws (or similar organizational documents) of Seller or any of its subsidiaries party thereto, or (ii) conflict with or violate (or cause an event which would reasonably be likely to have a Material Adverse Effect as a result of) any Law or Governmental Order applicable to Seller or any of its subsidiaries or the Assets or the Business, or (iii) conflict with, result in any breach of, constitute a default (or event which with the giving of notice or lapse of time, or both, would become a default) under, require any consent under, or give to others any rights of termination, amendment, acceleration, suspension, revocation or cancellation of, any Contract included in the Assets, or result in the creation of any Encumbrance on any of the Assets.

**SECTION 3.4. Governmental Consents and Approvals.** The execution, delivery and performance of this Agreement and each Ancillary Agreement by Seller and its subsidiaries do not and will not require any consent, approval, authorization or other order of, action by, filing with or notification to, any Governmental Authority, except as described in Section 3.4 of the Disclosure Schedule.

**SECTION 3.5. Financial Information; Books and Records.**

(a) True and complete copies of (i) the audited balance sheet of Seller for each of the two fiscal years ended as of December 31, 2000 and 2001, and unaudited balance sheet of Seller for the year ended December 31, 2002, and the related audited (or unaudited, as applicable) statements of income, retained earnings, stockholders' equity and changes in financial position of Seller, together with all related notes and schedules thereto, accompanied by the reports thereon of Seller's Accountants (collectively, the "**Financial Statements**") and (ii) the unaudited balance sheet of Seller as of June 30, 2003, and the related statements of income, retained earnings, stockholders' equity and changes in financial position of Seller (collectively, the "**Interim Financial Statements**") have been delivered by Seller to Purchaser. The Financial Statements and the Interim Financial Statements (i) were prepared in accordance with the books of account and other financial records of Seller, (ii) present fairly the financial condition and results of operations of Seller as of the dates thereof or for the periods covered thereby, (iii) with respect to the audited statements only, have been prepared in accordance with U.S. GAAP applied on a basis consistent with the past

practices of Seller and throughout the periods involved and (iv) with respect to the audited statements only, will include all adjustments (consisting only of normal recurring accruals) that are necessary for a fair presentation of the financial condition of Seller and the results of the operations of Seller as of the dates thereof for the periods covered thereby.

(b) The books of account and other financial records of Seller: (i) with respect to Seller's audited financial statements, reflect all items of income and expense and all assets and Liabilities required to be reflected therein in accordance with U.S. GAAP applied on a basis consistent with the past practices of Seller and throughout the periods involved, (ii) are in all material respects complete and correct, and do not contain or reflect any material inaccuracies or discrepancies and (iii) have been maintained in accordance with good business and accounting practices.

**SECTION 3.6. Receivables.** Section 3.6 of the Disclosure Schedule is an aged list of the Receivables as of July 21, 2003, indicating which Receivables are Service Receivables and showing separately those Receivables that as of such date had been outstanding (i) over 30 and less than 90 days and (ii) more than 90 days. Except to the extent, if any, reserved for on Section 3.6 of the Disclosure Schedule, all Receivables reflected on Section 3.6 of the Disclosure Schedule arose from, and the Receivables existing on the Closing Date will have arisen from, the sale of Inventory or services to Persons not affiliated with Seller and in the ordinary course of the Business consistent with past practice and, except as reserved against on Section 3.6 of the Disclosure Schedule, constitute or will constitute, as the case may be, only valid, undisputed claims of Seller not subject to valid claims of set-off or other defenses or counterclaims other than normal cash discounts accrued in the ordinary course of the Business consistent with past practice. All Receivables reflected on Section 3.6 of the Disclosure Schedule or arising from the date thereof until the Closing (subject to the reserve for bad debts, if any, reflected on the Section 3.6 of the Disclosure Schedule) are or will be good and have been collected or are or will be collectible, without resort to litigation or extraordinary collection activity, within 120 days of the Closing Date.

**SECTION 3.7. Inventories.**

(a) Except as set forth in Section 3.7 of the Disclosure Schedule, Seller has good and marketable title to the Inventories free and clear of all Encumbrances. The Inventories do not consist of, in any material amount, items that are obsolete, damaged or slow-moving. The Inventories do not consist of any items held on consignment. Seller is not under any obligation or liability with respect to accepting returns of items of Inventory or merchandise in the possession of its customers other than in the ordinary course of the Business consistent with past practice. No clearance or extraordinary sale of the Inventories has been conducted since the date of the Interim Financial Statements. Seller has not acquired or committed to acquire or manufactured Inventory for sale which is not of a quality and quantity usable in the ordinary course of the Business within a reasonable period of time and consistent with past practice nor has Seller changed the price of any Inventory except for (i) reductions to reflect any reduction in the cost thereof to Seller, (ii) reductions and increases responsive to normal competitive conditions and consistent with Seller's past sales practices, (iii) increases to reflect any increase in the cost thereof to Seller and

(iv) increases and reductions made with the written consent of Purchaser. Section 3.7 of the Disclosure Schedule contains a complete list of the addresses of all warehouses and other facilities in which the Inventories are located.

(b) The Inventories are in good and merchantable condition in all material respects, are suitable and usable for the purposes for which they are intended and are in a condition such that they can be sold in the ordinary course of the Business consistent with past practice. To the extent they have been acquired from vendors or manufacturers, the Inventories are (i) returnable to such vendors or manufacturers for credit on customary terms, (ii) listed in such vendors' or manufacturers' catalog in use current as of the Closing Date, and (iii) are in "as new" condition.

**SECTION 3.8. Acquired Assets.** Except as disclosed in Section 3.8 of the Disclosure Schedule, since the date of the Interim Financial Statements all the Assets, including, without limitation, the benefit of any Contracts, have been acquired for consideration not less than the fair market value of such Asset at the date of such acquisition.

**SECTION 3.9. Sale and Purchase Order Backlog.**

(a) As of the date of the Interim Financial Statements, open sales orders accepted by Seller and included in the Assets totaled US\$0, and, as of the date immediately preceding the date hereof, open sales orders accepted by Seller and included in the Assets totaled US\$0. Section 3.9(a) of the Disclosure Schedule lists all sales included in the Assets as of the date hereof exceeding US\$0 per order, which have been accepted by Seller and which were open either as of the date of the Interim Financial Statements or as of the date hereof.

(b) As of the date of the Interim Financial Statements, open purchase orders issued by Seller and included in the Assets totaled US\$0, and, as of the date immediately preceding the date hereof, open purchase orders issued by Seller and included in the Assets totaled US\$0. Section 3.9(b) of the Disclosure Schedule lists all purchase orders included in the Assets exceeding US\$0 per order, which have been issued by Seller and which were open either as of the date of the Interim Financial Statements or as of the date hereof.

**SECTION 3.10. Conduct in the Ordinary Course; Absence of Certain Changes, Events and Conditions.** Since the date of the Interim Financial Statements, except as disclosed in Section 3.10 of the Disclosure Schedule, the Business has been conducted in the ordinary course and consistent with past practice. As amplification and not limitation of the foregoing, except as disclosed in Section 3.10 of the Disclosure Schedule, since the date of the Interim Financial Statements, Seller and its subsidiaries have not:

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

(ii) amended, terminated, cancelled or compromised any material claims of Seller or its subsidiaries related to the Business or waived any other rights of substantial value to Seller or its subsidiaries related to the Business;

(iii) sold, transferred, leased, subleased, licensed or otherwise disposed of any properties or assets, real, personal or mixed (including, without limitation, leasehold interests and intangible property) belonging to or used or intended to be used in the Business, other than the sale of Inventories in the ordinary course of the Business consistent with past practice;

(iv) issued or sold any capital stock, notes, bonds or other securities, or any option, warrant or other right to acquire the same, of, or any other interest in, any subsidiary;

(v) made any capital expenditure or commitment for any capital expenditure in excess of US\$10,000 individually or US\$50,000 in the aggregate in connection with any capital asset belonging to or used or intended to be used in the Business;

(vi) issued any sales orders or otherwise agreed to make any purchases included in the Assets involving exchanges in value in excess of US\$10,000 individually or US\$50,000 in the aggregate;

(vii) made any material changes in the customary methods of operations of the Business, including, without limitation, practices and policies relating to manufacturing, purchasing, Inventories, marketing, selling and pricing;

(viii) failed to pay any creditor any amount owed to such creditor when due;

(ix) (A) granted any increase, or announced any increase, in the wages, salaries, compensation, bonuses, incentives, pension or other benefits payable by Seller or any of its subsidiaries (whether in cash, stock or otherwise) to any of its employees who perform services, directly or indirectly, for the Business, including, without limitation, any increase or change pursuant to any Benefit Plan, or (B) established or increased or promised to increase any benefits under any Benefit Plan, in either case except as required by Law;

(x) entered into any agreement, arrangement or transaction with any of its directors, officers, employees or shareholders (or with any relative, beneficiary, spouse or Affiliate of such Persons);

(xi) disclosed any secret or confidential Business Intellectual Property (except by way of issuance of a patent) or permitted to lapse or go abandoned any Business Intellectual Property (or any registration or grant thereof or any application relating thereto) to which, or under which, Seller or any of its subsidiaries has any right, title, interest or license;

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

(xiii) suffered any casualty loss or damage with respect to any of the Assets which in the aggregate have a replacement cost of more than US\$20,000, whether or not such losses or damage shall have been covered by insurance;

(xiv) amended, modified or consented to the termination of any Material Contract or Seller's or any of its subsidiaries' rights thereunder;

(xv) made or changed any material election in respect of Taxes, adopted or changed any accounting method in respect of Taxes, entered into any closing agreement, settled any claim or assessment in respect of Taxes, or consented to any election or waiver of the limitation period applicable to any claim or assessment in respect of Taxes;

(xvi) suffered any Material Adverse Effect; or

(xvii) agreed, whether in writing or otherwise, to take any of the actions specified in this Section 3.10 or granted any options to purchase, rights of first refusal, rights of first offer or any other similar rights with respect to any of the actions specified in this Section 3.10, except as expressly contemplated by this Agreement and the Ancillary Agreements.

**SECTION 3.11. Litigation.** Except as set forth in Section 3.11 of the Disclosure Schedule (which, with respect to each Action disclosed therein, sets forth the parties, nature of the proceeding, date and method commenced, amount of damages or other relief sought and, if applicable, paid or granted), there are no Actions by or against Seller or any of its subsidiaries, or affecting any of the Assets or the Business, pending before any Governmental Authority (or, to the Knowledge of Seller, threatened to be brought by or before any Governmental Authority). None of the matters disclosed in Section 3.11 of the Disclosure Schedule has had or could have a Material Adverse Effect or could affect the legality, validity or enforceability of this Agreement or any Ancillary Agreement or the consummation of the transactions contemplated hereby or thereby. Except as set forth in Section 3.11 of the Disclosure Schedule, neither Seller nor any of its subsidiaries, nor any of the Assets, is subject to any Governmental Order (nor, to the Knowledge of Seller, are there any such Governmental Orders threatened to be imposed by any Governmental Authority) which has had or could have a Material Adverse Effect.

**SECTION 3.12. Compliance with Laws.**

(a) Except as set forth in Section 3.12(a) of the Disclosure Schedule, Seller and its subsidiaries have conducted and continue to conduct the Business in accordance with all Laws and Governmental Orders applicable to Seller or any of its subsidiaries and the Assets and the Business, and neither Seller nor any of its subsidiaries is in violation of any such Law or Governmental Order.

(b) Section 3.12(b) of the Disclosure Schedule sets forth a brief description of each Governmental Order applicable to Seller or any of its subsidiaries and the Assets and the Business, and no such Governmental Order has had or could have a Material Adverse Effect.

### **SECTION 3.13. Environmental and Other Permits and Licenses; Related Matters.**

(a) Neither Seller nor any of its subsidiaries is required to hold any permit, license, authorization, certificate, consent, exemption or approval for the operation of the Assets acquired by Purchaser hereunder under any Environmental Laws (collectively, "**Environmental Permits**"). There is no existing practice, action or activity of Seller or any of its subsidiaries related to the Business or the Assets, and no existing condition of the Assets or the Business, which could reasonably be expected to give rise to any civil or criminal Liability under, or violate or prevent compliance with, any Environmental Law.

(b) As of the Closing, except in compliance with Environmental Laws and in a manner that could not reasonably be expected to subject the Seller or any of its subsidiaries to liability, no Hazardous Materials are present on any Business Facility currently owned, operated, occupied or controlled or leased by the Seller or any of its subsidiaries or were present on any other Business Facility at the time it ceased to be owned, operated, occupied or controlled or leased by the Seller or any of its subsidiaries for the operation of the Business or the Assets as a consequence of the acts of Seller or its subsidiaries or agents. To the Knowledge of Seller, there are no underground storage tanks, asbestos which is friable or likely to become friable or PCBs present on any Business Facility currently owned, operated, occupied, controlled or leased by the Seller or any of its subsidiaries or as a consequence of the acts of the Seller and its subsidiaries or its subsidiaries or their agents.

(c) No action, proceeding, revocation proceeding, amendment procedure, writ, injunction or claim is pending, or to the best of Seller's or its subsidiaries' Knowledge, threatened, concerning or relating to any Hazardous Materials Activity of the Seller or its subsidiaries relating to the Business, or any Business Facility.

### **SECTION 3.14. Material Contracts.**

(a) Section 3.14(a) of the Disclosure Schedule lists each of the following Contracts (including, without limitation, oral and informal Contracts) of Seller and its subsidiaries belonging to or used or intended to be used in the Business (such Contracts and all Contracts relating to Intellectual Property set forth in Section 3.15(a) of the Disclosure Schedule, being "**Material Contracts**"):

(i) each Contract for the purchase of Inventory, other materials or personal property with any supplier or for the furnishing of services to Seller or any of its subsidiaries related to the Business under the terms of which Seller or any of its subsidiaries: (A) is likely to pay or otherwise give consideration of more than US\$5,000 in the aggregate during either of the calendar years ended December 31, 2003 or 2004, (B) is likely to pay or otherwise give consideration of more than US\$25,000 in the aggregate over the remaining term of such Contract, or (C) cannot be cancelled by Seller or the applicable subsidiary without penalty or further payment and without more than 30 days' notice;

(ii) each Contract for the sale of Transferred Products and Services or other personal property or for the furnishing of services by Seller or any of its subsidiaries related to the Business which: (A) is likely to involve consideration of more than US\$5,000 in the aggregate during either of the calendar years ended December 31, 2003 or 2004, (B) is likely to involve consideration of more than US\$25,000 in the aggregate over the remaining term of the contract, or (C) cannot be cancelled by Seller or the applicable subsidiary without penalty or further payment and without more than 30 days' notice;

(iii) all broker, distributor, dealer, manufacturer's representative, franchise, agency, sales promotion, market research, marketing consulting and advertising Contracts related to the Business to which Seller or any of its subsidiaries is a party;

(iv) all management Contracts and Contracts with independent contractors or consultants (or similar arrangements) related to the Business to which Seller or any of its subsidiaries is a party and which are not cancelable by Seller or the applicable subsidiary without penalty or further payment and without more than 30 days' notice;

(v) all Contracts with any Governmental Authority related to the Business to which Seller or any of its subsidiaries is a party;

(vi) all Contracts that limit or purport to limit the ability of Seller or any of its subsidiaries to compete in any line of business or with any Person or in any geographic area or during any period of time;

(vii) all Contracts between or among Seller or any Affiliate of Seller;

(viii) all Business Facility leases;

(ix) all other Contracts, whether or not made in the ordinary course of the Business, which are material to the conduct of the Business, or the absence of which would have a Material Adverse Effect; and

(x) all Intellectual Property Contracts.

(b) Except as disclosed in Section 3.14(b) of the Disclosure Schedule, each Material Contract: (i) is legal, valid and binding on Seller and/or its subsidiaries and is in full force and effect, (ii) is freely and fully assignable to Purchaser without penalty or other adverse consequences and (iii) upon consummation of the transactions contemplated by this Agreement and the Ancillary Agreements, except to the extent that any consents set forth in Section 3.3 of the Disclosure Schedule are not obtained, shall continue in full force and effect without penalty or other adverse consequence. Neither Seller nor any of its subsidiaries is in breach of, or default under, any Material Contract nor, to the Knowledge of Seller and its subsidiaries, is any third party in breach of, or default under, any Material Contract.

(c) Except as disclosed in Section 3.14(c) of the Disclosure Schedule, no other party to any Material Contract is in breach thereof or default thereunder.

(d) Except as disclosed in Section 3.14(d) of the Disclosure Schedule, there is no Contract granting any Person any preferential right to purchase, other than in the ordinary course of the Business consistent with past practice, any of the Assets.

### **SECTION 3.15. Intellectual Property.**

#### **(a) Business Intellectual Property.**

(i) **Transferred Products and Services and Seller Products.** Section 3.15(a)(i) of the Disclosure Schedule contains a complete and accurate list of all Transferred Products and Services and such other software products and technology currently existing and owned by Seller or its subsidiaries as of the Closing Date ("**Seller Products**"), including title and most current and version and release number.

(ii) **Registered Intellectual Property.** Section 3.15(a)(ii) of the Disclosure Schedule contains a complete and accurate list of all Seller Registered Intellectual Property, any proceedings or actions before any court, tribunal (including the United States Patent and Trademark Office or equivalent authority anywhere in the world) related to Seller Registered Intellectual Property, and any actions that must be taken within 150 days after the Closing Date for the purposes of obtaining, maintaining, perfecting or preserving or renewing any Seller Registered Intellectual Property, including the payment of any registration, maintenance or renewal fees or the filing of any responses to office actions, documents, applications or certificates.

(iii) **Intellectual Property Contracts.** Section 3.15(a)(iii) of the Disclosure Schedule contains a complete and accurate list of all Contracts to which Seller or any of its subsidiaries is a party (A) with respect to Seller Owned Intellectual Property licensed to any third party (other than Seller End-User Agreements), or (B) pursuant to which a third party has licensed any Business Intellectual Property to Seller or any of its subsidiaries ("**Intellectual Property Contracts**").

(iv) **Intellectual Property Indemnities.** Section 3.15(a)(iv) of the Disclosure Schedule contains a complete and accurate list of all Contracts whereby Seller or any of its direct or indirect subsidiaries has agreed to, or assumed, any obligation or duty to indemnify, reimburse, hold harmless, defend or otherwise assume or incur any obligation or liability with respect to the infringement or misappropriation of any Intellectual Property Rights.

(b) **Validity.** Each item of Seller Registered Intellectual Property is valid and subsisting, all necessary registration, maintenance and renewal fees currently due in connection with such Seller Registered Intellectual Property have been made and all necessary documents, recordations and certificates in connection with such Seller 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, perfecting and maintaining



such Seller Registered Intellectual Property. Except as set forth in Section 3.15(b) of the Disclosure Schedule, neither Seller nor its subsidiaries has claimed any status in the application for or registration of any Registered Intellectual Property Rights, including "small business status," that would not be applicable to Purchaser. Neither Seller nor its subsidiaries has Knowledge of any information, materials, facts, or circumstances, including any information or fact that would constitute prior art, that would render any Seller Registered Intellectual Property invalid or unenforceable, or would materially affect any pending application for any Seller Registered Intellectual Property, and neither Seller nor its subsidiaries has knowingly misrepresented, or knowingly failed to disclose, any facts or circumstances in any application for any Seller Registered Intellectual Property that would constitute fraud or a misrepresentation with respect to such application or that would otherwise affect the validity or enforceability of any Seller Registered Intellectual Property.

(c) Ownership.

(i) Neither Seller Owned Intellectual Property nor, to Seller's Knowledge, Business Intellectual Property is subject to any proceeding or outstanding decree, order, judgment, or stipulation or, other than the licenses described in Section 3.15(a)(iii) of the Disclosure Schedule, Contract restricting in any material manner, the use, transfer, or licensing thereof by Seller or any of its subsidiaries, or which may materially affect the validity, use or enforceability of such Business Intellectual Property, Seller Owned Intellectual Property or Seller Product.

(ii) All Seller Owned Intellectual Property will be fully transferable, alienable or licensable by Purchaser without restriction and without payment of any kind to any person.

(iii) Seller and its subsidiaries own, and have good and exclusive title to, each item of Seller Owned Intellectual Property free and clear of any lien or encumbrance (other than the licenses described in Section 3.15(a)(iii) of the Disclosure Schedule and the Precise Lien). Without limiting the foregoing: (A) except as set forth in Section 3.15(a)(iii) of the Disclosure Schedule, Seller and its subsidiaries own exclusively, and have good title to, all copyrighted works that are embodied in any Transferred Product and Seller Product; and (B) to the extent that any Patents would be infringed by the manufacture, use, sale or import of any Seller Product, Seller and its subsidiaries are the exclusive owners of such Patents, or have secured appropriate rights from the owner through license or other agreement to make, have made, use, sell, offer for sale and import the Seller Products.

(iv) Except as set forth in Section 3.15(c)(iv) of the Disclosure Schedule, no person other than Seller and its subsidiaries has ownership rights or license rights granted by Seller or its subsidiaries to improvements made by or for Seller or its subsidiaries in any Business Intellectual Property.

(v) Within the past year, Seller has not (A) transferred ownership of, or granted any exclusive license of or exclusive right to use, or authorized the retention of any exclusive rights to use or joint ownership of, Business Intellectual Property, to any other person, or

(B) permitted Seller's rights in any Seller Owned Intellectual Property to lapse or enter the public domain, except to the extent such failure would not adversely affect Seller.

(d) **Non-Infringement.**

(i) The operation of the Business as it currently is conducted or is currently contemplated to be conducted, including, without limitation, the design, development, manufacture, use, import, sale, licensing or other exploitation other of Seller Products, does not, and will not, infringe or misappropriate any Patents and does not and will not infringe or misappropriate non-Patent Intellectual Property of any third party or constitute unfair competition or trade practices under the laws of any jurisdiction. Except as set forth in Section 3.15(d)(i) of the Disclosure Schedule, neither Seller nor any of its subsidiaries has received notice from any third party alleging any such infringement, misappropriation, unfair competition or trade practices.

(ii) Except as set forth in Section 3.15(d)(ii) of the Disclosure Schedule, all Intellectual Property incorporated into or embodied in any Seller Product was developed solely by either (A) employees of Seller or its subsidiaries acting within the scope of their employment or (B) by third parties who have exclusively licensed to Seller or validly and irrevocably assigned all of their rights, including all Intellectual Property rights therein, to Seller or its subsidiaries. To the extent any such Intellectual Property relates to Seller Registered Intellectual Property, to the maximum extent provided for by, and in accordance with, applicable laws and regulations, Seller or its subsidiaries has recorded each such assignment with the relevant Governmental Entity.

(e) **Software.** Seller and its subsidiaries have the right to use, pursuant to valid licenses, all software development tools, library functions, compilers and all other third-party software that are material to the operation of the Business. Except as set forth in Section 3.15(e) of the Disclosure Schedule, no open source or public library software, including any version of any software licensed pursuant to any GNU public license, is, in whole or in part, embodied or incorporated into any Seller Products. Section 3.15(e) of the Disclosure Schedule lists all licenses of Seller Products in source code format.

(f) **Intellectual Property Contracts.**

(i) All Intellectual Property Contracts are in full force and effect.

(ii) Seller and its subsidiaries are not in material breach of any of the Intellectual Property Contracts, and, to Seller's and its subsidiaries' Knowledge, no other party to any Intellectual Property Contract has materially failed to perform thereunder.

(iii) Except as described in Section 3.15(f)(iii) of the Disclosure Schedule, the consummation of the transactions contemplated by this Agreement will neither violate nor result in the breach, modification, cancellation, termination or suspension of any Intellectual Property Contract. Except as described in Section 3.15(f)(iii) of the Disclosure Schedule, following the Closing Date, Purchaser will be permitted to exercise all of Seller's and its subsidiaries rights under all Intellectual Property Contracts, to the same extent Seller and its subsidiaries would have been

able to had the transactions contemplated by this Agreement not occurred and Purchaser will not be required to pay any additional amounts or consideration under the Intellectual Property Contracts other than fees, royalties or payments which Seller or its subsidiaries would otherwise be required to pay had such transactions contemplated hereby not occurred.

(iv) Neither the execution of this Agreement by Seller nor the consummation of the transactions contemplated by this Agreement, including the assignment to Purchaser, by operation of law or otherwise, of any contracts or agreements to which Seller or its subsidiaries is a party, will result in (A) any third party being granted rights or access to, or the placement in or release from escrow, of any software source code or other technology, (B) Purchaser granting to any third party any right in any Intellectual Property of Seller or its subsidiaries, (C) Purchaser being bound by, or subject to, any non-compete or other restriction on the operation or scope of its businesses, or (D) Purchaser being obligated to pay any royalties or other amounts to any third party in excess of those payable by Seller or its subsidiaries prior to the Closing.

(g) **Sufficiency of Intellectual Property Rights.** Seller Owned Intellectual Property, along with the Intellectual Property rights of Seller under the Intellectual Property Contracts, constitute all Business Intellectual Property.

(h) **Government Rights.** Except as set forth in Section 3.15(h) of the Disclosure Schedule, no government funding, facilities of a university, college, other educational institution or research center or funding from third parties was used in the development of any Seller Owned Intellectual Property. Except as set forth in Section 3.15(h) of the Disclosure Schedule, to the Knowledge of Seller and its subsidiaries, no current or former employee, consultant or independent contractor of Seller or its subsidiaries, who was involved in, or who contributed to, the creation or development of any Seller Owned Intellectual Property, has performed services for the government, university, college, or other educational institution or research center during a period of time during which such employee, consultant or independent contractor was also performing services for Seller or its subsidiaries.

(i) **Third-Party Infringement.** To the Knowledge of Seller and its subsidiaries, no person has infringed or misappropriated, or is infringing or misappropriating, any Seller Owned Intellectual Property, and no person has infringed or misappropriated, or is infringing or misappropriating, any Business Intellectual Property in a manner that would adversely affect Seller or its subsidiaries.

(j) **Confidential Information Protection.** Seller and each of its subsidiaries has taken reasonable steps to protect the rights of Seller and its subsidiaries in all confidential or proprietary information related to the Business, including without limitation, Seller's trade secrets, and any confidential or proprietary information or trade secrets of third parties provided to Seller or any of its subsidiaries under an obligation of confidentiality. Without limiting the foregoing, each of Seller and its subsidiaries has required all employees, contractors, directors, officers and technical and professional employees of Seller and its subsidiaries who are currently or who have previously performed services, directly or indirectly, for the Business to (i) maintain in confidence all confidential or proprietary information acquired by them related to the Business in the course of

their employment, (ii) execute a proprietary information/confidentiality agreement, forms of which have been previously provided to Purchaser and (iii) assign to Seller all inventions made by them within the scope of their employment related to the Business during such employment (a "**Seller Invention Assignment Agreement**"). All current and former employees, contractors, directors, officers, management employees, and technical and professional employees of Seller and any of its subsidiaries, including, without limitation, those listed on Schedule 3.15(j), have executed a Seller Invention Assignment Agreement.

(k) **Seller Products.** Each Seller Product conforms in all material respects to the specifications and documentation therefor and is otherwise in compliance with applicable law. Without limiting the foregoing,

(i) Seller Products (A) will record, store, process, calculate and present calendar dates falling on and after (and if applicable, spans of time including) January 1, 2000, and will calculate any information dependent on or relating to such dates in the same manner, and with the same functionality, data integrity and performance, as the products record, store, process, calculate and present calendar dates on or before December 31, 1999, or calculate any information dependent on or relating to such dates, and (B) lose no functionality with respect to the introduction of records containing dates falling on or after January 1, 2000.

(ii) Seller and its subsidiaries have secured any export licenses that are necessary or appropriate for the distribution of Seller Products outside the United States.

(iii) Transferred Products and Services do not contain any virus, Trojan horse, worm, or other software routines or hardware components designed to permit unauthorized access, to disable, erase, or otherwise harm software, hardware or data.

**SECTION 3.16. Real Property.** Seller has identified and provided to Purchaser the Business Facility leases. Except as set forth in Section 3.16 of the Disclosure Schedule, there are no oral or other agreements modifying the Business Facility leases. No party other than Seller or its subsidiaries have the right to occupy the Business Facility. The Business Facilities are in good condition and repair, reasonable wear and tear excepted. No event has occurred which with notice or lapse of time would constitute a breach or default, or permit termination, modification, or acceleration, under the Business Facility leases and no party has repudiated any provisions of the Business Facility leases. The present use of the Business Facilities conforms, and at the Closing Date will conform in all material respects (i) to the requirements of the Business Facility leases, and (ii) with all applicable ordinances and regulations and all building, zoning, health, safety, air and water pollution and other Laws. All permits necessary for occupancy and operation of the Business Facilities have been obtained and are, and immediately prior to the Closing will be, in full force and effect. The Business Facilities are supplied with utilities and other services necessary for the operation of such property for the use set forth in the Business Facility leases.

### SECTION 3.17. Assets.

(a) Except as disclosed in Section 3.17(a) of the Disclosure Schedule, Seller and its subsidiaries own, lease or have the legal right to use all the properties and assets, including, without limitation, the Business Intellectual Property and the furniture, equipment, computers, machinery and other tangible personal property included in the Assets, used or intended to be used in the conduct of the Business and, with respect to Contract rights, is a party to and enjoys the right to the benefits of all Contracts used or intended to be used by Seller and its subsidiaries in or in relating to the conduct of the Business, all of which properties, assets and rights constitute Assets except for the Excluded Assets. Seller and its subsidiaries have good and marketable title to all the Assets, free and clear of all Encumbrances, except (i) as disclosed in Section 3.15, 3.16, or 3.17(a) of the Disclosure Schedule; and (ii) the Precise Lien.

(b) The Assets and the Excluded Assets constitute all the properties, assets and rights forming a part of, used, held or intended to be used in, and all such properties, assets and rights as are necessary in the conduct of, the Business. At all times since the date of the Interim Financial Statements, Seller and its subsidiaries have caused the Assets to be maintained in accordance with good business practice, and all the Assets are in good operating condition and repair and are suitable for the purposes for which they are used and intended.

(c) Except as set forth in Sections 3.14(b), 3.14, 3.16, 3.17(a) or 3.17(c) of the Disclosure Schedule, Seller and its subsidiaries have the complete and unrestricted power and unqualified right to sell, assign, transfer, convey and deliver the Assets to Purchaser without penalty or other adverse consequences. Following the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements and the execution of the instruments of transfer contemplated by this Agreement and the Ancillary Agreements, Purchaser will own, with good, valid and marketable title to, or otherwise acquire the interests of Seller and its subsidiaries in, the Assets, free and clear of any Encumbrances, other than the Precise Lien, and without incurring any penalty or other adverse consequence, including, without limitation, any increase in rentals, royalties, or license or other fees imposed as a result of, or arising from, the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements.

**SECTION 3.18. Customers.** Listed in Section 3.18(i) of the Disclosure Schedule are the names and addresses of all the customers of the Business which ordered goods or merchandise from Seller and its subsidiaries with an aggregate value of US\$10,000 or more during the twelve-month period ended May 31, 2003 and the amount for which each such customer was invoiced during such period. Except as disclosed in Section 3.18(ii) of the Disclosure Schedule, neither Seller nor any of its subsidiaries has received any notice and has no reason to believe that any significant customer of Seller or any of its subsidiaries has ceased, or will cease, to use the products, equipment, goods or services of Seller or any of its subsidiaries or has substantially reduced, or will substantially reduce, the use of such products, equipment, goods or services at any time.

**SECTION 3.19. Suppliers.** Listed in Section 3.19(i) of the Disclosure Schedule are the names and addresses of all the suppliers from which Seller and its subsidiaries ordered raw materials, supplies, merchandise and other goods for the Business with an aggregate purchase price

of US\$10,000 or more during the twelve-month period ended May 31, 2003 and the amount for which each such supplier invoiced Seller and its subsidiaries during such period. Except as disclosed in Section 3.19(ii) of the Disclosure Schedule, neither Seller nor any of its subsidiaries has received any notice and has no reason to believe that any such supplier will not sell raw materials, supplies, merchandise and other goods to Seller or any of its subsidiaries at any time after the Closing Date on terms and conditions similar to those imposed on current sales to the Business, subject only to general and customary price increases.

**SECTION 3.20. Employee Benefit Matters.**

(a) **Schedule of Benefit Plans.** Section 3.20(a) of the Disclosure Schedule contains a complete list of all Benefit Plans.

(b) **Benefit Plans.** Except as set forth in Section 3.20(b) of the Disclosure Schedule, neither Seller nor any ERISA Affiliate has ever maintained, established, sponsored, participated in or contributed to any Pension Plan that is subject to Part 3 of Subtitle B of Title I of ERISA, Title IV of ERISA or Section 412 of the Code. Except as set forth in Section 3.20(b) of the Disclosure Schedule, at no time has Seller or any ERISA Affiliate contributed to or been requested to contribute to any multi-employer plan within the meaning of Section 3(37) of ERISA. Except as set forth in Section 3.20(b) of the Disclosure Schedule, neither Seller nor any ERISA Affiliate has at any time ever maintained, established, sponsored, participated in or contributed to any multiple employer plan or to any plan described in Section 413 of the Code. Except as set forth in Section 3.20(b) of the Disclosure Schedule, neither Seller nor any ERISA Affiliate has ever maintained, established, sponsored, participated in or contributed to any self-insured Benefit Plan (including any Benefit Plan covered by a stop-loss policy).

(c) **No Post-Employment Obligations.** No Benefit Plan provides, or has any liability to provide, life insurance, medical or other employee benefits to any current or former employee, consultant or director of Seller or any Affiliate upon his or her retirement or termination of employment for any reason, except as may be required by statute.

(d) **Compliance with Applicable Law.** Each Benefit Plan is now and always has been operated in all material respects in accordance with its terms and is current with the requirements of all applicable Laws, including, without limitation, ERISA and the Code. No action is pending or threatened with respect to any Benefit Plan (other than claims for benefits in the ordinary course) and no fact or event exists that could give rise to any such Action.

(e) **Absence of Certain Liabilities and Events.** Seller has not incurred any liability for any excise tax arising under Section 4971, 4972, 4980 or 4980B of the Code and to the knowledge of Seller or any ERISA Affiliate, no fact or event exists which could give rise to any such liability. Except as set forth in Section 3.20(e) of the Disclosure Schedule, no complete or partial termination has occurred within the five years preceding the date hereof with respect to any Benefit Plan.

(f) **Warn Act.** Seller is in compliance with the requirements of the Workers Adjustment and Retraining Notification Act ("WARN") or similar state or local law and has never triggered any liability pursuant to WARN or similar state or local law and has no liabilities pursuant to WARN.

(g) **International Employee Plan.** Neither Seller nor, as applicable, its ERISA Affiliates currently, nor have they ever, had the obligation to maintain, establish, sponsor, participate in or contribute to any International Employee Plan.

(h) **Effect of Transaction.** Except as set forth in Section 3.20(h) of the Disclosure Schedule, the execution of this Agreement and the consummation of the transactions specifically contemplated by this Agreement will not (either alone or upon the occurrence of any additional or subsequent events) constitute an event under any Benefit Plan, employee agreement, trust or loan that will or may result in any payment (whether of severance pay or otherwise), acceleration, forgiveness of indebtedness, vesting, distribution, increase in benefits or obligation to fund benefits with respect to any Employee.

(i) **Employment Matters.** Seller and its ERISA Affiliates: (i) are in compliance with all applicable federal, state and local laws, rules and regulations respecting employment, employment practices, terms and conditions of employment and wages and hours, in each case, with respect to the Employees; (ii) have withheld and reported all amounts required by law or by agreement to be withheld and reported with respect to the wages, salaries and other payments to the Employees by virtue of their employment, the transactions specifically contemplated by this Agreement or otherwise; (iii) are not liable for any arrears of wages or any taxes or any penalty for failure to comply with any of the foregoing; (iv) are not liable for any payment to any trust or other fund or to any governmental or administrative authority, with respect to unemployment compensation benefits, social security or other benefits or obligations for the Employees (other than routine payments to be made in the normal course of business and consistent with past practice). There are no pending or, to the Knowledge of Seller or any ERISA Affiliate any threatened or reasonably anticipated claims or actions against Seller or any ERISA Affiliate under any Benefit Plan.

(j) **Labor.** No work stoppage or labor strike against Seller is pending or, to the Knowledge of Seller, threatened by any Employee. Seller is not involved in or, to the Knowledge of Seller, threatened with, any labor dispute, grievance, or litigation relating to labor, safety or discrimination matters involving any Employee, including charges of unfair labor practices or discrimination complaints, which, if adversely determined, would, individually or in the aggregate, result in liability to Purchaser. Seller has not engaged in any unfair labor practices within the meaning of the National Labor Relations Act which would, individually or in the aggregate, directly or indirectly result in a liability to Purchaser. Seller is not presently, nor has been in the past, a party to, or bound by, any collective bargaining agreement or union contract with respect to Employees and no collective bargaining agreement is being negotiated by Seller or any ERISA Affiliate with respect to the Employees.

(k) **Exit Incentive Plan.** No persons have any rights to any current or future payment under Seller's Exit Incentive Plan adopted on or about September 21, 2001. No obligations or liabilities remain or can be incurred in the future under such Exit Incentive Plan.

**SECTION 3.21. Taxes.**

(a) (i) All returns and reports in respect of Taxes required to be filed by Seller or its Affiliates relating to the Assets or the Business have been timely filed; (ii) all Taxes required to be shown on such returns and reports or otherwise due have been timely paid; (iii) all such returns and reports are true, correct and complete in all material respects; (iv) no adjustment relating to such returns has been proposed formally or informally by any Tax authority; (v) there are no pending or, to the best Knowledge of Seller, threatened Actions for the assessment or collection of Taxes against Seller or (insofar as either relates to the activities or income of Seller or the Business or could result in liability of Seller on the basis of joint and/or several liability) any corporation that was includible in the filing of a return with Seller on a consolidated or combined basis; and (vi) there are no Tax liens, other than customary liens for Taxes not yet due, on any properties or assets of Seller, including, without limitation, the Assets and the Business.

(b) Except as disclosed with reasonable specificity in Section 3.21(b) of the Disclosure Schedule: (i) there are no outstanding waivers or agreements extending the statute of limitations for any period with respect to any Tax to which Seller or the Business may be subject; (ii) there are no requests for information currently outstanding that could affect the Taxes of Seller or the Business; and (iii) there are no proposed reassessments of any property owned by Seller or other proposals that could increase the amount of any Tax to which Seller or the Business would be subject.

(c) On the Interim Financial Statements, reserves and allowances have been provided, adequate to satisfy all Liabilities for Taxes relating to the Business for periods (or any portion of a period) through the date of the Interim Financial Statements (without regard to the materiality thereof) and no Tax liabilities relating to the Business have been incurred since that date other than in the ordinary course of business.

(d) There is no contract, agreement, plan or arrangement to which Seller or any of its subsidiaries is a party that, individually or collectively, could reasonably be expected to give rise to the payment of any amount that would not be deductible pursuant to Sections 280G, 404 or 162(m) of the Code. There is no contract, agreement, plan or arrangement to which the Company is a party or by which it is bound to compensate any individual for excise taxes paid pursuant to Section 4999 of the Code. Neither the Seller nor any of its subsidiaries is party to any joint venture, partnership or other arrangement that could be treated as a partnership for federal and applicable state, local or foreign Tax purposes.

**SECTION 3.22. Full Disclosure.** Seller is not aware of any facts pertaining to the Assets or the Business (other than facts related to general economic and industry conditions) which would reasonably be expected to affect adversely the Assets or the Business or which are likely in the future to affect adversely the Assets or the Business and which have not been disclosed in this



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

**SECTION 3.23. Brokers.** Except as set forth in Section 3.23 of the Disclosure Schedule, no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the transactions contemplated by this Agreement or the Ancillary Agreements based upon arrangements made by or on behalf of Seller.

## ARTICLE IV

### REPRESENTATIONS AND WARRANTIES OF PURCHASER

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

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

**SECTION 4.2. No Conflict.** Assuming compliance with applicable and material foreign statute or regulation and the making and obtaining of all filings, notifications, consents, approvals, authorizations and other actions referred to in Section 4.3 hereof, except as may result from any facts or circumstances relating solely to Seller and/or its subsidiaries, the execution, delivery and performance of this Agreement and the Ancillary Agreements by Purchaser, do not and will not (a) violate, conflict with or result in the breach of any provision of the charter or by-laws (or other organizational documents) of Purchaser, (b) conflict with or violate any Law or Governmental Order applicable to Purchaser or (c) conflict with, or result in any breach of, constitute a default (or event which with the giving of notice or lapse of time, or both, would become a default) under, require any consent under, or give to others any rights of termination, amendment, acceleration, suspension, revocation or cancellation of, or result in the creation of any Encumbrance on any of the assets or properties of Purchaser pursuant to, any note, bond, mortgage or indenture, contract, agreement,

lease, sublease, license, permit, franchise or other instrument or arrangement to which Purchaser is a party or by which any of such assets or properties is bound or affected, which would have a material adverse effect on the ability of Purchaser to consummate the transactions contemplated by this Agreement or by the Ancillary Agreements.

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

**SECTION 4.4. Financing.** Purchaser has and will have at the Closing sufficient funds or available borrowing capacity to permit Purchaser to consummate all the transactions contemplated herein.

## ARTICLE V

### ADDITIONAL AGREEMENTS

**SECTION 5.1. Conduct of Business Prior to the Closing.**

(a) Seller covenants and agrees that, except as described in Section 5.1(a) of the Disclosure Schedule, between the date hereof and the Closing, Seller shall not, and shall cause its subsidiaries not to, conduct the Business other than in the ordinary course and consistent with Seller's past practice beginning January 1, 2003. Without limiting the generality of the foregoing, except as described in Section 5.1(a) of the Disclosure Schedule, Seller shall, and shall cause its subsidiaries to, (i) not shorten or lengthen the customary payment cycles for any of its Service Receivables; (ii) use its commercially reasonable efforts to (A) preserve intact business organization of the Business, (B) keep available to Purchaser the services of the Transferred Employees, and (C) preserve its current relationships with its customers, suppliers and other persons with which it has significant business relationships; and (iii) not engage in any practice, take any action, fail to take any action or enter into any transaction which would cause any representation or warranty of Seller to be untrue or result in a breach of any covenant made by Seller in this Agreement.

(b) Except as described in Section 5.1(b) of the Disclosure Schedule, Seller covenants and agrees that, prior to the Closing, without the prior written consent of Purchaser, Seller will not, and will cause its subsidiaries not to, do any of the things enumerated in the second sentence of Section 3.10 of this Agreement (including, without limitation, clauses (i) through (xvii) thereof).

**SECTION 5.2. Access to Information.**

(a) From the date hereof until the Closing, upon reasonable notice, Seller shall and shall cause each of Seller's subsidiaries and each of their respective officers, directors, employees, agents, accountants and counsel to: (i) afford the officers, employees and authorized agents,

accountants, counsel and representatives of Purchaser reasonable access, during normal business hours, to the offices, facilities, books and records of Seller and its subsidiaries and to those officers, directors, employees, agents, accountants and counsel of Seller and its subsidiaries who have any Knowledge relating to the Business and (ii) furnish to the officers, employees and authorized agents, accountants, counsel and representatives of Purchaser such additional financial and operating data and other information regarding the Business and the Assets as Purchaser may from time to time reasonably request.

(b) In order to facilitate the resolution of any claims made by or against or incurred by Seller prior to the Closing, for a period of seven years after the Closing (unless Seller has dissolved in accordance with Section 5.12 of this Agreement), Purchaser shall (i) retain the books and records which are transferred to Purchaser pursuant to this Agreement relating to periods prior to the Closing in a manner reasonably consistent with the prior practices of Seller and (ii) upon reasonable notice, afford the officers, employees and authorized agents and representatives of Seller reasonable access (including the right to make photocopies at Seller's expense), during normal business hours, to such books and records.

(c) In order to facilitate the resolution of any claims made by or against or incurred by Purchaser after the Closing or for any other reasonable purpose, for a period of seven years following the Closing (unless Seller has dissolved in accordance with Section 5.12 of this Agreement), Seller shall, and shall cause its subsidiaries to, (i) retain all books and records which are not transferred to Purchaser pursuant to this Agreement and which relate to the Business for periods prior to the Closing and which shall not otherwise have been delivered to Purchaser and (ii) upon reasonable notice, afford the officers, employees and authorized agents and representatives of Purchaser, reasonable access (including the right to make photocopies at Purchaser's expense), during normal business hours, to such books and records.

**SECTION 5.3. Confidentiality.** Seller agrees to, and shall cause its subsidiaries and each of their respective agents, representatives, Affiliates, employees, officers and directors to: (i) treat and hold as confidential (and not disclose or provide access to any Person to) all information relating to trade secrets, processes, patent or trademark applications, product development, price, customer and supplier lists, pricing and marketing plans, policies and strategies, operations methods, product development techniques, business acquisition plans, new personnel acquisition plans and any other confidential information with respect to the Business, (ii) in the event that Seller or any such subsidiary, agent, representative, Affiliate, employee, officer or director becomes legally compelled to disclose any such information, provide Purchaser with prompt written notice of such requirement so that Purchaser may seek a protective order or other remedy or waive compliance with this Section 5.3, (iii) in the event that such protective order or other remedy is not obtained, or Purchaser waives compliance with this Section 5.3, furnish only that portion of such confidential information which is legally required to be provided and exercise its best efforts to obtain assurances that confidential treatment will be accorded such information, and (iv) promptly furnish (prior to, at, or as soon as practicable following, the Closing) to Purchaser any and all copies (in whatever form or medium) of all such confidential information then in the possession of Seller or any of its subsidiaries and each of their respective agents, representatives, Affiliates, employees, officers and

directors and destroy any and all additional copies then in the possession of Seller or any of its subsidiaries and each of their respective agents, representatives, Affiliates, employees, officers and directors of such information and of any analyses, compilations, studies or other documents prepared, in whole or in part, on the basis thereof; *provided, however*, that this sentence shall not apply to any information that, at the time of disclosure, is available publicly and was not disclosed in breach of this Agreement by Seller, its subsidiaries and each of their respective agents, representatives, Affiliates, employees, officers or directors; *provided further* that specific information shall not be deemed to be within the foregoing exception merely because it is embraced in general disclosures in the public domain. In addition, any combination of features shall not be deemed to be within the foregoing exception merely because the individual features are in the public domain unless the combination itself and its principle of operation are in the public domain. Seller agrees and acknowledges that remedies at Law for any breach of its obligations under this Section 5.3 are inadequate and that in addition thereto Purchaser shall be entitled to seek equitable relief, including injunction and specific performance, in the event of any such breach, without the necessity of demonstrating the inadequacy of money damages.

#### **SECTION 5.4. Regulatory and Other Authorizations; Notices and Consents.**

(a) Seller shall, and shall cause its subsidiaries to, use its commercially reasonable efforts to obtain all authorizations, consents, orders and approvals of all Governmental Authorities and officials that may be or become necessary for its execution and delivery of, and the performance of its obligations pursuant to, this Agreement and the Ancillary Agreements and will cooperate fully with Purchaser in promptly seeking to obtain all such authorizations, consents, orders and approvals. Each party hereto agrees to make an appropriate filing, if necessary, pursuant to applicable and material foreign statute or regulation with respect to the transactions contemplated by this Agreement within five (5) Business Days of the date hereof and to supply as promptly as practicable to the appropriate Governmental Authorities any additional information and documentary material that may be requested pursuant to applicable and material foreign statute or regulation.

(b) Seller shall give promptly such notices to third parties and use its best efforts to obtain such third party consents and estoppel certificates as Purchaser may in its sole and absolute discretion deem necessary or desirable in connection with the transactions contemplated by this Agreement and the Ancillary Agreements, including, without limitation, all third party consents that are necessary or desirable in connection with the transfer of the Material Contracts.

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

(d) Seller knows of no reason why all the consents, approvals and authorizations necessary for the consummation of the transactions contemplated hereby will not be received.

(e) Seller and Purchaser agree that, in the event any consent, approval or authorization necessary or desirable to preserve for the Business or Purchaser any right or benefit under any Contract to which Seller is a party is not obtained prior to the Closing, Seller will, subsequent to the Closing, cooperate with Purchaser in attempting to obtain such consent, approval or authorization as promptly thereafter as practicable, including, without limitation, the consents listed on Schedule 5.4(e). If such consent, approval or authorization cannot be obtained, Seller will use its best efforts to provide Purchaser with the rights and benefits of the affected Contract for the term of such Contract, and, if Seller provides such rights and benefits, Purchaser shall assume the obligations and burdens thereunder.

**SECTION 5.5. Notice of Developments.** Prior to the Closing, Seller shall promptly notify Purchaser in writing of (a) all events, circumstances, facts and occurrences arising subsequent to the date of this Agreement which could result in any breach of a representation or warranty or covenant of Seller in this Agreement or which could have the effect of making any representation or warranty of Seller in this Agreement untrue or incorrect in any material respect and (b) all other material developments affecting the Assets, Assumed Liabilities, business, financial condition, operations, results of operations, customer or supplier relations, employee relations, projections or prospects of the Business.

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

**SECTION 5.7. Calculation of Business Revenue.** With respect to the Transferred Products and Services or the Purchaser Products, which include, incorporate, or are based in substantial part on the Transferred Products and Services, Seller and Purchaser shall promptly agree on a fair and reasonable fixed amount from the sale or revenue therefrom to be included in the

Business Revenue. Notwithstanding the foregoing; such fair and reasonable fixed amount shall be based solely on Purchaser's internal criteria and procedures for determining pricing for, or an allocation of revenue among, its products and product features.

**SECTION 5.8. Covenant Not to Compete.**

(a) In partial consideration of the payment of the Purchase Price, Seller covenants and agrees that for a period of two (2) years following the Closing Date, none of Seller or any of its subsidiaries shall, directly or indirectly, (i) engage in, carry on, manage, operate, perform or control the management or operation of any Restricted Business in any portion of the territory (the "**Restricted Territory**") consisting of the world, or (ii) own any equity interest in any Person that is engaged in, carries on, manages, operates, performs or controls the management or operations of any Restricted Business in the Restricted Territory.

(b) For purposes of this Section 5.8, the term "**Restricted Business**" means the business of developing, making, selling and providing application reliability management software and solutions to customers at various locations in the United States and other countries.

(c) Notwithstanding Section 5.8(a), it will not constitute a breach of this Section 5.8 for Seller to acquire (including through a merger or other corporate transaction), invest in or own equity interests in any Person engaged in, carrying on, managing, operating, performing or controlling the management or operation of a Restricted Business, so long as (i) Seller and its subsidiaries do not own, directly or indirectly, in the aggregate in excess of 5% of the outstanding equity interests of such Person, and (ii) none of Seller or any of its subsidiaries, directly or indirectly, manages, operates or controls the management or operation of such Person or any Restricted Business of such Person.

(d) Purchaser and Seller acknowledge and agree that compliance with the covenants contained in this Section 5.8 is necessary to protect Purchaser and that a breach of any such covenant would result in irreparable and continuing damage for which there would be no adequate remedy at Law. Seller agrees that in the event of any breach of such covenant, Purchaser shall be entitled to preliminary and permanent injunctive relief and to such other and further relief as is proper under the circumstances without the posting of any bond by Purchaser. Seller agrees that these covenants shall be deemed to be a series of separate covenants not to compete for each year within the applicable periods of non-competition and separate covenants not to compete for each state within the United States and each country in the world. If any court of competent jurisdiction determines any of the foregoing covenants to be unenforceable with respect to the term thereof or the scope of the subject matter or geography covered thereby, then such covenant shall nonetheless be enforceable by such court against Seller or other relevant Person upon such shorter term or within such lesser scope as may be determined by the court to be reasonable and enforceable. In the event Seller or any of its subsidiaries is in violation of the aforementioned restrictive covenants, then the time limitation thereof shall be extended for a period of time during which such breach or breaches shall occur, unless a court of competent jurisdiction renders a final non-appealable judgment to the effect that such extension is illegal or unenforceable.

(e) Seller further covenants and agrees that, without the prior written consent of the Purchaser, neither Seller nor any of its subsidiaries will, for a period of two (2) years following the Closing Date, solicit for employment or hire as an employee, officer, agent, consultant, advisor, or in any other capacity whatsoever, any employee of Purchaser. As used herein, "solicit" means contact or communicate in any manner whatsoever, including, but not limited to, contacts or communications by or through intermediaries, agents, contractors, representatives, or other parties, *provided* that nothing herein shall be construed to prohibit Seller from (i) placing advertisements for employment that are aimed at the public at large in any newspaper, trade magazine, or other periodical in general circulation, or (ii) responding to any unsolicited inquiry by any Purchaser employee concerning employment.

(f) This Section 5.8 shall be binding upon any successor or assign to all or substantially all the assets of business of Seller or any of its subsidiaries, and Seller and any such subsidiaries will cause any such successor or assign to acknowledge and agree to be bound by this Section 5.8 for the benefit of Purchaser as a condition precedent to making such entity its successor or assign.

**SECTION 5.9. Excluded Liabilities.** Seller will pay and discharge the Excluded Liabilities as and when the same become due and payable.

**SECTION 5.10. Bulk Transfer Laws.** Prior to Closing, Seller shall comply with the requirements of all applicable bulk sale, bulk transfer or similar laws in all jurisdictions. Pursuant to Article IX, Seller has agreed to indemnify Purchaser against any and all liabilities that may be asserted by third parties against Purchaser as a result of Seller's noncompliance with any applicable bulk sale, bulk transfer or other similar law.

**SECTION 5.11. Approval of Stockholders.** Seller shall take all actions necessary in accordance with the Delaware General Corporation Law and its Certificate of Incorporation and Bylaws to solicit the written consent from the Stockholders as promptly as practicable to consider and vote upon the adoption and approval of this Agreement and the transactions contemplated hereby, including the indemnification obligations of the Stockholders set forth in Article IX hereof, and to acknowledge the provisions set forth in Section 5.12 and Section 5.13 hereof. Seller will, through its Board of Directors, recommend to its Stockholders approval of such matters. Seller shall promptly prepare the written consent of the Stockholders approving this Agreement and the transactions contemplated hereby, which shall include the recommendation of the Seller's Board of Directors that Stockholders vote in favor of the approval and adoption of this Agreement. Seller shall comply with any requirement of the Delaware General Corporation Law or other applicable Law relating to the mailing of notices or other documents to the Stockholders in connection with the transactions contemplated by this Agreement.

**SECTION 5.12. Payments to Stockholders; Liquidation.** Seller shall not (i) distribute any portion of the Contingent Consideration to the Stockholders unless and until all of the Excluded Liabilities then existing have been satisfied in full; including, to the extent the Excluded Liabilities include contingent obligations, such contingent obligations, or (ii) liquidate or dissolve without making appropriate provisions for the satisfaction of all of its creditors.

**SECTION 5.13. No Obligation of Purchaser.** Purchaser shall have no obligation to include or incorporate the Transferred Products and Services in the Purchaser Products or to further develop or support the Transferred Products and Services or to take any actions for the purposes of generating Business Revenue. Purchaser's use or sale or non-use or non-sale of the Transferred Products and Services shall be solely at Purchaser's discretion.

**SECTION 5.14. Closing Advance; Post Closing Advance.**

(a) At Closing, Purchaser shall provide Seller a non-refundable advance against the Contingent Consideration in an amount not to exceed US\$ [REDACTED] to be used by Seller solely to satisfy the obligations set forth on the attached Schedule 5.14(a) (the "Closing Advance").

(b) Following the Closing Date and prior to the Contingent Consideration Payment Date, Seller shall be entitled make a single written request each calendar month to Purchaser for a non-refundable advance (such advances not to exceed US\$ [REDACTED], in the aggregate) (the "Post Closing Advance"), to be used by Seller to fund the costs associated with the activities listed on Schedule 5.15(b) hereto. Each request for a Post Closing Advance shall be in writing and shall include such supporting documentation Purchaser shall reasonably require. Upon receipt of such request and supporting documentation satisfactory to Purchaser in its reasonable judgment, Purchaser shall provide Seller with a Post Closing Advance in the amount mutually agreed upon by Seller and Purchaser. The aggregate amount of the Post Closing Advance shall be offset against the Contingent Consideration, if any, pursuant to Section 2.7(b).

**SECTION 5.15. Mainframe Agreements.**

(a) Seller shall perform all of its obligations under the Mainframe Agreements listed on Schedule 5.15 hereto.

(b) Between the Closing Date and September 30, 2003, Purchaser shall reimburse Seller for costs associated with fulfilling its obligations under the Master Agreement for License of Software, Maintenance and Support Services between Seller's subsidiary and AT&T Canada Corp., dated September 14, 2002, including consulting fees and equipment lease expenses.

(c) Purchaser shall provide Seller with a limited source code license for the Examiner, Traceback for CICS or Abend Analyzer products for Seller to use for the sole purpose of providing service and support under the Mainframe Agreements.

**SECTION 5.16. Website.** Upon Closing, Seller shall indicate on its website that the transactions contemplated by this Agreement have been completed and it shall provide information directing its former customers to the appropriate contact person at Purchaser or otherwise, as applicable.

**SECTION 5.17. Further Action.** Each of the parties hereto shall use all reasonable efforts to take, or cause to be taken, all appropriate action, do or cause to be done all things necessary, proper or advisable under applicable Laws, and execute and deliver such documents and



other papers, as may be required to carry out the provisions of this Agreement and consummate and make effective the transactions contemplated by this Agreement.

## ARTICLE VI

### EMPLOYEE MATTERS

**SECTION 6.1. Employment Offers.** Purchaser shall offer each of the key employees identified on Schedule 6.1 and each of the other employees of the Business as mutually agreed upon by Purchaser and Seller (collectively, the "**Offered Employees**") employment prior to the Closing Date, to be effective as of the Closing Date. Such offers of employment shall provide comparable benefits in the aggregate as those provided to similarly situated employees of Purchaser (the "**Employment Offer**"). Offered Employees who accept Employment Offers shall become an employee of Purchaser or a subsidiary of Purchaser (as the case may be) effective on the Closing Date (collectively "**Transferred Employees**").

**SECTION 6.2. Access to Employees.** Seller agrees to provide Purchaser with reasonable access to the Offered Employees prior to the Closing Date during normal business hours following the date of the execution of this Agreement in order to, among other things, deliver Employment Offers and to provide information to such Offered Employees about Purchaser. All communications by Purchaser with the Offered Employees shall be conducted in a manner that does not disrupt or interfere with Seller's operation of its business.

**SECTION 6.3. Benefits.** Effective at the Closing Date, Transferred Employees shall cease all participation in the Benefit Plans. Purchaser shall use commercially reasonable efforts to cause applicable Purchaser benefit plans to waive, to the extent waived or satisfied under the analogous Benefit Plans, (i) any pre-existing condition or (ii) any waiting period limitation that would otherwise be applicable to Transferred Employees on or after the Closing Date under the Purchaser benefit plans.

**SECTION 6.4. COBRA Continuation Coverage.** The Seller agrees and acknowledges that the selling group (as defined in Treasury Regulation Section 54.4980B-9, Q&A-3(a)) of which it is a part (the "**Selling Group**") will continue to offer a group health plan to employees of Seller (and eligible former employees of Seller) and their qualified beneficiaries (the "**Seller COBRA Employees**") but not to employees of Seller's subsidiary (or eligible former employees of Seller's subsidiary) or their qualified beneficiaries (the "**Subsidiary COBRA Employees**") after the Closing Date. Seller shall indemnify, defend and hold harmless Purchaser for, from and against any and all claims, liabilities, losses, costs and expenses (including attorney's fees) relating to, arising out of, or resulting from any and all COBRA obligations, liabilities and claims related to Seller COBRA Employees and any multiple employer healthcare benefit plan that Seller may participate in or contribute to.

## ARTICLE VII

### TAX MATTERS

#### SECTION 7.1. Indemnity.

(a) Seller agrees to indemnify and hold harmless Purchaser against the following Taxes and, except as otherwise provided in Section 7.4, against any loss, damage, liability or expense, including reasonable fees for attorneys and other outside consultants, incurred in contesting or otherwise in connection with any such Taxes: (i) Taxes owed by Seller or any Affiliate of Seller, or attributable to the Assets or the Business with respect to any taxable periods (or any portion thereof) ending on or before the Closing Date; (ii) with respect to any taxable period (or portion thereof) beginning before the Closing Date and ending after the Closing Date, Taxes imposed on Seller or the Business which are allocable, pursuant to Section 7.1(b), to the portion of such period ending on the Closing Date; (iii) Taxes imposed on any member of any affiliated group with which Seller files, has filed or should have filed a Tax return on a consolidated or combined basis for a taxable period (or a portion thereof) ending on or before the Closing Date; and (iv) Taxes imposed on Purchaser as a result of any breach of warranty or misrepresentation under Section 3.22 of this Agreement. Purchaser shall be responsible for Taxes and associated expenses not allocated to Seller pursuant to this Section 7.1(a) or Section 7.7.

(b) In the case of Taxes that are payable with respect to a taxable period that begins before the Closing Date and ends after the Closing Date, the portion of any such Tax that is allocable to the portion of the period ending on the Closing Date shall be:

(i) in the case of Taxes that are either (x) based upon or related to income or receipts, or (y) imposed in connection with any sale or other transfer or assignment of property (real or personal, tangible or intangible) (other than conveyances pursuant to this Agreement, as provided under Section 7.7), deemed equal to the amount which would be payable if the taxable year ended with the Closing Date; and

(ii) in the case of Taxes imposed on a periodic basis with respect to the assets of Seller, any Assets or otherwise measured by the level of any item, deemed to be the amount of such Taxes for the entire period (or, in the case of such Taxes determined on an arrears basis, the amount of such Taxes for the immediately preceding period) multiplied by a fraction the numerator of which is the number of calendar days in the period ending on the Closing Date and the denominator of which is the number of calendar days in the entire period.

#### SECTION 7.2. Returns and Payments.

(a) From the date of this Agreement through and after the Closing Date, Seller shall prepare and file or otherwise furnish in proper form to the appropriate Governmental Authority (or cause to be prepared and filed or so furnished) in a timely manner all Tax returns, reports and forms ("Returns") relating to Seller and the Business that are due on or before or relate to any taxable period ending on or before the Closing Date (and Purchaser shall do the same for Returns relating to

the Business with respect to any taxable period ending after the Closing Date). Returns of the Business not yet filed for any taxable period that begins before the Closing Date shall be prepared in a manner consistent with past practices to the extent permitted by applicable Law. With respect to any Return required to be filed by Purchaser or Seller with respect to the Business and as to which an amount of Tax is allocable to the other party under Section 7.1(b), the filing party shall provide the other party and its authorized representatives with a copy of such completed Return and a statement certifying the amount of Tax shown on such Return that is allocable to such other party pursuant to Section 7.1(b), together with appropriate supporting information and schedules at least twenty (20) Business Days prior to the due date (including any extension thereof) for the filing of such Return, and such other party and its authorized representatives shall have the right to review and comment on such Return and statement prior the filing of such Return.

(b) Seller shall pay or cause to be paid when due and payable all Taxes with respect to Seller and with respect to the Business for any taxable period ending on or before the Closing Date, and Purchaser shall so pay or cause to be paid Taxes for the Business for any taxable period ending after the Closing Date (subject to its right of indemnification from Seller by the date set forth in Section 7.5 for Taxes attributable to the portion of any Tax period that includes the Closing Date pursuant to Sections 7.1(a) and 7.1(b)).

**SECTION 7.3. Refunds.** Any Tax refund (including any interest with respect thereto) relating to Seller or the Business for any taxable period ending on or prior to the Closing Date shall be the property of Seller, and if received by Purchaser shall be paid promptly to Seller.

**SECTION 7.4. Contests.**

(a) After the Closing, Purchaser shall promptly notify Seller in writing of any written notice of a proposed assessment or claim in an audit or administrative or judicial proceeding of Purchaser which, if determined adversely to the taxpayer, would be grounds for indemnification by Seller under this Article VII; *provided, however*, that a failure to give such notice will not affect Purchaser's right to indemnification under this Agreement except to the extent, if any, that, but for such failure, Seller could have avoided all or a portion of the Tax liability in question.

(b) In the case of an audit or administrative or judicial proceeding that relates to periods ending on or before the Closing Date, *provided* that Seller acknowledges in writing its liability under this Agreement to hold Purchaser harmless against the full amount of any adjustment which may be made as a result of such audit or proceeding that relates to periods ending on or before the Closing Date (or, in the case of any taxable year that includes the Closing Date, against an adjustment allocable under Section 7.1(b) to the portion of such year ending on or before the Closing Date), Seller shall have the right at its expense to participate in and control the conduct of such audit or proceeding but only to the extent that such audit or proceeding relates solely to a potential adjustment for which Seller has acknowledged its liability; Purchaser also may participate in any such audit or proceeding and, if Seller does not assume the defense of any such audit or proceeding, Purchaser may defend the same in such manner as it may deem appropriate, including, without limitation, settling such audit or proceeding after giving five days' prior written notice to Seller setting forth the terms and conditions of settlement. In the event that issues relating to a potential

adjustment for which Seller has acknowledged its liability are required to be dealt with in the same proceeding as separate issues relating to a potential adjustment for which Purchaser would be liable, Purchaser shall have the right, at its expense, to control the audit or proceeding with respect to the latter issues.

(c) With respect to issues relating to a potential adjustment for which both Seller (as evidenced by its acknowledgment under this Section 7.4) and Purchaser could be liable, (i) each party may participate in the audit or proceeding, and (ii) the audit or proceeding shall be controlled by that party which would bear the burden of the greater portion of the sum of the adjustment and any corresponding adjustments that may reasonably be anticipated for future Tax periods. The principle set forth in the preceding sentence shall govern also for purposes of deciding any issue that must be decided jointly (in particular, choice of judicial forum) in situations in which separate issues are otherwise controlled under this Article VII by Purchaser and Seller.

(d) Neither Purchaser nor Seller shall enter into any compromise or agree to settle any claim pursuant to any Tax audit or proceeding which would adversely affect the other party for such year or a subsequent year without the written consent of the other party, which consent may not be unreasonably withheld. Purchaser and Seller agree to cooperate in the defense against or compromise of any claim in any audit or proceeding.

**SECTION 7.5. Time of Payment.** Payment by Seller of any amounts due under this Article VII in respect of Taxes shall be made (i) at least three Business Days before the due date of the applicable estimated or final Return required to be filed by Purchaser on which is required to be reported income for a period ending after the Closing Date for which Seller is responsible under Sections 7.1(a) and 7.1(b) without regard to whether the Return shows overall net income or loss for such period, and (ii) within three Business Days following the earliest of notice from Purchaser that an indemnity amount is payable (including calculation or other materials supporting such amount), an assessment of a Tax by a taxing authority, or a "determination" as defined in Section 1313(a) of the Code. If liability under this Article VII is in respect of costs or expenses other than Taxes, payment by Seller of any amounts due under this Article VII shall be made within five Business Days after the date when Seller has been notified by Purchaser that Seller has a liability for a determinable amount under this Article VII and is provided with calculations or other materials supporting such liability.

**SECTION 7.6. Cooperation and Exchange of Information.** Upon the terms set forth in Section 5.2, Seller and Purchaser shall provide each other with such cooperation and information as either of them reasonably may request of the other in filing any Return, amended Return or claim for refund, determining a liability for Taxes or a right to a refund of Taxes, participating in or conducting any audit or other proceeding in respect of Taxes. Such cooperation and information shall include providing copies of relevant Returns or portions thereof, together with accompanying schedules, related work papers and documents relating to rulings or other determinations by Tax authorities. Seller shall make its employees available on a basis mutually convenient to both parties to provide explanations of any documents or information provided hereunder. Each of Seller and Purchaser shall retain all Returns, schedules and work papers, records and other documents in its

possession relating to Tax matters of Seller and the Business for each taxable period first ending after the Closing Date and for all prior taxable periods until the later of (i) the expiration of the statute of limitations of the taxable periods to which such Returns and other documents relate, without regard to extensions except to the extent notified by the other party in writing of such extensions for the respective Tax periods, or (ii) six years following the due date (without extension) for such Returns. Any information obtained under this Section 7.6 shall be kept confidential in accordance with Section 5.3 except as may be otherwise necessary in connection with the filing of Returns or claims for refund or in conducting an audit or other proceeding.

**SECTION 7.7. Conveyance Taxes.** Seller shall be liable for and shall hold Purchaser harmless against any real property transfer or gains, sales, use, transfer, value added, stock transfer, and stamp taxes, and any transfer, recording, registration, and other fees, and any similar Taxes which become payable in connection with the transactions contemplated by this Agreement and the Ancillary Agreements. Purchaser and Seller shall cooperate in a commercially reasonable manner to minimize any such Taxes. Without limiting the foregoing, Purchaser shall execute and deliver all instruments and certificates necessary to enable Seller to comply with the foregoing. Purchaser shall complete and execute a resale or other exemption certificate with respect to the inventory items sold hereunder, and shall provide Seller with an executed copy thereof.

**SECTION 7.8. Miscellaneous.**

(a) Seller and Purchaser agree to treat all payments made by either to or for the benefit of the other under this Article VII, under other indemnity provisions of this Agreement and for any misrepresentations or breach of warranties or covenants, as adjustments to the Purchase Price for Tax purposes and that such treatment shall govern for purposes hereof except to the extent that the laws of a particular jurisdiction provide otherwise. All payments shall be made in an amount sufficient to indemnify the relevant party on an after-Tax basis (taking into account Tax benefits and costs actually realized by the indemnified party).

(b) Notwithstanding any provision in this Agreement to the contrary, the obligations of Seller to indemnify and hold harmless Purchaser pursuant to the representations and warranties contained in Section 3.22 (except to the extent indemnification is otherwise required under this Article VII) shall terminate at the close of business on the 120th day following the expiration of the applicable statute of limitations with respect to the Tax liabilities in question (giving effect to any waiver, mitigation or extension thereof).

(c) From and after the date of this Agreement, Seller shall not without the prior written consent of Purchaser (which may, in its sole and absolute discretion, withhold such consent) make, or cause or permit to be made, any Tax election that would affect the Business.

(d) For purposes of this Article VII, "Purchaser" and "Seller," respectively, shall include each member of the affiliated group of corporations of which it is or becomes a member.

(e) Purchaser shall be entitled to recover professional fees and related costs that it may reasonably incur to enforce the provisions of this Article VII.

## ARTICLE VIII

### CONDITIONS TO CLOSING

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

(a) **Stockholder Approval.** This Agreement and the transactions contemplated hereby shall have been approved and adopted by the requisite vote of the Stockholders, and Seller shall have taken all other corporate actions necessary to authorize the execution, delivery and performance of this Agreement, and the consummation of the transactions contemplated hereby;

(b) **Representations, Warranties and Covenants.** The representations and warranties of Purchaser contained in this Agreement shall have been true and correct in all material respects when made and shall be true and correct in all material respects as of the Closing, with the same force and effect as if made as of the Closing, other than such representations and warranties as are made as of another date, the covenants and agreements contained in this Agreement to be complied with by Purchaser on or before the Closing shall have been complied with in all material respects, and Seller shall have received a certificate from Purchaser to such effect signed by a duly authorized officer thereof;

(c) **No Proceeding or Litigation.** No Action shall have been commenced by or before any Governmental Authority against either Seller or Purchaser, seeking to restrain or materially and adversely alter the transactions contemplated by this Agreement which, in the reasonable, good faith determination of Seller, is likely to render it impossible or unlawful to consummate such transactions; *provided, however*, that the provisions of this Section 8.1(c) shall not apply if Seller has directly or indirectly solicited or encouraged any such Action; and

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

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

(a) **Stockholder Approval.** This Agreement and the transactions contemplated hereby, including the Stockholder indemnification obligations set forth in Article IX hereof, shall have been approved and adopted by, and the provisions set forth in Section 5.12 and Section 5.13 hereof shall have been approved and acknowledged by Stockholders holding at least 90% of the outstanding shares of Seller's Common Stock and Series D Convertible Participating Preferred Stock, including each Stockholder who is a party to the Precise Merger Agreement, and Seller shall have taken all other corporate actions necessary to authorize the execution, delivery and performance of this Agreement, and the consummation of the transactions contemplated hereby;

(b) **Representations, Warranties and Covenants.** The representations and warranties of Seller contained in this Agreement shall have been true and correct in all material respects when made and shall be true and correct in all material respects as of the Closing with the same force and effect as if made as of the Closing, other than such representations and warranties as are made as of another date, the covenants and agreements contained in this Agreement to be complied with by Seller on or before the Closing shall have been complied with in all material respects, and Purchaser shall have received a certificate of Seller to such effect signed by a duly authorized officer thereof;

(c) **No Proceeding or Litigation.** No Action shall have been commenced or threatened by or before any Governmental Authority against either Seller or Purchaser, seeking to restrain or materially and adversely alter the transactions contemplated hereby which Purchaser believes, in its sole and absolute discretion, is likely to render it impossible or unlawful to consummate the transactions contemplated by this Agreement or which could have a Material Adverse Effect or otherwise render inadvisable, in Purchaser's sole and absolute discretion, the consummation by Purchaser of the transactions contemplated by this Agreement; *provided, however*, that the provisions of this Section 8.2(c) shall not apply if Purchaser has solicited or encouraged any such Action;

(d) **Legal Opinion.** Purchaser shall have received from Katten Muchin Zavis Rosenman, an opinion, addressed to Purchaser and dated the Closing Date, substantially in the form of Exhibit 8.2(d);

(e) **Ancillary Agreements.** Seller and its subsidiaries shall have executed and delivered to Purchaser each of the Ancillary Agreements to which they are a party;

(f) **Consents and Approvals.** Purchaser and Seller shall have received, each in form and substance reasonably satisfactory to Purchaser, all authorizations, consents, orders and approvals of all Governmental Authorities and officials and all third party consents and estoppel certificates which Purchaser in its sole and absolute discretion deems necessary for the consummation of the transactions contemplated by this Agreement and the Ancillary Agreements, including, without limitation, all third party consents required under any Material Contracts included in the Assets;

(g) **Consents; Assignments.** Each consent and assignment set forth in Schedule 8.2(g) shall have been obtained;

(h) **Employees.** Purchaser shall have received an executed offer letter (including Purchaser's standard form of employee proprietary information and inventions agreement), effective as of the Closing Date, from each of the employees of Seller listed on Schedule 8.2(h), and each of such employees shall not have notified the Purchaser or Seller of such employee's intention not to continue his or her employment with the Purchaser after the Closing;

(i) **Employee Terminations.** Effective immediately prior to the Closing, Seller shall terminate the employment of the persons agreed to by Purchaser and Seller between the date hereof

and the Closing Date and shall deliver to Purchaser the severance and release agreements from such persons in a form and substance acceptable to Purchaser;

(j) **Non-Competition and Non-Solicitation Agreements**. Purchaser shall have received Non-Competition and Non-Solicitation agreements from the Transferred Employees and the parties listed in Schedule 8.2(j) hereof. Furthermore, no party to such Non-Competition and Non-Solicitation agreement shall have threatened to breach their respective Non-Competition and Non-Solicitation agreement (nor taken any action inconsistent therewith);

(k) **Precise Merger Agreement**. Precise and Seller shall have terminated the Precise Merger Agreement;

(l) **No Material Adverse Effect**. No circumstance, change in, or effect on the Business shall have occurred which has or could reasonably be expected to have a Material Adverse Effect.

## ARTICLE IX

### INDEMNIFICATION

**SECTION 9.1. Survival of Representations and Warranties**. Subject to Section 7.8(b), the parties agree that, regardless of any investigation made by Purchaser, the representations, warranties, covenants and agreements (in the case of covenants and agreements, to the extent of performance or non-performance prior to the Closing Date) of Seller contained in this Agreement shall survive the execution and delivery of this Agreement for a period beginning on the date hereof and ending at 5:00 p.m., Pacific time, on the date that is (i) the Contingent Consideration Payment Date, or (ii) with respect to any breach of the representations and warranties of Seller contained in Sections 3.15, 3.17, 3.20 or 3.21, 60 days after the last day of the statute of limitations period for any third party claim relating thereto (the "**Survival Period**"). If Purchaser has given to Seller written notice of an Indemnification Claim in accordance with Section 9.2(b) of this Agreement and prior to the expiration of the applicable representations and warranties, then the relevant representations and warranties shall survive as to such claim until the claim has been finally resolved.



## SECTION 9.2. Indemnification.

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

(i) the breach of any representation or warranty made by Seller or any of its subsidiaries contained in the Acquisition Documents;

(ii) the breach of any covenant or agreement by Seller or any of its subsidiaries contained in the Acquisition Documents;

(iii) Liabilities of Seller, whether arising before or after the Closing Date, arising from or relating to the ownership or actions or inactions of Seller or the conduct of the Business prior to the Closing, except for the Assumed Liabilities;

(iv) any and all Losses suffered or incurred by Purchaser by reason of or in connection with any claim or cause of action of any third party to the extent arising out of any action, inaction, event, condition, liability or obligation of Seller occurring or existing prior to the Closing, except for the Assumed Liabilities;

(v) Liabilities, whether arising before or after the Closing Date, that are not expressly assumed by Purchaser pursuant to this Agreement, including, without limitation, Liabilities arising from or related to any failure by Seller to comply with laws relating to bulk transfers or bulk sales with respect to the transactions contemplated by this Agreement; or

(vi) Liabilities or Losses associated with Section 6.4 hereof.

To the extent that Seller's undertakings set forth in this Section 9.2 may be unenforceable, Seller shall contribute the maximum amount that it is permitted to contribute under applicable Law to the payment and satisfaction of all Losses incurred by Purchaser.

(b) An Indemnified Party shall give Seller notice of an Indemnification Claim by delivery of a certificate signed by an officer of Purchaser (an **"Officer's Certificate"**) within sixty (60) calendar days of determining the existence of any such Indemnification Claim, stating the amount of the Loss, if known, and method of computation thereof, and containing a reference to the provisions of this Agreement in respect of which such right of indemnification is claimed or arises. Seller may object to any Indemnification Claim set forth in an Officer's Certificate by delivery to Purchaser of a written statement of objection (an **"Objection Notice"**) within thirty (30) calendar days of receipt of an Officer's Certificate. The obligations and Liabilities of Seller under this Article IX with respect to Losses arising from claims of any third party which are subject to the indemnification provided for in this Article IX (**"Third Party Claims"**) shall be governed by and be

contingent upon the following additional terms and conditions: if an Indemnified Party shall receive notice of any Third Party Claim, the Indemnified Party shall give Seller notice of such Third Party Claim within fifteen (15) calendar days of the receipt by the Indemnified Party of such notice; *provided, however*, that the failure to provide such written notice shall not release Seller from any of its obligations under this Article IX except to the extent Seller is materially prejudiced by such failure and shall not relieve Seller from any other obligation or liability that it may have to any Indemnified Party otherwise than under this Article IX. If Seller acknowledges in writing its obligation to indemnify the Indemnified Party hereunder against any Losses that may result from such Third Party Claim, then Seller shall be entitled to assume and control the defense of such Third Party Claim at its expense and through counsel of its choice if it gives notice of its intention to do so to the Indemnified Party within five (5) business days of the receipt of such notice from the Indemnified Party; *provided, however*, that if there exists or is reasonably likely to exist a conflict of interest that would make it inappropriate in the reasonable judgment of the Indemnified Party for the same counsel to represent both the Indemnified Party and Seller, then the Indemnified Party shall be entitled to retain its own counsel, in each jurisdiction for which the Indemnified Party determines counsel is required, at the expense of Seller. In the event Seller exercises the right to undertake any such defense against any such Third Party Claim as provided above, the Indemnified Party shall cooperate with Seller in such defense and make available to Seller, at Seller's expense, all witnesses, pertinent records, materials and information in the Indemnified Party's possession or under the Indemnified Party's control relating thereto as is reasonably required by Seller. Similarly, in the event the Indemnified Party is, directly or indirectly, conducting the defense against any such Third Party Claim, Seller shall cooperate with the Indemnified Party in such defense and make available to the Indemnified Party, at Seller's expense, all such witnesses, records, materials and information in Seller's possession or under Seller's control relating thereto as is reasonably required by the Indemnified Party. No such Third Party Claim may be settled by Seller without the written consent of the Indemnified Party.

### SECTION 9.3. Limits on Indemnification.

(a) An Indemnified Party shall not be entitled to indemnification hereunder for any Losses arising from the breach of any representation, warranty, covenant or agreement until the amount of all such Losses exceeds US\$15,000 individually, or US\$50,000 in the aggregate (the "Threshold"), at which time all Losses incurred shall be subject to indemnification hereunder in full, including the amount of the Threshold; *provided, however*, that any claims for indemnification pursuant to Section 9.2(a)(iii), shall be indemnifiable in full without regard to the Threshold.

(b) There shall be no limit to the amount any Indemnified Party may recover from Seller pursuant to an indemnity set forth in Section 9.2 hereof for any Losses. The maximum amount any Indemnified Party may recover from the Stockholders pursuant to an indemnity set forth in Section 9.2 hereof for any Losses shall be an amount equal to the portion, if any, of the Contingent Consideration allocable to each such Stockholder based on such Stockholder's pro rata share of such Contingent Consideration as determined in accordance with Seller's Certificate of Incorporation then in effect. Notwithstanding any other provisions in this Agreement to the contrary, from and after the Contingent Consideration Payment Date an Indemnified Party shall not be entitled to recover any amount from the Stockholders pursuant to any indemnity set forth in Section 9.2 for any Losses, including, without limitation, from Stockholders on account of distributions made by Seller to the Stockholders.

(c) Purchaser shall satisfy its claims for indemnification first by right of setoff against any portion of the then earned but unpaid Contingent Consideration and, second, from Seller directly. To the extent the amount of any such claim is greater than the aggregate amount then available from the then earned but unpaid Contingent Consideration, Seller shall promptly upon demand pay to Purchaser such excess amount, subject to the limitations set forth in Section 9.3(b) above.

**SECTION 9.4. Payment of Indemnification.** In the event that (a) Seller shall not have objected to the amount claimed by an Indemnified Party for indemnification with respect to any Loss in accordance with the procedures set forth in Section 9.2(b) of this Agreement or (b) Seller shall have delivered an Objection Notice as to the amount of any indemnification requested by an Indemnified Party and either (i) Seller and the Indemnified Party shall have, subsequent to the giving of such notice, mutually agreed that Seller is obligated to indemnify the Indemnified Party for a specified amount or (ii) a final nonappealable judgment shall have been rendered by the court having jurisdiction over the matters relating to such Indemnification Claim by an Indemnified Party for indemnification from Seller, then Seller shall pay any such indemnification owed to the Indemnified Party within thirty (30) calendar days of such mutual agreement or final nonappealable judgment, as applicable, by wire transfer in immediately available funds to an account directed by the Indemnified Party.

**SECTION 9.5. Stockholder Agent.** In the event of a liquidation or dissolution of Seller following the Closing Date, a stockholder agent (the "**Stockholder Agent**") shall be appointed upon the affirmative vote of holders of a majority of the shares of Seller's capital stock (on an as converted basis) outstanding as of the date hereof. The Stockholder Agent shall, upon such liquidation or dissolution of Seller, the Stockholder Agent shall act on behalf of Seller and the Stockholders as his, her and/or its representative and the attorney-in-fact for and on behalf of each such Stockholder and Seller for purposes of this Article IX. Accordingly, the Stockholder Agent shall have unlimited authority and power to act on behalf of each Stockholder with respect to this Agreement and the disposition, settlement or other handling of all Indemnification Claims, rights or obligations arising from and taken pursuant to each such agreement. The Stockholder Agent shall have no liability to any Stockholder for any actions taken or failed to be taken on behalf of the Stockholders pursuant to this Article IX.

**SECTION 9.6. Tax Matters.** Anything in this Article IX to the contrary notwithstanding, the rights and obligations of the parties with respect to indemnification for any and all Tax matters shall be governed by Article VII.

**SECTION 9.7. Purchase Price Calculation.** Anything in this Article IX to the contrary notwithstanding, any adjustments, distributions and disputes arising pursuant to Article II of this Agreement shall be governed by such Article II.

## ARTICLE X

### TERMINATION AND WAIVER

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

(a) by Purchaser if, between the date hereof and the time scheduled for the Closing:

(i) an event or condition occurs that has resulted in or that may be reasonably expected to result in a Material Adverse Effect; or (ii) Seller makes a general assignment for the benefit of creditors, or any proceeding shall be instituted by or against Seller seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up or reorganization, arrangement, adjustment, protection, relief or composition of its debts under any Law relating to bankruptcy, insolvency or reorganization; or

(b) by either Seller or Purchaser if the Closing shall not have occurred by September 1, 2003; *provided, however*, that the right to terminate this Agreement under this Section 10.1(b) shall not be available to any party whose failure to fulfill any obligation under this Agreement shall have been the cause of, or shall have resulted in, the failure of the Closing to occur on or prior to such date; or

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

(d) by either Purchaser or Seller in the event that this Agreement and the transactions contemplated hereby shall not have been approved and adopted by the Stockholders; or

(e) by the mutual written consent of Seller and Purchaser.

**SECTION 10.2. Effect of Termination.** In the event of termination of this Agreement as provided in Section 10.1, this Agreement shall forthwith become void and there shall be no liability on the part of either party hereto except (i) as set forth in Sections 5.3; 10.2 and 11.1 and (ii) that nothing herein shall relieve either party from liability for any breach of this Agreement.

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

## ARTICLE XI

### MISCELLANEOUS

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

**SECTION 11.2. Notices.** All notices, requests, claims, demands and other communications hereunder shall be in writing and shall be given or made (and shall be deemed to have been duly given or made upon receipt) by delivery in person, or by courier service, facsimile (provided that such facsimile is sent during normal business hours of a Business Day of the recipient, the sender receives a machine-generated confirmation of successful transmission and a copy of which notice is contemporaneously sent by regular mail) or registered or certified mail (postage prepaid, return receipt requested) to the respective parties hereto at their addresses set forth on the signature pages to this Agreement (or at such other address for a party hereto as shall be specified in a notice given in accordance with this Section 11.2), with copies of such notice being given to counsel for the parties as follows:

If to Seller, with a copy to:

Katten Muchin Zavis Rosenman  
525 West Monroe Street  
Suite 1600  
Chicago, IL 60661  
Tel: (312) 902-5679  
Fax: (312) 902-1061  
Attn: Arthur Hahn, Esq.

If to Purchaser, with a copy to:

Wilson Sonsini Goodrich & Rosati, PC  
One Market, Spear Tower  
Suite 3300  
San Francisco, CA 94105  
Tel: (415) 947-2000  
Fax: (415) 947-2099  
Attn: Michael Dorf, Esq.

**SECTION 11.3. Public Announcements.** No party to this Agreement shall make, or cause to be made, any press release or public announcement in respect of this Agreement or the transactions contemplated hereby or otherwise communicate with any news media without the prior written consent of the other party, and the parties shall cooperate as to the timing and contents of any such press release or public announcement.

**SECTION 11.4. Headings.** The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning, construction or interpretation of this Agreement.

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

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

**SECTION 11.7. Assignment.** Other than as set forth in Article XI hereto, this Agreement may not be assigned by operation of Law or otherwise without the express written consent of Seller and Purchaser (which consent may be granted or withheld in the sole discretion of such party); *provided, however*, that Purchaser may, without the consent of Seller, (i) designate its parent or any of its subsidiaries to acquire the rights and title to the Assets and assume the Assumed Liabilities under the terms and conditions of this Agreement, (ii) assign any of its rights or obligations under this Agreement in any country to any of its Affiliates, or (iii) delegate its obligations under this Agreement in any country to any of its Affiliates; *provided, however*, that such assignment or delegation shall not relieve Purchaser of its responsibilities for performance of its obligations under this Agreement.

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

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

**SECTION 11.10. Governing Law.** THIS AGREEMENT AND THE OBLIGATIONS OF EACH PARTY ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REGARD TO THE PRINCIPLES THEREOF REGARDING CONFLICT OF LAWS, AND ANY APPLICABLE LAWS OF THE UNITED STATES OF AMERICA.

**SECTION 11.11. Jurisdiction and Venue.** Each of the parties hereto irrevocably consents to the exclusive jurisdiction and venue of any court within Santa Clara County, State of California, in connection with any matter based upon or arising out of this Agreement or the matters contemplated herein, agrees that process may be served upon them in any manner authorized by the laws of the State of California for such persons and waives and covenants not to assert or plead any objection which they might otherwise have to such jurisdiction, venue and such process.


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

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

**SECTION 11.14. Rules of Construction.** The parties hereto agree that they have been represented by counsel during the negotiation and execution of this Agreement and, therefore, waive the application of any law, regulation, holding or rule of construction providing that ambiguities in an agreement or other document will be construed against the party drafting such agreement or document.

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

**GEODESIC SYSTEMS, INC.**

By   
Name: Michael Spertus  
Title: Chairman & CEO  
Address: 414 N. Orleans Street  
Suite 410  
Chicago, IL 60610  
Attn: Philip Spertus  
Telecopy: (312) 832-1230

**VERITAS SOFTWARE CORPORATION**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: 350 Ellis Street  
Mountain View, CA 94043  
Attention: \_\_\_\_\_  
Telecopy: \_\_\_\_\_

*[Signature Page to Asset Purchase Agreement]*

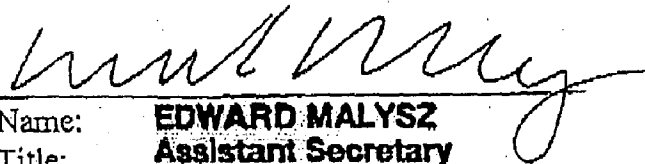


IN WITNESS WHEREOF, Seller and Purchaser have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

**GEODESIC SYSTEMS, INC.**

By \_\_\_\_\_  
Name:  
Title:  
Address: 414 N. Orleans Street  
Suite 410  
Chicago, IL 60610  
Attn: Philip Spertus  
Telecopy: (312) 832-1230

**VERITAS SOFTWARE CORPORATION**

By  \_\_\_\_\_  
Name: **EDWARD MALYSZ**  
Title: **Assistant Secretary**  
Address: 350 Ellis Street  
Mountain View, CA 94043  
Attention: General Counsel  
Telecopy: 650.527.2581

*[Signature Page to Asset Purchase Agreement]*

**Seller Disclosure Schedule**

to

**Asset Purchase Agreement**

dated as of July 30, 2003

between

Geodesic Systems, Inc.,  
as Seller

and

VERITAS Software Corporation,  
as Purchaser

Reference is here by made to the Asset Purchase Agreement dated as of July 30, 2003 (the "Agreement"), between Geodesic Systems, Inc., a Delaware corporation ("Seller"), and VERITAS Software Corporation, a Delaware corporation. Capitalized terms used herein and not otherwise defined shall have the respective meanings assigned to such terms in the Agreement.

The Agreement is qualified in its entirety by reference to specific provisions set forth in this Disclosure Schedule. This Disclosure Schedule is not intended to constitute, and shall not be construed as constituting, representations or warranties of Seller except and to the extent provided in the Agreement or as expressly provided herein. The section numbers in this Disclosure Schedule correspond to the section numbers in the Agreement. Items and matters disclosed in this Disclosure Schedule shall provide an exception to or otherwise qualify or respond to the representations or warranties of Seller in the section or subsection specifically referred to, as well as in such other sections or subsections that a reasonable reader of this Disclosure Schedule would clearly understand such exception or qualification to apply.

Headings have been inserted in this Disclosure Schedule for convenience of reference only and shall to no extent have the effect of amending or changing the express description of the sections set forth in the Agreement.

## Section 3.2 - Subsidiaries

Seller has the following wholly-owned subsidiaries:

InCert Software Corporation, a Delaware corporation ("InCert").

Seller's interest in InCert is subject to a security interest in favor of Precise Software Corporation, a Delaware corporation ("Precise").

Seller had a wholly-owned subsidiary in the United Kingdom called "Geodesic Systems Limited" that was stricken from the Company House records. Seller is awaiting word from its UK attorneys for an official date that such subsidiary will be considered to be dissolved. The attorney working on this matter is:

Bill Annan  
Clifton Ingram  
22-24 Broad Street  
Wokingham  
Berkshire  
RG40 1BA  
DX 33500 Wokingham  
United Kingdom  
+44 (0118) 9780099

InCert had a wholly-owned subsidiary in the United Kingdom called "InCert Software Ltd." that was dissolved as of June 18, 2002.

## Section 3.15 – Intellectual Property

Products commercially available for sale consist of the following and “Seller Products” include the technology therein:

| Product Name        | Version | SPARC: Solaris 2.6: VW4.2/VW5/VW6 | SPARC: Solaris 7: VW4.2/VW5/VW6 | SPARC: Solaris 8: VW4.2/VW5/VW6 | PPC: AIX 4.3.3: VA 5 | PPC: AIX 5.1: VA 5 | PA-RISC: HP-UX 11: HPa1/HpaC++ | PA-RISC: HP-UX 11i: HPa1/HpaC++ | X86: Linux 2.4: GCC 2.95 | X86: Linux 2.2: GCC 2.95 | X86: Win NT 4.0: MSVC6 | X86: Win 2000: MSVC6 | X86: Win XP: MSVC6 |
|---------------------|---------|-----------------------------------|---------------------------------|---------------------------------|----------------------|--------------------|--------------------------------|---------------------------------|--------------------------|--------------------------|------------------------|----------------------|--------------------|
| Runtime Solutions   | 7.0     | x                                 | x                               | x                               | x                    | x                  | x                              | x                               | x                        | x                        | x                      | x                    | x                  |
| HA Runtime          | 7.0     | x                                 | x                               | x                               | x                    | x                  | x                              | x                               | x                        | x                        | x                      | x                    | x                  |
| Great Circle        | 7.0     | x                                 | x                               | x                               | x                    | x                  | x                              | x                               | x                        | x                        | x                      | x                    | x                  |
| TraceBack for Java  | 7.0     | x                                 | x                               | x                               | x                    | x                  | x                              | x                               | x                        | x                        | x                      | x                    | x                  |
| TraceBack for C/C++ | 7.0     | x                                 | x                               | x                               |                      |                    |                                |                                 |                          |                          | x                      | x                    | x                  |
| Runtime Analyzer    | 2.0     | x                                 | x                               | x                               | x                    | x                  |                                |                                 | x                        | x                        | x                      | x                    | x                  |

## Business Intellectual Property

Status of Seller's patents and applications:

See attached schedule entitled “Schedule 3.15(a)(ii) – IP Status.xls” for additional patent information, including items to be completed in the next 150 days, which items appear under the heading “Status/Next Steps/Comments” in such schedule for those patents with dates set forth under the heading “USPTO Deadline” in such schedule.

(a)(ii) Registered Intellectual Property:

### Issued Patents - Seller:

- U.S. Patent 6,055,612, Spertus, et al., *Incremental garbage collector with decommit barrier*, issued April 25, 2000. An incremental garbage collector in which a memory allocator can decommit memory without affecting operation of the incremental garbage collector.
- U.S. Patent 6,518,979, Michael Spertus et al., *Automatically-maintained customizable user interfaces*, filed 4/29/98 (priority date 4/30/97). This

application contains much material from Braid; currently being claimed: a programming construct user interface generator which generates a plurality of interactive user interfaces for a programming construct. PCT Chapter II Demand for an international preliminary examination made 11/24/98; all claims found to satisfy the requirements for novelty, inventive step, and industrial applicability under PCT Article 33(2-4). This application has entered the National Stage in the following countries:

- a. US: USSN 09/402814, entered national stage 10/8/99. – issued
  - b. Canada: Canadian patent application 2,287,303, entered national stage 10/20/99. abandoned 2/17/03
  - c. EPC: European Patent Application 98919994.8, entered national stage 10/29/99, designated countries: UK, France, Germany. abandoned 2/17/03
- U.S. Patent 6,584,478, Michael Spertus, *Transparent garbage collection of resources*, filed 3/2/99 (priority date 3/3/98), designating EPC, Canada, Japan, US. A technique for automatically releasing a resource no longer needed by an execution of a program. A program's behavior is automatically modified to register the resource in a registry; when the program's execution is finished with the resource, the registry is consulted to determine whether the resource should be released. PCT Chapter II demand for international preliminary examination made 9/23/99, all 47 claims found to satisfy the requirements for novelty, inventive step, and industrial applicability under PCT Article 33(2-4). PCT National stage applications
    - a. Canada: 2,321,787, entered national stage 8/22/00. Awaiting examination.
    - b. EPO: 99908619.2, entered national stage 9/19/00. Abandoned.
    - c. Japan: 2000-534995, entered national stage 9/4/00. Abandoned.

#### Pending Patent Applications - Seller

- PCT/US98/22923, Michael Spertus, Gustavo Rodriguez-Rivera, Charles Fiterman, *Interactive debugging system with debug database system*, filed 10/28/98 (priority date 10/29/97), designating EPC, Canada, Japan, US. An interactive debugging system with a debug database system. The debugging system makes update queries indicating the state of a program being executed on the debug data base and an interactive interface reads the program state from the debug database. PCT Chapter II demand for international preliminary examination made 5/21/99, all claims found to satisfy the requirements for novelty, inventive step, and industrial applicability under PCT Article 33(2-4). National stage applications:

- a. US: 09/529760, entered national stage 4/18/00, Non-final Office Action written 4/16/03. Awaiting response.
  - b. Canada: 2,307,297, entered national stage 4/17/00. Awaiting examination. Maintenance fee due 10/28/03
  - c. EPO: 98957409.0, filed 4/12/00. Awaiting examination. Maintenance fee due 10/28/03
- PCT/US01/28787, Gustavo Rodriguez-Rivera, et al., *Conservative garbage collections that can be used with general memory allocators*, filed 09/13/01, (priority date 9/13/00), designating the US, Canada, the European Patent Office, and Japan. A technique that permits a conservative garbage collector to be used with the heap management functions provided by an allocator which is independent of the garbage collector. The allocator and the garbage collector employ a malloc table to exchange information about the heap. PCT Chapter II demand for international preliminary application made 3/28/02, response to Written Opinion filed 9/16/02.
- a. US: 10/362,252, entered national stage 2/20/03
  - b. Canada: new application, entered national stage 3/3/03

#### Other:

- US provisional application 60/357,774, Michael Spertus, *Automatic XML enhancement*, filed 2/19/02 was abandoned. A decision was made on 11/18/02 not to pursue this provisional application.

#### InCert Patents and Patent Applications:

- Dr. Anant Agarwal filed a US patent application entitled "Test, Protection, and Repair Through Binary Code Augmentation" with the PTO on December 4, 1997 (Serial No. 08/985,052). On December 10, 1997, Dr. Agarwal assigned all intellectual property in connection with this invention to InCert. On March 2, 1998, the assignment of this patent application to InCert was recorded with the PTO. On October 12, 1999, InCert was granted U.S. Patent No. 5,966,541. On October 16, 2001, InCert was granted U.S. Patent No. 6,305,010.
- Richard Schooler filed a US patent application entitled "A Method for Determining Program Control Flow" with the PTO on December 11, 1998 (Application No. 09/210,138). In connection with the patent application, Mr. Schooler assigned all intellectual property in connection with this invention to InCert. On December 11, 1998, the assignment of this patent application to InCert was recorded with the PTO. On December 8, 1999, an international patent application was filed: PCT/US99/29190 and

Canada 2353442\*. On October 23, 2001, InCert was granted U.S. Patent No. 6,308,321.

- Andrew Ayers, Anant Agarwal and Richard Schooler filed a US patent application entitled "A Method for Back Tracing Program Execution" with the PTO on February 8, 1999 (Application No. 09/246,619). In connection with the patent application, the inventors assigned all intellectual property in connection with this invention to InCert. On February 8, 1999, the assignment of this patent application to InCert was recorded with the PTO. On December 9, 1999, an international patent application was filed: PCT/US99/29231.\* On March 5, 2002, InCert was granted U.S. Patent No. 6,353,924.
- Emmett Witchel, Christopher Metcalf and Andrew Ayers filed a US patent application entitled "Method for Determining the Degree to Which Changed Code has Been Exercised" with the PTO on December 29, 1999 (Application No. 09/474,389). In connection with the patent application, the inventors assigned all intellectual property in connection with this invention to InCert. On March 23, 2000, the assignment of this patent application to InCert was recorded with the PTO. On December 20, 2000, an international patent application was filed. On December 20, 2000, an international patent application was filed: PCT/US00/34827.\*
- Andrew Ayers, Richard Schooler and Anant Agarwal filed a US patent application entitled "Method for Simulating Back Program Execution from a Traceback Sequence" with the PTO on December 29, 1999 (Application No. 09/474,680). In connection with the patent application, the inventors assigned all intellectual property in connection with this invention to InCert. On March 27, 2000, the assignment of this patent application to InCert was recorded with the PTO. On December 20, 2000, an international patent application was filed.\* (Application No. PCT/US00/34697).
- Anant Agarwal, Andrew Ayers and Richard Schooler filed a US patent application entitled "Early Warning Mechanism for Enhancing Enterprise Availability" with the PTO on December 29, 1999 (Application No. 09/474,679). In connection with the patent application, the inventors assigned all intellectual property in connection with this invention to InCert. On March 20, 2000, the assignment of this patent application to InCert was recorded with the PTO. On December 20, 2000, an international patent application was filed.\* (Application No. PCT/US00/34825).
- \*\*Andrew Ayers, Thomas Soranno and Chris Metcalf filed a US patent provisional application entitled "A Policy-Based Method for Controlling the Production of Traces at Application Failure Points" with the PTO on



December 6, 2000 (Serial No. 60251734). In connection with the patent application, the inventors assigned all intellectual property in connection with this invention to InCert. On April 2, 2001, the assignment of this patent application to InCert was recorded with the PTO.

- \*\*Andrew Ayers, Chris Metcalf and Sanjeev Banerjia filed a US patent provisional application entitled "Trace Capture and Reconstruction in the Presence of Multiple Threads, Synchronous and Asynchronous Exceptions and Dynamically Loaded and Unloaded Modules" with the PTO on December 6, 2000 (Serial No. 60251757). In connection with the patent application, the inventors assigned all intellectual property in connection with this invention to InCert. On April 2, 2001, the assignment of this patent application to InCert was recorded with the PTO.
- \*\*Ian Schechter and Richard Bagley filed a US patent provisional application entitled "A Method for Tracing Back the Execution of Java Programs" with the PTO on December 21, 2000 (Application No. 60/257,753). In connection with the patent application, the inventors assigned all intellectual property in connection with this invention to InCert. On February 8, 2001, the assignment of this patent application to InCert was recorded with the PTO.
- \*\*Chris Metcalf, Andrew Ayers and Tom Soranno filed a US patent provisional application entitled "A Method for Automatically Collecting, Transporting, Receiving, Characterizing, Recognizing, and Proposing Solutions for Software Defects" with the PTO on December 21, 2000 (Application No. 60/257,751). In connection with the patent application, the inventors assigned all intellectual property in connection with this invention to InCert. On February 28, 2001, the assignment of this patent application to InCert was recorded with the PTO.

\* In 2002, all international patent applications were suspended.

\*\* While these four provisional applications are no longer pending, they have been combined into a single non-provisional application, for which retention fees were paid and Continuations filed. The Continuation is still pending and has a serial number 10/156,724.

Sequence of Provisional Applications:

| Serial #   | Type         | Filed on | Docket #      | Status    |
|------------|--------------|----------|---------------|-----------|
| 60/251,757 | Provisional  | 12/6/00  | 2517.2004-000 | Expired   |
| 10/005,214 | Utility      | 12/4/01  | 2517.2004-001 | Abandoned |
| 10/156,724 | Continuation | 5/24/02  | 2517.2004-    | To be     |