PATENT ASSIGNMENT

Electronic Version v1.1
Stylesheet Version v1.1

SUBMISSION TYPE:	NEW ASSIGNMENT
NATURE OF CONVEYANCE:	ASSIGNMENT

CONVEYING PARTY DATA

Name	Execution Date
3GUPload.com, Inc.	12/09/2005

RECEIVING PARTY DATA

Name:	Mixxer, Inc.
Street Address:	2001 Western Ave
City:	Seattle
State/Country:	WASHINGTON
Postal Code:	98121

PROPERTY NUMBERS Total: 1

Property Type	Number
Application Number:	10747588

OP $40.00 10747588

CORRESPONDENCE DATA

Fax Number: (206)315-4004
Correspondence will be sent via US Mail when the fax attempt is unsuccessful.
Phone: 2063154001
Email: pam@leehayes.com
Correspondent Name: Lee & Hayes, PLLC
Address Line 1: 421 W. Riverside Ave
Address Line 2: Suite 500
Address Line 4: Spokane, WASHINGTON 99201

ATTORNEY DOCKET NUMBER:	VP1-0003US
NAME OF SUBMITTER:	Tim R. Wyckoff

Total Attachments: 78
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Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AMENDMENT OF "VANTAGEPOINT MOBILE, INC.", CHANGING ITS NAME FROM "VANTAGEPOINT MOBILE, INC." TO "MIXXER, INC.", FILED IN THIS OFFICE ON THE TWELFTH DAY OF MAY, A.D. 2006, AT 10:20 O'CLOCK A.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE KENT COUNTY RECORDER OF DEEDS.

4059655 8100

060450109

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 4744286

DATE: 05-15-06

State of Delaware
Secretary of State
Division of Corporations
Delivered 01:44 PM 05/12/2006
FILED 10:20 AM 05/12/2006
SRV 060450109 - 4059655 FILE

CERTIFICATE OF AMENDMENT OF

RESTATED CERTIFICATE OF INCORPORATION

OF

VANTAGEPOINT MOBILE, INC.

Patrick Schultheis certifies that:

1. He is the duly elected and acting Secretary of VantagePoint Mobile, Inc., a corporation organized and existing under the laws of the state of Delaware (the "**Corporation**").

2. The name of the Corporation is VantagePoint Mobile, Inc. The original Certificate of Incorporation of the Corporation was filed with the Secretary of State of the State of Delaware on November 10, 2005, in the name of 3GUpload Acquisition Corp. The Certificate of Incorporation was amended on November 17, 2005, December 20, 2005 and February 16, 2006.

3. Pursuant to Section 242 of the General Corporation Law of the State of Delaware, this Certificate of Amendment of the Restated Certificate of Incorporation amends the provisions of the Corporation's Restated Certificate of Incorporation.

4. The terms and provisions of this Certificate of Amendment of the Restated Certificate of Incorporation have been duly approved by written consent of the required number of shares of outstanding stock of the Corporation pursuant to Subsection 228(a) of the General Corporation Law of the State and written notice pursuant to Subsection 228(e) of the General Corporation Law of the State has been or will be given to those stockholders whose written consent has not been obtained.

5. Article I of the Restated Certificate of Incorporation is hereby amended to read in its entirety as follows:

"ARTICLE I: NAME

The name of the corporation is Mixxer, Inc."

IN WITNESS WHEREOF, this Certificate of Amendment of the Restated Certificate of Incorporation has been duly executed by its Secretary this 12th day of May, 2006.

By: _____
Patrick Schultheis, *Secretary*

ASSET PURCHASE AGREEMENT

BY AND BETWEEN

VANTAGEPOINT MOBILE, INC.,

VANTAGEPOINT VENTURE PARTNERS IV(Q), L.P.

DAVID HOSEI,

MICHAEL SLATE

AND

3GUPLOAD.COM, INC.

DECEMBER 9, 2005

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Exhibit B	-	Form of Bill of Sale
Exhibit C	-	Form of Assignment and Assumption Agreement
Exhibit D	-	Form of Escrow Agreement
Exhibit E	-	Form of Acquiror Legal Opinion
Exhibit F	-	Form of Seller Legal Opinion

ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (this "**Agreement**") is made and entered into as of December 9, 2005 (the "**Agreement Date**"), by and between VantagePoint Mobile, Inc., a Delaware corporation ("**Acquiror**"), VantagePoint Venture Partners IV(Q), L.P., a Delaware limited partnership ("**VantagePoint**") (solely for the purposes of Sections 5.19, 5.20, 7.1, 8.10 and 8.11 hereof), David Hosei and Michael Slate (each a "**Seller Shareholder**" and collectively, the "**Seller Shareholders**"), and 3GUpload.com, Inc., an Indiana corporation ("**Seller**").

RECITALS

A. Seller is engaged in the business of providing media content (including digital content), content sharing and content storage and selling accessories for mobile devices, including the operation of an online system that allows users to search for and purchase digital content and download such digital content to mobile phones, through a retail website (the "**Business**").

B. The Boards of Directors of Seller and Acquiror, respectively, have determined that it would be advisable and in the best interests of the securityholders of their respective entities that Acquiror purchase from Seller, and that Seller sell, transfer and assign to Acquiror, substantially all of the assets of Seller and, that in connection therewith, Acquiror will assume certain Liabilities of Seller, all on the terms set forth herein (the "**Asset Purchase**"), and, in furtherance thereof, have approved the Asset Purchase and the other transactions contemplated by this Agreement. Additionally, all of the shareholders of Seller have adopted and approved this Agreement and the Asset Purchase.

C. Seller and Acquiror desire to make certain representations, warranties, covenants and other agreements in connection with the Asset Purchase as set forth herein.

D. Concurrently with the execution of this Agreement and as a material inducement to the willingness of Acquiror to enter into this Agreement, each of the Seller Shareholders and John Scrofano ("**Scrofano**") are entering into employment offer letters with Acquiror (each, an "**Employment Agreement**"), together with an Employee Invention Assignment and Confidentiality Agreement (each, an "**Invention Assignment Agreement**") and a Non-Competition Agreement (each, a "**Noncompetition Agreement**") in the forms attached to the Employment Agreement, in each case to become effective upon the Closing.

NOW, THEREFORE, in consideration of the representations, warranties, covenants and other agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE I

THE ASSET PURCHASE

1.1 Certain Definitions. As used in this Agreement, the following terms shall have the meanings indicated below. Unless indicated otherwise, all mathematical calculations contemplated hereby shall be made without rounding.

"**Acquiror Ancillary Agreements**" means all agreements and documents to which Acquiror is or will be a party that are required to be executed pursuant to this Agreement.

"**Affiliate**" means an "affiliate" within the meaning of Rule 144 promulgated under the Securities Act.

"**Audit Expenses**" means the total costs and expenses incurred by Seller in connection with the preparation of the Audited Financial Statements of Seller by L.M. Henderson & Company, P.C.

"**Audited Financial Statements**" means the financial statements of Seller for the period ended September 30, 2005 (including a balance sheet, statement of operations and statement of cash flows) audited by L.M. Henderson & Company, P.C.

"**Business Day**" means a day (a) other than Saturday or Sunday and (b) on which commercial banks are open for business in San Francisco, California.

"**Closing Financial Certificate**" means a certificate executed by the Director of Finance of Seller dated as of the Closing Date, certifying (i) the amount of Seller Closing Liabilities (with the presentation of Seller Closing Liabilities being made according to the line items for Liabilities as are set forth on the Seller Balance Sheet (as defined in Section 2.4(a)), (ii) the amount of each Specified Liability, (iii) the Share Repurchase Amount, (iv) the amount of Seller Shareholder Debt, if any, (v) the amount of Seller's cash assets as of immediately prior to the Closing, and (vi) the amount of Paid Transaction Expenses, if any (including an itemized list of each Paid Transaction Expense, the Person to whom such payment was made and the date of payment thereof).

"**COBRA**" means the United States Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, and the rules and regulations promulgated thereunder.

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

"**Contract**" means any formal or informal written, oral or other agreement, contract, subcontract, lease, binding understanding, promise, instrument, note, option, warranty, purchase order, license, sublicense, insurance policy, benefit plan, commitment or undertaking of any nature as of the date hereof or as may hereafter be in effect.

"**Encumbrance**" means, with respect to any asset, any mortgage, deed of trust, lien, pledge, charge, security interest, title retention device, conditional sale or other security arrangement, collateral assignment, claim, charge, adverse claim of title, ownership or right to use, restriction or other encumbrance of any kind in respect of such asset (including any restriction on (i) the voting of any security or the transfer of any security or other asset, (ii) the receipt of any income derived from any asset, (iii) the use of any asset, and (iv) the possession, exercise or transfer of any other attribute of ownership of any asset).

"**Environmental and Safety Laws**" means any laws, ordinances, codes, regulations, rules, policies and orders that are intended to assure the protection of the environment, or that classify, regulate, call for the remediation of, require reporting with respect to, or list or define air, water, groundwater, solid waste, hazardous or toxic substances, materials, wastes, pollutants or contaminants, or which are intended to assure the safety of employees, workers or other persons, including the public.

"**ERISA Affiliate**" means 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 thereunder.

"**ERISA**" means the United States Employee Retirement Income Security Act of 1974, as amended, and the regulations thereunder.

"**Escrow Cash**" means an amount of cash equal to the lesser of (a) twenty-five percent (25%) of the Purchase Price, or (b) Two Million Three Hundred Seventy-Five Thousand Dollars ($2,375,000).

"**GAAP**" means United States generally accepted accounting principles.

"**Governmental Entity**" means any supranational, national, state, municipal, local or foreign government, any court, tribunal, arbitrator, administrative agency, commission or other governmental official, authority or instrumentality, in each case whether domestic or foreign, any stock exchange or similar self-regulatory organization or any quasi-governmental or private body exercising any regulatory, Taxing or other governmental or quasi-governmental authority.

"**Intellectual Property**" means worldwide industrial and intellectual property rights and all rights associated therewith, and all rights to all patents and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof, all inventions (whether patentable or not), invention disclosures, improvements, trade secrets, proprietary information, know how, technology, technical data, proprietary processes and formulae, algorithms, specifications, customer lists and supplier lists, all trade names, logos, common law trademarks and service marks, trademark and service mark registrations and applications therefor, Internet domain names, Internet and World Wide Web URLs or addresses, all copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto, all computer software, including all source code, object code, programs, objects, modules, routines, firmware, development tools, files, records and data, all schematics, netlists, test methodologies, test vectors, emulation and simulation tools and reports, all databases and data collections and all rights therein, all moral and economic rights of authors and inventors, however denominated, and any similar or equivalent rights to any of the foregoing, and all tangible embodiments of the foregoing.

"**IRS**" means the United States Internal Revenue Service.

"**knowledge**" means, with respect to any fact, circumstance, event or other matter in question, the knowledge of such fact, circumstance, event or other matter after reasonable inquiry of (a) an individual, if used in reference to an individual, or (b) with respect to Seller, each of the Seller Shareholders, Scrofano and Leonard (as defined below) (and, with respect to Section 2.10 (Intellectual Property), the persons engaged in technology development activity for Seller) (the persons specified in clause (b) are collectively referred to herein as the "**Entity Representatives**"). Any such individual or Entity Representative will be deemed to have knowledge of a particular fact, circumstance, event or other matter if (i) such fact, circumstance, event or other matter is reflected in one or more documents (whether written or electronic, including electronic mails sent to or by such individual or Entity Representative) in, or that have been in, the possession of such individual or Entity Representative, including his or her

personal files, (ii) such fact, circumstance, event or other matter is reflected in one or more documents (whether written or electronic) contained in books and records of such Person that would reasonably be expected to be reviewed by an individual who has the duties and responsibilities of such individual or Entity Representative in the customary performance of such duties and responsibilities, or (iii) such knowledge could be obtained from reasonable inquiry of the persons employed by such Person charged with administrative or operational responsibility for such matters for such Person.

"**Legal Requirements**" means any law, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Entity and any orders, writs, injunctions, awards, judgments and decrees applicable to Seller or to any of Seller's assets, properties or Business.

"**Leonard Bonus**" means the "Special Bonus payable to Robert Leonard ("**Leonard**") pursuant to Section 2(c) of the Employment Agreement between Leonard and Seller dated April 28, 2005, as amended, together with any other amounts and benefits (including severance) payable to Leonard in connection with the consummation of the transactions contemplated by this Agreement, and/or in connection with the termination of Mr. Leonard's employment with Seller either in connection with the consummation of the transactions contemplated by this Agreement or otherwise, provided however that the following benefits shall not be considered part of the Leonard Bonus: (i) any amount of bonus accrued and payable to Leonard in the ordinary course of business as part of the Seller Employee Bonus Payments, (ii) any accrued but unpaid salary, wages, vacation pay or sick pay owed to Leonard, together with employer taxes thereon, as of immediately prior to the Closing.

"**Liabilities**" means debts, liabilities, accounts payable and obligations, whether accrued or fixed, absolute or contingent, material or immaterial, determined or determinable, known or unknown, including those arising under any Legal Requirement and those arising under any Contract.

"**Material Adverse Effect**" with respect to any entity, or with respect to the Business, as applicable, means any change, event, violation, circumstance or effect (each, an "**Effect**") that, individually or taken together with all other Effects, and regardless of whether or not such Effect constitutes a breach of the representations or warranties made by such entity in this Agreement, is, or is reasonably likely to, (i) be or become materially adverse in relation to the condition (financial or otherwise), assets (including intangible assets), liabilities, business, prospects, operations or results of operations of such entity and its subsidiaries, taken as a whole, or in Seller's case, with respect to the Business, or (ii) materially impede or delay such entity's ability to consummate the transactions contemplated by this Agreement in accordance with its terms and applicable Legal Requirements, except to the extent that any such Effect results directly from general business or economic conditions affecting the industry in which such entity operates (provided that such changes do not affect such entity disproportionately in any material respect as compared to such entity's competitors).

"**Permitted Distribution**" means the payment of a cash dividend by Seller to its shareholders prior to the Closing in an aggregate amount not to exceed $150,000.

"**Person**" means any natural person, company, corporation, limited liability company, general partnership, limited partnership, trust, proprietorship, joint venture, business organization or Governmental Entity.

"**Purchase Price**" means $10,100,000 less the sum of (i) the Seller Closing Liabilities Adjustment, if any, (ii) the amount of Seller Shareholder Debt, if any, (iii) the amount of Paid Transaction Expenses, if any, (iv) the Share Repurchase Amount, and (v) the amount by which the Royalty Accrual

exceeds the sum of (A) the amount of the cash assets of Seller as of immediately prior to the Closing and (B) the Share Repurchase Amount.

"**Ringtone**" shall mean (a) a polyphonic MIDI or digital audio file (including an MP3 file) of all or any part of a musical composition ("**Polyphonic Ringtones**"), or (b) a digital audio file of all or any part of a sound recording of a musical composition (commonly known as "music tones", "master tones", "true tones" or similar names) ("**Musictones**"), that is used to announce an incoming phone call, or serve as an audible alarm, reminder or other similar function on a mobile phone.

"**Royalty Accrual**" means the aggregate amount of the accrual as of the Closing for royalty payments or infringement damages payable to third party content providers or owners with respect to Seller's distribution of Ringtones in the conduct of the Business prior to the Closing as certified in the Closing Financial Certificate.

"**Securities Act**" means the United States Securities Act of 1933, as amended.

"**Seller Ancillary Agreements**" means all agreements and documents to which Seller is or will be a party that are required to be executed pursuant to this Agreement.

"**Seller Capital Stock**" means the shares of capital stock of Seller.

"**Seller Closing Liabilities**" means all Liabilities of Seller that would be required to be set forth on the face of a consolidated balance sheet of Seller as of the Closing Date prepared in accordance with GAAP, including Seller Debt and the Seller Employee Bonus Payments (but excluding the Specified Liabilities) as disclosed in the Closing Financial Certificate.

"**Seller Closing Liabilities Adjustment**" means the amount, if any, by which Seller Closing Liabilities, if any, exceed $600,000.

"**Seller Common Stock**" means the common stock of Seller.

"**Seller Debt**" means the aggregate amount of outstanding principal, accrued interest, premiums and any other amounts paid or payable in order to fully and finally discharge all indebtedness of Seller to any Person as of the Closing for money borrowed.

"**Seller Employee Plans**" means 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 and any ERISA Affiliate or with respect to which Seller or any ERISA Affiliate have or may have any liability or obligation.

"**Seller Infringement Claim**" means a claim asserted against Seller or Acquiror seeking Content Infringement Claim Damages.

"**Seller Products**" means all technology, products or services currently made, marketed, licensed, sold, or distributed, or proposed to be made, marketed, licensed, sold, or distributed, by or on behalf of Seller on or prior to the Closing Date, including without limitation all digital products and

services offered and/or distributed through Seller's websites, such as Ringtones, musical compositions, and other applications, and all Intellectual Property used in any of the foregoing.

"**Seller Shareholder Debt**" means the aggregate amount of outstanding principal, accrued interest, premiums and any other amounts paid or payable by the Seller Shareholders in order to fully and finally discharge all indebtedness of each such Seller Shareholder to Seller as of the Closing for money borrowed.

"**Seller Transaction Expenses**" means all costs and expenses incurred by Seller, its officers, directors and employees and/or by the Seller Shareholders in connection with the Asset Purchase, this Agreement, the Seller Ancillary Agreements and the transactions contemplated hereby, including any fees and expenses of legal counsel, financial advisors, investment bankers and accountants; provided, however, that "Seller Transaction Expenses" shall not include the Audit Expenses.

"**Seller Shareholder's Pro Rata Share**" means, with respect to Michael Slate, seventy percent (70%), and with respect to David Hosei, thirty percent (30%).

"**Share Repurchase Amount**" means the amount paid by Seller to Scrofano with respect to the redemption or repurchase of shares of capital stock of Seller owned by Scrofano (the "**Share Repurchase**").

"**Specified Liabilities**" means the following Liabilities of Seller: (i) the deferred revenue obligations of Seller, (ii) the Royalty Accrual, (iii) Seller Transaction Expenses or any accruals therefor, and (iv) the Leonard Bonus or any accruals therefor.

"**Tax**" (and, with correlative meaning, "**Taxes**" and "**Taxable**") means (i) any net income, alternative or add-on minimum tax, gross income, capital gains, estimated, gross receipts, sales, use, ad valorem, value added, transfer, franchise, capital stock, profits, license, registration, withholding, payroll, social security (or equivalent), employment, unemployment, disability, excise, severance, stamp, occupation, premium, property (real, tangible or intangible), environmental or windfall profit tax, custom duty or other tax, governmental fee or other like assessment or charge of any kind whatsoever, together with any interest or any penalty, addition to tax or additional amount (whether disputed or not) imposed by any Governmental Entity responsible for the imposition of any such tax (domestic or foreign) (each, a "**Tax Authority**"), (ii) any liability for the payment of any amounts of the type described in clause (i) of this sentence as a result of being a member of an affiliated, consolidated, combined, unitary or aggregate group for any Taxable period, and (iii) any liability for the payment of any amounts of the type described in clause (i) or (ii) of this sentence as a result of being a transferee of or successor to any Person or as a result of any express or implied obligation to assume such Taxes or to indemnify any other Person.

"**Tax Return**" means any return, statement, declaration, claim for refund, report or form (including estimated Tax returns and reports, withholding Tax returns and reports, any schedule or attachment, and information returns and reports) required to be filed with respect to Taxes.

"**Transfer Taxes**" means, collectively, any sales, use, transfer, VAT, stamp duty or similar transfer Taxes imposed or assessed in connection with the execution and delivery of this Agreement, the Asset Purchase or the transactions contemplated hereby.

"**WARN**" means the United States Federal Worker Adjustment and Retraining Act of 1988, as amended, and any similar foreign, state or local law.

Other capitalized terms defined elsewhere in this Agreement and not defined in this Section 1.1 shall have the meanings assigned to such terms in this Agreement.

1.2 The Purchase and Sale. Upon the terms and subject to the conditions of this Agreement, Acquiror agrees to purchase from Seller and Seller agrees to sell, transfer, convey, assign and deliver, or cause to be sold, transferred, conveyed, assigned and delivered, to Acquiror at Closing all of Seller's right, title and interest in and to all of the assets, properties and business of every kind and description, wherever located, real, personal or mixed, tangible or intangible, owned, held or used by Seller in the conduct of the Business as currently conducted or currently proposed to be conducted, in each case free and clear of all Encumbrances (except for Permitted Encumbrances), including all right, title and interest of Seller in, to and under the Seller Products and such of the foregoing as are more specifically described below, excepting only the Excluded Assets (collectively, the "**Purchased Assets**"):

(i) all real property and leases of, and other interests in, real property, in each case together with all buildings, fixtures, and improvements erected thereon;

(ii) all personal property and interests therein, including machinery, equipment, furniture, office equipment, communications equipment, vehicles and other tangible property relating to the Business (the "**Tangible Assets**"), including the Tangible Assets listed on Schedule 1.2(ii) hereto;

(iii) all Ringtones, musical compositions, applications, and other digital files, work-in-process, supplies, and inventories relating to the Business and all rights under Contracts to purchase or create any additional Ringtones, compositions, or other inventory, including without limitation all Seller Products and all of Seller's Intellectual Property therein;

(iv) all rights under (A) all Contracts of Seller with customers of the Business (the "**Subscriber Contracts**"), (B) those Contracts of Seller set forth on Exhibit A (together with the Subscriber Contracts, the "**Assumed Contracts**"), (C) Contracts between Seller and any employee of Seller to the extent that such Contracts relate to confidentiality, nondisclosure, assignment of proprietary rights or noncompetition with respect to the Business, Seller Products or the Purchased Assets, and (D) all Contracts entered into in the course of operating the Business that generally have expired or been terminated or canceled containing a provision or evidencing an obligation of a party other than Seller, or any right of Seller, relating to Seller IP Rights (as defined in Section 2.10(a)) that survives such expiration, termination or cancellation (Acquiror may, by notice to Seller, at any time after the date hereof, amend Exhibit A to include additional Assumed Contracts);

(v) all accounts, notes and other receivables, except the Seller Shareholder Debt and any notes evidencing same;

(vi) all prepaid expenses, advances and deposits relating to the Business including without limitation ad valorem taxes, leases, rentals and software maintenance fees;

(vii) all of Seller's cash and cash equivalents on hand and in banks, including petty cash located at the operating facilities of the Business and all securities and investments other than an amount of cash to be retained by Seller pursuant to Section 5.10(d) and Section 5.10(f) for the purpose of discharging accrued salary and vacation benefits owed to the Transferred Employees and accrued employer taxes as of the Closing;

(viii) all of Seller's rights, claims, credits, causes of action or rights of set-off against third parties relating to the Purchased Assets;

(ix) all transferable licenses, permits or other governmental authorizations affecting, or relating in any way to, the Business;

(x) all of Seller's data regarding subscribers or customers, or prospective subscribers or customers, of the Business, including without limitation subscriber and customer lists, subscriber and customer account histories, all subscriber and customer technical support data, and all other marketing, promotional and sales information, whether stored in written form, magnetic or electronic media or in any other form, that have been or now are related to the Business or that have been or now are used, developed or purchased in connection with the Business;

(xi) all books, records, files, correspondence and papers of Seller, whether in hard copy or computer format, relating in any manner to the Business, including engineering information, financial information, sales and promotional literature, manuals and data, sales and purchase correspondence, lists of present and former suppliers, lists of present and former customers and other users of Seller's products and services, customer, subscriber, supplier and vendor records, personnel, payroll and employment records (to the extent permitted by applicable law) relating to the Transferred Employees (as defined in Section 5.10(b)), and any information relating to Tax imposed on the Purchased Assets;

(xii) all Seller-Owned IP Rights (as defined in Section 2.10(a)), all rights in any of the foregoing provided by international treaties and conventions, and all rights to use and recover for damages for past, present and future infringement, dilution, misappropriation, violation, unlawful imitation or breach thereof, including all rights with respect to the www.3gupload.com domain;

(xiii) all copies and tangible embodiments of all Seller-Owned IP Rights (as defined in Section 2.10(a));

(xiv) all software, software tools, development tools, testing tools, testing suites and environments owned, possessed, used, developed or under development by Seller and used in or to be used in, the Business, including source and object code versions thereof in any format and for all hardware platforms, software platforms and operating environments;

(xv) all indemnification agreements in favor of Seller with, and indemnification and similar rights against, third parties;

(xvi) all proceeds payable pursuant to insurance policies in effect as of the Agreement Date arising out of claims made or damages to any Purchased Assets on or after the Agreement Date;

(xvii) all rights or claims against employees or consultants, excluding the Seller Shareholders;

(xviii) all goodwill associated with the Business or the Purchased Assets, together with the right to represent to third parties that Acquiror is the successor to the Business; and

(xix) all (A) other assets (and related rights) acquired, developed or primarily used in connection with the Business currently or previously, and (ii) all warranties and representations made to Seller or any of its Affiliates by third parties with respect to any of the Purchased Assets or the Business, all rights, privileges, remedies, set-offs, allowances, rebates, refunds, discounts and credits granted to Seller or any of its Affiliates with respect to any Purchased Assets or the Business, together

with any and all claims, demands, causes of action and rights of Seller or any of its Affiliates existing previously, now or hereafter with respect to any of the Purchased Assets or the Business.

To the extent that any tangible or intangible assets or rights are discovered or identified at any time after the Closing Date that, pursuant to this Agreement, constitute Purchased Assets (or would have been if such assets or rights been listed in the applicable schedules) and should have been transferred to Acquiror, Seller, as applicable, shall immediately transfer and promptly deliver such assets or rights (or cause them to be delivered) to Acquiror without additional payment.

1.3 Excluded Assets. The following assets and properties of Seller (the "**Excluded Assets**") shall be excluded from the Purchased Assets, except, in each case, as included in the Purchased Assets:

(i) all rights and assets under all Contracts of Seller except (A) the Assumed Contracts and (B) all rights assigned to Acquiror under Sections 1.2(iv)(C) and (D) (the "**Retained Contracts**");

(ii) all income Tax Returns of Seller and all minute books, stock record books and other corporate records of Seller;

(iii) any amounts payable to, or claims or causes of action of, Seller in respect of Taxes refundable to Seller;

(iv) all rights, claims, credits, causes of action or rights of set-off against third parties relating to the Excluded Assets or the Excluded Liabilities;

(v) the Seller Employee Plans; and

(vi) all claims and rights against the Seller Shareholders, including, without limitation, all rights and amounts payable to Seller with respect to the Seller Shareholder Debt.

1.4 Assumed Liabilities. Upon the terms and subject to the conditions of this Agreement, Acquiror agrees, effective at the time of Closing, to assume and pay, perform and discharge, or to reimburse Seller in the event Seller is required to pay, perform or discharge, the following Liabilities only (the "**Assumed Liabilities**"):

(i) the Liabilities of Seller arising under the Assumed Contracts after the Closing Date but only to the extent that such Liabilities (i) arise, are incurred or require performance of an action subsequent to the Closing Date (but in no event shall Assumed Liabilities include any liability for payment of money, or taking of actions, post-Closing with respect to obligations arising pre-Closing except as expressly provided herein), and (ii) do not arise or result from any breach, default or violation by Seller of any provision of any Assumed Contract or from any other act or omission of Seller that occurred prior to, on or after the Closing Date;

(ii) all Liabilities of Seller falling in one of the categories of liabilities reflected on the Seller Balance Sheet and which are either (A) reflected on the Seller Balance Sheet and remain unpaid as of the Closing, or (B) incurred between the date of the Seller Balance Sheet and the Closing in the ordinary course of the Business, including, without limitation, the Liabilities for which the Royalty Accrual has been established, but otherwise excluding any accounts payable related to the Excluded Liabilities described in Section 1.5 (i)-(ix);

(iii) all Liabilities incurred in, relating to or arising as a result of, or in connection with, the use and operation of the Purchased Assets and/or the conduct of the Business by Acquiror after the Closing;

(iv) any Transfer Taxes; and

(v) any Liabilities assumed by Acquiror pursuant to Section 5.10(c) and Section 5.10(f) hereof.

1.5 Excluded Liabilities. Notwithstanding any provision in this Agreement, or any schedule or exhibit hereto, Seller will retain, and will be solely responsible for paying, performing and discharging promptly when due, and Acquiror will not assume or otherwise have any responsibility or liability for, any and all Liabilities of Seller (whether now existing or hereafter arising) other than the Assumed Liabilities (the "**Excluded Liabilities**"), except as expressly provided below in this Section 1.5. By way of example and not by way of limitation, the Excluded Liabilities that are not being assumed by Acquiror include, without limitation:

(i) any Liability with respect to any Excluded Asset;

(ii) any Seller Transaction Expenses;

(iii) the Leonard Bonus;

(iv) except as set forth in Section 1.6 and except with respect to payments to be made by Acquiror from the Royalty Accrual, any Liability for royalty payments due to any third party content providers with respect to Ringtones distributed by Seller in the conduct of the Business prior to the Closing;

(v) any Liabilities arising from any action, suit, investigation, or proceeding (or any written notice or threat of any such action, suit, investigation, proceeding) relating to any tort, breach of contract, default or violation of any Legal Requirement by Seller or any act or omission of any Seller, prior to, on or after the Closing, or which involves a claim of infringement or misappropriation of any copyright or other Intellectual Property right of any third party or which contests the validity, ownership or right of Seller to exercise any Intellectual Property right;

(vi) any and all Taxes (other than Transfer Taxes) now or hereafter due and payable by Seller, and any and all Taxes resulting from Seller owning or using the Purchased Assets prior to the Closing Date;

(vii) any and all Liabilities with respect to any environmental damage, or for any disposal, discharge or other use or treatment of any hazardous or toxic substance, under any and all Environmental and Safety Laws;

(viii) any and all Liabilities to employees or contractors of Seller related to or arising from or with respect to any act or omission of Seller or arising from or with respect to any event occurring prior to the Closing Date, including without limitation those Liabilities described in Sections 5.10(c)-(f) of this Agreement (other than Assumed Liabilities);

(ix) any and all Liabilities arising from the termination by Seller of the employment of any current or former employees of Seller or any of its Affiliates, including any claims for wrongful discharge or employment discrimination or arising under ERISA, COBRA or WARN, or any

other claims brought against Seller arising from Seller's employment of any Person, or arising from any duties or obligations under any existing or future Contracts with or relating to employees, or severance, vacation or other employee benefit plans of Seller or any of its Affiliates (other than Assumed Liabilities);

(x) any and all Liabilities arising from any breach or default by Seller of any Contract of Seller (including but not limited to any breach or default by Seller of any of the Assumed Contracts), except for obligations to perform an Assumed Contract after the Closing, or any and all Liabilities arising from any claims, judgments or arbitration awards against Seller with respect to any tort, breach of contract or violation of law prior to or following the Closing;

(xi) any Liabilities of Seller to any shareholder of Seller; and

(xii) any Liability of Seller incurred after the Closing Date.

Notwithstanding the retention of the Excluded Liabilities by Seller pursuant to this Section 1.5, in the event that either Seller or a Seller Shareholder becomes obligated to pay any Excluded Liability, except those described in clauses (i)-(iv), (vi) with respect to Tax Liabilities (as defined below) arising from activities after the Closing Date, (xi) and (xii) above in this Section 1.5, such amount shall be paid by Acquiror on behalf of Seller or such Seller Shareholder, as applicable, and Acquiror shall indemnify and hold harmless Seller and the Seller Shareholders with respect to any failure of Acquiror to pay such Excluded Liability, provided however that in the event such Excluded Liability is paid by Acquiror prior to the first anniversary of the Closing, or is identified in an Officer's Certificate delivered on or prior to such date pursuant to Section 8.5, Acquiror shall have the right to discharge such Excluded Liability, and to be indemnified for such Excluded Liability, from the Escrow Fund (to the extent of available funds therein) which portion of the Escrow Fund shall be forfeited by Seller, and provided further that, in the event that any amounts become payable by Acquiror with respect to any Excluded Liabilities described in Section 1.5(vi) ("**Tax Liabilities**") following distribution of any remaining portion of the Escrow Fund to Seller upon the expiration of the Escrow Period (the "**Escrow Release Amount**") and prior to the third anniversary of the Closing (and for which Acquiror has not been indemnified from the Escrow Fund), Seller and the Seller Shareholders shall jointly and severally reimburse, indemnify and hold Acquiror harmless for the amount of such Tax Liabilities up to a maximum amount equal to Escrow Release Amount minus all sums previously paid by them from the Escrow Release Amount under this Section or Section 1.6.

1.6 Infringement Liability Allocation Provisions. The following provisions shall apply with respect to the allocation of liability between Seller and the Seller Shareholders on the one hand, and Acquiror on the other hand, for payment of Content Infringement Claim Damages:

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

(i) "**Closing Content**" means all Ringtones displayed on and/or downloadable from Seller's website, www.3gupload.com, as of the Closing.

(ii) "**Content Infringement Claim Damages**" means all losses, liabilities, reductions in value, damages, costs and expenses, including costs of investigation and defense and reasonable fees and expenses of lawyers, experts and other professionals, arising out of, resulting from or in connection with any claim that Seller's use or distribution of any Ringtone prior to the Closing infringed Intellectual Property of any other Person with respect to such Ringtone.

(iii) **Prior Content**" means all Ringtones displayed on and/or downloadable from Seller's website, www.3guplоad.com, at any time prior to the Closing other than the Closing Content.

(iv) "**Revived Prior Content**" means unlicensed Prior Content that Acquiror reintroduces for download on the website, www.3guplоad.com, after the Closing or that is contained on and/or downloadable from any other website controlled by Acquiror or an Affiliate of Acquiror after the Closing.

(b) With respect to any Content Infringement Claim Damages incurred by either Acquiror or Seller in connection with the use or distribution by Seller of Revived Prior Content prior to the Closing that are payable upon settlement by Acquiror or Seller, or that Seller or Acquiror become legally obligated to pay, Acquiror will bear responsibility therefor and shall either pay same or reimburse Seller or the Seller Shareholders, as applicable, for the payment of same.

(c) With respect to any Content Infringement Claim Damages incurred by either Acquiror or Seller in connection with the use or distribution by Seller of Closing Content prior to the Closing, or the use or distribution by Seller of Prior Content prior to the Closing (other than Revived Prior Content), in each case, payable upon settlement by Acquiror or Seller, or that Seller or Acquiror become legally obligated to pay (the "**Damage Amount**"), the following provisions shall apply:

(i) To the extent that the Royalty Accrual has not been fully paid by Acquiror in payment of royalties accrued as of the Closing and/or other Content Infringement Claim Damages, a portion of the Damage Amount equal to the remaining portion of the Royalty Accrual shall be paid by Acquiror as its expense and charged against the unpaid portion of the Royalty Accrual;

(ii) after the amount of the Royalty Accrual has been fully paid by Acquiror in payment of royalties accrued as of the Closing and/or Content Infringement Claim Damages, any remaining portion of the Damage Amount shall be paid from the Escrow Fund to the extent that the Escrow Fund (A) has not previously been paid to the Acquiror for discharge of Excluded Liabilities pursuant to Section 1.5 or in satisfaction of other claims for Acquiror Indemnifiable Damages pursuant to Section 8.2 hereof or pursuant to any forfeiture under Section 8.9, (B) is not subject to any pending unresolved or unsatisfied claims for payment of Excluded Liabilities pursuant to Section 1.5 or Acquiror Indemnifiable Damages or for forfeiture, and (C) has not been paid to Seller following the expiration of the Escrow Period;

(iii) in the event that a claim for Content Infringement Claim Damages arises after the distribution of any Escrow Release Amount to Seller following expiration of the Escrow Period, that portion of the Damage Amount that has not been paid by Acquiror pursuant to sub clause (i) of this Section 1.6(c) shall be paid by Seller and the Seller Shareholders, jointly and severally, up to a maximum amount equal to the Escrow Release Amount (as such maximum amount may be reduced in accordance with Section 1.6(d) below) minus all sums previously paid by Seller and the Seller Shareholders from the Escrow Release Amount pursuant to this Section and Section 1.5;

(iv) following the payment of Content Infringement Claim Damages pursuant to clauses (i), (ii) and (iii) of this Section 1.6(c), Acquiror will be responsible for any remaining portion of the Damage Amount and shall either pay same or reimburse Seller or the Seller Shareholders, as applicable, for the payment of same.

(d) Notwithstanding anything herein to the contrary and subject to the provisions hereof, the maximum amount of Content Infringement Claim Damages for which Seller and the Seller

Shareholders shall be liable to pay pursuant to Section 1.6(c)(iii) above shall be reduced by an amount equal to the quotient of the Escrow Release Amount divided by 18 (rounded to the tenth decimal place) commencing on the last day of the thirty (30) day period following the date that is eighteen months following the Closing Date (the "**Reduction Commencement Date**") and thereafter shall be reduced by the same amount on the last day of each thirty (30) day period elapsed following the Reduction Commencement Date (the "**Reduction Period**") until reduced to zero (upon which time Seller and/or the Seller Shareholders shall have no further liability pursuant to Section 1.6(c)(iii)); provided, however, that (A) in the event that any Content Infringement Claim Damages in an amount of $100,000 or more with respect to any individual claim therefor, or in an aggregate amount of $200,000 or more with respect to all claims therefor (each such amount, the "**Threshold Amount**"), have been paid prior to the Reduction Commencement Date, the Reduction Commencement Date shall be the later of (1) the last day of the thirty (30) day period following the date that is eighteen months following the Closing Date or (2) the last day of the thirty (30) day period following the date that is twelve months after the payment of the Threshold Amount, and (B) in the event that the Threshold Amount is paid following the Reduction Commencement Date (or in part prior to the Reduction Commencement Date and in part following the Reduction Commencement Date), any remaining reductions of the maximum amount payable under Section 1.6(c)(iii) scheduled to occur after the date of payment of the Threshold Amount shall be deferred for a period of twelve months following such payment. In the event funds are released to Seller from the Escrow Fund subsequent to the initial release of funds therefrom (a "**Subsequent Escrow Release Amount**"), the amount thereof to be included in the Escrow Release Amount shall be calculated as if such Subsequent Escrow Release Amount had been released to Seller as part of the initial Escrow Release Amount by making the appropriate thirty (30) day reductions of one-eighteenth ($1/18^{th}$) of the amount thereof from the Reduction Commencement Date to the date of such subsequent release of Escrow Funds, and the periodic reduction amount to be applied thereafter shall be increased by one-eighteenth ($1/18^{th}$) of such Subsequent Escrow Release Amount.

(e) If Seller and/or the Seller Shareholders, as applicable, pay any Liabilities for Content Infringement Claim Damages, the allocation of responsibility for which is governed by this Section 1.6, in excess of those amounts required to be paid by them pursuant to the provisions of this Section 1.6, Acquiror shall reimburse Seller and/or the Seller Shareholders, as applicable, for such excess amount promptly following demand therefor.

(f) Seller shall not (and the Seller Shareholders shall cause Seller not to) add, remove or otherwise change the Ringtones displayed on and/or downloadable from Seller's website, www.3gupload.com, as of October 31, 2005 without Acquiror's consent other than the addition or removal of Ringtones in the ordinary course of the Business for which Seller has been granted a valid license, or is otherwise validly authorized, with respect to the use and distribution thereof, by the holder of any Third Party Intellectual Property Rights in such Ringtones.

1.7 Assignment of Contracts and Rights. Notwithstanding anything in this Agreement to the contrary, this Agreement shall not constitute an agreement to assign any Purchased Asset or any claim or right or any benefit arising thereunder or resulting therefrom if an attempted assignment thereof, without consent of a third party thereto, would constitute a breach or other contravention thereof or in any way adversely affect the rights of Acquiror or Seller thereunder. Prior and subsequent to the Closing, Acquiror and Seller will use their commercially reasonable efforts (but without any payment of money by Acquiror or Seller) to obtain the consent required from any other Person to the assignment of any such Purchased Asset or claim or right or any benefit arising thereunder thereof to Acquiror or as Acquiror may otherwise request. If such consent is not obtained, or if an attempted assignment thereof would be ineffective or would adversely affect the rights thereunder so that Acquiror would not in fact receive all such rights, Acquiror and Seller will cooperate in a mutually agreeable arrangement under which Acquiror would obtain the benefits and assume the obligations thereunder in accordance with this

Agreement, including subcontracting, sublicensing or subleasing to Acquiror, or under which Seller would enforce for the benefit of Acquiror, with Acquiror assuming Seller's obligations, any and all rights of Seller against a third party thereto. Seller will promptly pay to Acquiror when received all monies received by Seller with respect to any Purchased Asset or any claim or right or any benefit arising thereunder.

1.8 Purchase Price. On the terms and subject to the conditions set forth in this Agreement, as consideration for the Purchased Assets, Acquiror shall, upon the Closing, (i) pay to Seller cash in the amount of the Purchase Price by wire transfer of immediately available funds; *provided*, that the Escrow Cash shall be withheld from such payment and delivered to the Escrow Agent pursuant to Section 1.12, (ii) assume the Assumed Liabilities, and (iii) perform the indemnification and reimbursement obligations of Acquiror hereunder.

1.9 Allocation of Purchase Price. The Purchase Price will be allocated to the Purchased Assets and Assumed Liabilities in an amount equal to their recorded book values at Closing (the "**Aggregate Book Value**") and any amount of the Purchase Price in excess of the Aggregate Book Value will be allocated solely to goodwill. Such allocation shall be reflected in a statement to be attached as Schedule 1.9 hereto (the "**Purchase Price Allocation**"). The Purchase Price Allocation shall be prepared by Seller in consultation with Acquiror as soon as reasonably practicable hereafter and, when final and approved by Acquiror, shall be attached as Schedule 1.9 to this Agreement. The parties shall file report, act and file Tax Returns (including IRS Form 8594) in all respects and for all purposes consistent with the Purchase Price Allocation. Seller shall timely and properly prepare, execute, file and deliver all such documents, forms and other information as Acquiror may reasonably request to prepare the Purchase Price Allocation. Neither Acquiror nor Seller shall take any position (whether in audits, Tax Returns or otherwise) that is inconsistent with the Purchase Price Allocation. The Purchase Price Allocation may be modified to reflect any subsequent adjustments to the Purchase Price, including the adjustments referred to in Article VIII to establish a final Purchase Price Allocation prior to the filing of the applicable Tax Returns by Acquiror and Seller in a manner that is consistent with Section 1060 of the Code and the regulations promulgated thereunder. Damages pursuant to Article VIII shall be considered to be an adjustment to the Purchase Price.

1.10 Closing. Unless this Agreement is earlier terminated in accordance with Section 7.1, the closing of the transactions contemplated hereby (the "**Closing**") shall take place at a time and date to be specified by the parties which will be no later than the second Business Day after the satisfaction or waiver of each of the conditions set forth in Article VI (other than those conditions that by their nature are to be satisfied at the Closing, but subject to the fulfillment or waiver of those conditions) or at such other time as Acquiror and Seller agree. The Closing shall take place at the offices of Fenwick & West LLP, 275 Battery Street, San Francisco, California, or at such other location as the parties hereto agree. The date on which the Closing occurs is herein referred to as the "**Closing Date**".

1.11 Closing Deliveries.

(a) Acquiror Deliveries. Acquiror shall deliver to Seller or the Escrow Agent, as applicable, at or prior to the Closing, each of the following:

(i) a certificate, dated as of the Closing Date, executed on behalf of Acquiror by a duly authorized officer of Acquiror, to the effect that each of the conditions set forth in clause (a) of Section 6.2 has been satisfied;

(ii) the Purchase Price (less the Escrow Cash which Escrow Cash shall be paid by Acquiror at the Closing to the Escrow Agent) in cash by wire transfer of immediately available funds to an account designated in writing by Seller to Acquiror prior to the Closing Date;

(iii) the Bill of Sale in substantially the form of Exhibit B attached hereto (the "**Bill of Sale**") executed by Acquiror;

(iv) the Assignment and Assumption Agreement in substantially the form of Exhibit C attached hereto (the "**Assignment and Assumption Agreement**") executed by Acquiror;

(v) the Escrow Agreement in substantially the form of Exhibit D attached hereto (the "**Escrow Agreement**") executed by Acquiror; and

(vi) a written opinion from Acquiror legal counsel, covering the matters set forth on Exhibit E, dated as of the Closing Date and addressed to Seller.

(b) Seller Deliveries. Seller shall deliver to Acquiror, at or prior to the Closing, each of the following:

(i) a certificate, dated as of the Closing Date and executed on behalf of Seller by the Chief Executive Officer of Seller and by each of the Seller Shareholders, to the effect that each of the conditions set forth in clause (a) of Section 6.3 has been satisfied;

(ii) a receipt for Acquiror's payment of the Purchase Price paid at the Closing, executed by a duly authorized officer of Seller;

(iii) a written opinion from Seller legal counsel, covering the matters set forth on Exhibit F, dated as of the Closing Date and addressed to Acquiror;

(iv) the Bill of Sale executed by a duly authorized officer of Seller;

(v) the Assignment and Assumption Agreement executed by Seller;

(vi) assignments from Seller, as applicable, to Acquiror of all registered patents, copyrights, trademarks, domain names and service marks, or applications therefor, included in the Purchased Assets, duly executed on behalf of Seller by its Chief Executive Officer and notarized, and in a form acceptable to Acquiror for recording with the United States Copyright Office or the United States Patent and Trademark Office, as applicable;

(vii) a certified copy of Seller's corporate action authorizing the Asset Purchase as set forth in Section 2.3(a);

(viii) each of an Employment Agreement, Invention Assignment Agreement and Noncompetition Agreement duly executed and delivered by each of the Seller Shareholders;

(ix) a certificate of existence from the Secretary of State of Indiana certifying that Seller is in good standing with the Secretary of State of Indiana;

(x) evidence satisfactory to Acquiror of the novation or consent to assignment of any Person with respect to the Contracts listed or described on Schedule 1.11(b)(x);

(xi) the Closing Financial Certificate; and

(xii) the Escrow Agreement executed by the Chief Executive Officer of Seller.

1.12 Escrow. At the Closing, Acquiror shall withhold the Escrow Cash from the Purchase Price to secure the performance of the indemnification obligations of Seller and the Seller Shareholders pursuant to Article VIII and as security for certain other obligations of the Seller Shareholders. Acquiror shall pay the Escrow Cash to the Escrow Agent by wire transfer of immediately available funds concurrent with the Closing and shall provide Seller with confirmation by the Escrow Agent of the receipt thereof.

1.13 Title Passage; Delivery of Purchased Assets.

(a) Title Passage. Upon the Closing, all of the right, title and interest of Seller in and to all of the Purchased Assets shall pass to Acquiror, and Seller shall deliver to Acquiror (i) possession of all of the Purchased Assets and (ii) proper assignments, conveyances and bills of sale sufficient to convey to Acquiror good and marketable title to all of the Purchased Assets, free and clear of all Encumbrances other than Permitted Encumbrances.

(b) Method of Delivery of Assets; Transfer Taxes. At the Closing, Seller shall deliver or cause to be delivered to Acquiror or its designated subsidiary all of the Purchased Assets, which shall be delivered to Acquiror in the form and to the location to be determined by Acquiror in its reasonable discretion before the Closing Date at Acquiror's cost and expense; *provided*, that, to the extent practicable, Seller shall deliver all of the Purchased Assets through electronic delivery or in another manner reasonably calculated and legally permitted to minimize or avoid the incurrence of Transfer Taxes if such method of delivery does not adversely affect the condition, operability or usefulness of any Purchased Asset. Acquiror will pay all Transfer Taxes and file all required Transfer Tax returns in a timely manner.

1.14 Taking of Necessary Action; Further Action. If, at any time after the Closing, any further action is necessary or desirable to vest Acquiror with full right, title and interest in, to and under, and/or possession of all of the Purchased Assets, and if Seller shall fail to refuse to take any such action within ten (10) days after having been requested in writing to do so, the directors and officers of Acquiror are fully authorized, in the name and on behalf of Seller or otherwise and, subject to Section 5.6, at Seller's expense, to take all lawful action necessary or desirable to accomplish such purpose or acts.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF SELLER AND THE SELLER SHAREHOLDERS

Subject to the disclosures set forth in the disclosure letter delivered to Acquiror concurrently with the parties' execution of this Agreement (the "**Seller Disclosure Letter**") (each of which disclosures, in order to be effective, shall clearly indicate the Section and, if applicable, the Subsection of this Article II to which it relates (unless and except to the extent the relevance of a disclosure to other representations and warranties is readily apparent from the actual text of such disclosure), and each of which disclosures shall also be deemed to be representations and warranties made by Seller and the Seller Shareholders to Acquiror under this Article II), Seller and each Seller Shareholder represents and warrants to Acquiror as follows:

2.1 Organization, Standing and Power. Seller is a corporation duly organized and validly existing and in good standing under the laws of the State of Indiana. Seller has the corporate power to own its properties and to conduct its business as now being conducted and as currently proposed by it to be conducted and is duly qualified to do business and is in good standing in each jurisdiction where the

failure to be so qualified and in good standing, individually or in the aggregate with any such other failures, would reasonably be expected to have a Material Adverse Effect on Seller or the Purchased Assets. Seller is not in violation of any of the provisions of its Articles of Incorporation or Bylaws. Seller does not have any subsidiaries and does not directly or indirectly otherwise own any equity or other interest in, or any interest convertible or exchangeable or exercisable for, any equity or other interest in, any Person.

2.2 Capital Structure. The authorized capital stock of Seller consists solely of 1,000 shares of Seller Common Stock. A total of 100 shares of Seller Common Stock are issued and outstanding as of the Agreement Date. Section 2.2 of the Seller Disclosure Letter accurately sets forth, as of the Agreement Date, the name of each Person that is the registered owner of any shares of Seller Common Stock and the number of such shares so owned by such Person. The number of such shares set forth as being so owned by such Person constitutes the entire interest of such person in the issued and outstanding capital stock or voting securities of Seller.

2.3 Authority; Noncontravention.

(a) Seller has all requisite corporate power and authority to enter into this Agreement and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby, have been duly authorized by Seller's Board of Directors. This Agreement has been duly executed and delivered by Seller and constitutes the valid and binding obligation of Seller enforceable against Seller in accordance with its terms, subject only to the effect, if any, of applicable bankruptcy and other similar laws affecting the rights of creditors generally and rules of law governing specific performance, injunctive relief and other equitable remedies. The Board of Directors of Seller, by resolutions duly adopted (and not thereafter modified or rescinded) by the unanimous vote or consent of the Board of Directors of Seller, has approved and adopted this Agreement and approved the Asset Purchase, determined that this Agreement and the terms and conditions of the Asset Purchase and this Agreement are advisable and in the best interests of Seller and its shareholders, and directed that the adoption of this Agreement be submitted to Seller's shareholders for consideration and recommended that all of the shareholders of Seller adopt this Agreement. The affirmative votes of the holders of a majority of the outstanding shares of Seller Common Stock is the only vote of the holders of Seller Capital Stock necessary to adopt this Agreement and approve the Asset Purchase (the "**Seller Shareholder Approval**"). This Agreement and the Asset Purchase have been adopted and approved by the unanimous written consent of all shareholders of Seller in accordance with all applicable Legal Requirements and Seller's Articles of Incorporation, and no further action is required in order to obtain the Seller Shareholder Approval.

(b) The execution and delivery of this Agreement by Seller does not, and the consummation of the transactions contemplated hereby will not, (i) result in the creation of any Encumbrance on any of the Purchased Assets or (ii) conflict with, or result in any violation or breach of or default under (with or without notice or lapse of time, or both), or give rise to a right of termination, cancellation or acceleration of any obligation or loss of any benefit under, or require any consent, approval or waiver from or notice to any Person pursuant to, (A) any provision of the Articles of Incorporation or Bylaws of Seller, in each case as amended to date, (B) any Contract of Seller or any Contract applicable to any of the Purchased Assets, or (C) any Legal Requirements applicable to Seller or to any of the Purchased Assets.

(c) The execution and delivery of this Agreement by Seller does not, and the performance of this Agreement and the transactions contemplated hereby by Seller will not require any consent, approval, authorization or permit of, or filing or registration with or notification to, any Governmental Entity or any other Person.

2.4 Financial Statements.

(a) Seller has delivered to Acquiror its unaudited financial statements for the year ended December 31, 2004, and its interim audited financial statements for the period ended September 30, 2005 (including, in each case, balance sheets, statements of operations and statements of cash flows) (collectively, the "**Financial Statements**"), which are included in Section 2.4(a) of the Seller Disclosure Letter. The Financial Statements (i) are derived from and in accordance with the books and records of Seller, (ii) complied as to form in all material respects with applicable accounting requirements with respect thereto as of their respective dates, (iii) have been prepared in accordance with GAAP (except that the unaudited Financial Statements do not contain footnotes) applied on a consistent basis throughout the periods indicated and consistent with each other, (iv) fairly present the consolidated financial condition of Seller at the dates therein indicated and the consolidated results of operations and cash flows of Seller for the periods therein specified (subject, in the case of unaudited interim period financial statements, to normal recurring year-end audit adjustments, none of which individually or in the aggregate will be material in amount), and (v) are true, complete and correct in all material respects. Seller has no Liabilities other than (i) those set forth or adequately provided for in the balance sheet, included in the Financial Statements as of September 30, 2005 (the "**Seller Balance Sheet**"), (ii) those incurred in the conduct of Seller's Business since September 30, 2005 (the "**Seller Balance Sheet Date**") in the ordinary course, consistent with past practice, which are of the type that ordinarily recur and do not result from any breach of Contract, tort or violation of law, and (iii) Seller Transaction Expenses incurred by Seller in connection with the execution of this Agreement. Except for Liabilities reflected in the Financial Statements, Seller has no off balance sheet Liability of any nature to, or any financial interest in, any third party or entities, the purpose or effect of which is to defer, postpone, reduce or otherwise avoid or adjust the recording of debt expenses incurred by Seller. At the Seller Balance Sheet Date, there were no material loss contingencies (as such term is used in Statement of Financial Accounting Standards No. 5 ("**Statement No. 5**") issued by the Financial Accounting Standards Board in March 1975) that are not adequately provided for in the Seller Balance Sheet as required by said Statement No. 5. All reserves that are set forth in or reflected in the Seller Balance Sheet have been established in accordance with GAAP and are adequate.

(b) Neither Seller, nor Seller's independent auditors, nor to the knowledge of Seller and the Seller Shareholders, any current or former employee, consultant or director of Seller, has identified or been made aware of any fraud, whether or not material, that involves Seller's management or other current or former employees, consultants, directors of Seller who have a role in the preparation of financial statements or the internal accounting controls utilized by Seller, or any claim or allegation regarding any of the foregoing. Neither Seller nor, to the knowledge of Seller and the Seller Shareholders, any director, officer, employee, auditor, accountant or representative of Seller has received or otherwise had or obtained knowledge of any material complaint, allegation, assertion or claim, whether written or oral, in each case, regarding deficient accounting or auditing practices, procedures, methodologies or methods of Seller or its internal accounting controls or any material inaccuracy in Seller's financial statements. No attorney representing Seller, whether or not employed by Seller, has reported to the Board of Directors of Seller or any committee thereof or to any director or officer of Seller evidence of a material violation of securities laws, breach of fiduciary duty or similar violation by Seller or any of its officers, directors, employees or agents.

(c) Section 2.4(c) of the Seller Disclosure Letter sets forth the names and locations of all banks, trust companies, savings and loan associations and other financial institutions at which Seller maintains accounts of any nature and the names of all persons authorized to draw thereon or make withdrawals therefrom.

(d) Section 2.4(d) of the Seller Disclosure Letter accurately lists all Seller Debt, including, for each item of Seller Debt, the agreement governing the Seller Debt and the interest rate, maturity date and any assets or properties securing such Seller Debt. All Seller Debt may be prepaid at the Closing without penalty under the terms of the Contracts governing such Seller Debt.

2.5 Absence of Certain Changes. Since the Seller Balance Sheet Date, and except for the execution of this Agreement and Seller's performance of its covenants expressly provided for hereunder, Seller has conducted its business only in the ordinary course consistent with past practice and (a) there has not occurred a Material Adverse Effect on Seller or with respect to the Business, (b) Seller has not made or entered into any Contract or letter of intent with respect to any acquisition, sale or transfer of any asset of Seller (other than the sale or nonexclusive license of Seller Products (as defined below) to its customers in the ordinary course of its business consistent with its past practice), (c) except as required by GAAP, there has not occurred any change in accounting methods or practices (including any change in depreciation or amortization policies or rates or revenue recognition policies) by Seller or any revaluation by Seller of its assets, (d) there has not occurred any declaration, setting aside, or payment of a dividend or other distribution with respect to any securities of Seller other than the Permitted Distribution, or any direct or indirect redemption, purchase or other acquisition by Seller of any of its securities, or any change in any rights, preferences, privileges or restrictions of any of its outstanding securities, (e) Seller has not entered into, amended or terminated any Material Contract, and there has not occurred any default under any Material Contract (as hereinafter defined) to which Seller is a party or by which it is, or any of its assets and properties are, bound, (f) there has not occurred any amendment or change to the Articles of Incorporation, Bylaws or other comparable governing documents of Seller, (g) there has not occurred any increase in or modification of the compensation or benefits payable or to become payable by Seller to any of its directors, officers, employees or consultants (other than increases in the base salaries of employees who are not officers in an amount that does not exceed 10% of such base salaries) or any new loans or extension of existing loans to any such Persons (other than routine expense advances to employees of Seller consistent with past practice), and Seller has not entered into any Contract to grant or provide (nor has granted any) severance, acceleration of vesting or other similar benefits to any such Persons, (h) there has not occurred the execution of any employment agreements or service Contracts or the extension of the term of any existing employment agreement or service Contract with any Person in the employ or service of Seller, (i) there has not occurred any change in identity with respect to the management, supervisory or other key personnel of Seller, any termination of employment of any such employees, or any labor dispute or claim of unfair labor practices involving Seller, (j) Seller has not incurred, created or assumed any Encumbrance (other than a Permitted Encumbrance, as such term is defined in Section 2.9) on any of its assets or properties, any Liability for borrowed money or any Liability as guaranty or surety with respect to the obligations of any other Person, (k) Seller has not made any deferral of the payment of any accounts payable other than in the ordinary course of business, consistent with past practice, or in an amount in excess of $15,000, or given any discount, accommodation or other concession other than in the ordinary course of business, consistent with past practice, in order to accelerate or induce the collection of any receivable, (l) Seller has not made any material change in the manner in which it extends discounts, credits or warranties to subscribers or customers or otherwise deals with its subscribers or customers, (m) there has been no material damage, destruction or loss, whether or not covered by insurance, affecting the assets, properties or business of Seller, (n) Seller has not sold, disposed of, transferred, assigned or licensed to any Person any of its material assets, including any rights to Seller IP Rights other than the sale or nonexclusive license of its products to customers in the ordinary course of business consistent with past practice, or has acquired or licensed from any Person any Intellectual Property or sold, disposed of, transferred, assigned or provided a copy of Seller Source Code to any Person, (o) Seller has not entered into any transaction or Contract that by its terms requires or contemplates a current and/or future financial commitment, expense (inclusive of overhead expense) or Liability on its part that involves in excess of $10,000 or that is not entered into in the ordinary course of business consistent with its past practices and (p) there has not occurred any announcement of, any negotiation by or any entry into any Contract by

Seller to do any of the things described in the preceding clauses (a) through (q) (other than negotiations and agreements with Acquiror and its representatives regarding the transactions contemplated by this Agreement).

2.6 Litigation. There is no private or governmental action, suit, proceeding, claim, mediation, arbitration or investigation pending before any Governmental Entity, or, to the knowledge of Seller and the Seller Shareholders, threatened against Seller or any of its assets or properties or any of its directors, officers or employees (in their capacities as such or relating to their employment, services or relationship with Seller), nor, to the knowledge of Seller and the Seller Shareholders, is there any reasonable basis for any such action, suit, proceeding, claim, mediation, arbitration or investigation. There is no judgment, decree, injunction or order against Seller, any of its assets or properties, or, to the knowledge of Seller and the Seller Shareholders, any of its directors, officers or employees (in their capacities as such or relating to their employment, services or relationship with Seller). To the knowledge of Seller and the Seller Shareholders, there is no reasonable basis for any Person to assert a claim against Seller or any of the Purchased Assets based upon: (a) Seller entering into this Agreement or any of the other transactions or agreements contemplated hereby; (b) any confidentiality or similar agreement entered into by Seller regarding the Purchased Assets; or (c) any claim that Seller has agreed to sell or dispose of the Purchased Assets to any party other than Acquiror, whether by way of merger, consolidation, sale of assets or otherwise. Seller has no action, suit, proceeding, claim, mediation, arbitration or investigation pending against any other Person.

2.7 Restrictions on Business Activities. There is no Contract, judgment, injunction, order or decree binding upon, or affecting, Seller, the Business or the Purchased Assets which has or would reasonably be expected to have, whether before or after consummation of the Asset Purchase, the effect of prohibiting or impairing any current or presently proposed business practice of Seller or the conduct of the Business or operation of the Purchased Assets in any respect by Acquiror after the Closing. Other than as set forth on the Seller Disclosure Letter, there are no Material Contracts or permits to which Seller is a party that affect the Purchased Assets.

2.8 Compliance with Laws; Governmental Permits.

(a) Seller has complied in all material respects with, is not in material violation of, and has not received any notices of violation with respect to, any Legal Requirement with respect to the conduct of its business, or the ownership or operation of the Business or any of the Purchased Assets. Neither Seller nor any director, officer, Affiliate or employee thereof (in their capacities as such or relating to their employment, services or relationship with Seller), has given, offered, paid, promised to pay or authorized payment of any money, any gift or anything of value, with the purpose of influencing any act or decision of the recipient in his or her official capacity or inducing the recipient to use his or her influence to affect an act or decision of a government official or employee, to any (i) governmental official or employee, (ii) political party or candidate thereof, or (iii) Person while knowing that all or a portion of such money or thing of value would be given or offered to a governmental official or employee or political party or candidate thereof.

(b) Seller has obtained each federal, state, county, local or foreign governmental consent, license, permit, grant, or other authorization of a Governmental Entity (i) pursuant to which Seller currently operates or holds any interest in any of the Purchased Assets or (ii) that is required for the operation of Seller's business or the holding of any such interest (all of the foregoing consents, licenses, permits, grants, and other authorizations, collectively, the "**Seller Authorizations**"), and all of Seller Authorizations are in full force and effect. The Seller Authorizations are listed in Section 2.8 of the Seller Disclosure Letter. Seller has not received any notice or other communication from any Governmental Entity regarding (i) any actual or possible violation of law or Seller Authorization or any

failure to comply with any term or requirement of Seller Authorization or (ii) any actual or possible revocation, withdrawal, suspension, cancellation, termination or modification of Seller Authorization. None of the Seller Authorizations will be terminated or impaired, or will become terminable, in whole or in part, as a result of the consummation of the transactions contemplated by this Agreement.

2.9 Title to Property and Assets. Seller has good and valid title to all of the Purchased Assets, free and clear of all Encumbrances, except for current Taxes not yet due and payable and statutory liens incurred for obligations not past due and restrictions contained in the Assumed Contracts ("**Permitted Encumbrances**"). Following the consummation of the transactions contemplated by this Agreement and the execution of the instruments of transfer contemplated by this Agreement, Acquiror will acquire good and marketable title to all of the Purchased Assets, free and clear of any Encumbrances other than Permitted Encumbrances. The Tangible Assets are (i) suitable for the uses to which they are currently employed, (ii) in good operating condition and repair, subject to normal wear and tear, (iii) regularly and properly maintained, (iv) not obsolete, dangerous or in need of renewal or replacement, (v) to the knowledge of Seller and the Seller Shareholders, free from any material defects, and (v) are adequate and sufficient for all current operations of the Business. Schedule 1.2(ii) of this Agreement sets forth a true, complete and accurate description of each item, or each group of like items (stating the number), of the Tangible Assets, which description identifies (i) the location of each such item or group of items, and (ii) to the extent available, original acquisition date and cost of such items. All properties used in the operations of Seller are reflected on the Seller Balance Sheet to the extent required under GAAP to be so reflected. Section 2.9 of the Seller Disclosure Letter identifies each parcel of real property leased by Seller. Seller has heretofore provided to Acquiror's counsel true, correct and complete copies of all leases, subleases and other agreements under which such uses or occupies or has the right to use or occupy, now or in the future, any real property or facility, or under which Seller has the right to use personal property including all modifications, amendments and supplements thereto. Seller is in peaceful and undisturbed possession of each leased parcel of real property and such personal property and has a valid right to use all leasehold properties. All leases of real or personal property to which Seller is a party are in full force and effect. Seller does not own any real property. Seller has adequate rights of ingress and egress into any real property used in the operation of the Business. The Purchased Assets constitute all assets, properties and rights necessary for the conduct of the Business as currently conducted and as currently proposed to be conducted.

2.10 Intellectual Property.

(a) Seller (i) owns and has independently developed or (ii) has the valid right or license to any and all Seller IP Rights. "**Seller IP Rights**" means any and all Intellectual Property used in the conduct of the Business as currently conducted or as presently proposed to be conducted by Seller, including the design, development, manufacture, use, import, distribution, sale, and performance of the Seller Products. The Seller IP Rights are sufficient for the conduct of the Business as currently conducted and as proposed to be conducted by Seller, including the design, development, manufacture, use, import, distribution, sale, and performance of Seller Products. "**Seller-Owned IP Rights**" means Seller IP Rights that are or are purportedly owned by or exclusively licensed to Seller.

(b) Seller has not transferred ownership of any Intellectual Property that is or was Seller-Owned IP Rights, to any third party, or knowingly permitted Seller's rights in any Intellectual Property that is or was Seller-Owned IP Rights to enter the public domain or, with respect to any Intellectual Property for which Seller has submitted an application or obtained a registration, lapse (other than through the expiration of registered Intellectual Property at the end of its maximum statutory term). Seller owns and has good and exclusive title to each item of Seller-Owned IP Rights, free and clear of any Encumbrances other than Permitted Encumbrances. The right, license and interest of Seller in and to all Intellectual Property licensed by Seller from a third party are free and clear of all Encumbrances

other than Permitted Encumbrances. After the Closing, all Seller-Owned IP Rights will be fully transferable, alienable or licensable by Acquiror without restriction and without payment of any kind to any third party.

(c) Section 2.10(c) of the Seller Disclosure Letter lists all United States, international and foreign: (i) patents and patent applications (including provisional applications); (ii) registered trademarks, applications to register trademarks, intent-to-use applications, or other registrations or applications related to trademarks; (iii) registered Internet domain names; (iv) registered copyrights and applications for copyright registration; and (v) any other Intellectual Property that is the subject of an application, certificate, filing, registration or other document issued, filed with, or recorded by any governmental authority owned by, registered or filed in the name of, Seller ("**Seller Registered Intellectual Property**"), including the jurisdictions in which each such item of Intellectual Property has been issued or registered or in which any application for such issuance and registration has been filed, or in which any other filing or recordation has been made. Each item of Seller Registered Intellectual Property is subsisting (or in the case of applications, applied for), all registration, maintenance and renewal fees currently due in connection with Seller Registered Intellectual Property have been made and all documents, recordations and certificates in connection with 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, maintaining and perfecting Seller Registered Intellectual Property and recording Seller's ownership interests therein. Section 2.10(c) of the Seller Disclosure Letter sets forth a list of all actions that are required to be taken by Seller within 120 days of the Agreement Date with respect to any of the Seller Registered Intellectual Property in order to avoid prejudice to, impairment or abandonment of Seller Registered Intellectual Property. Seller owns and has good and exclusive title to each item of Seller Registered Intellectual Property, free and clear of any Encumbrances other than Permitted Encumbrances.

(d) Section 2.10(d) of the Seller Disclosure Letter lists (i) all licenses, sublicenses and other Contracts as to which Seller is a party and pursuant to which any Person is authorized to use Seller IP Rights, (ii) other than "shrink wrap" and similar widely available commercial end-user licenses that have an individual acquisition cost of $5,000 or less, all licenses, sublicenses and other Contracts to which Seller is a party and pursuant to which Seller acquired or is authorized to use any third party Intellectual Property ("**Third Party Intellectual Property Rights**"); and (iii) all licenses, sublicenses and other Contracts pursuant to which Seller has agreed to any restriction on the right of Seller to use or enforce Seller-Owned IP Rights. None of the licenses or Contracts listed in Section 2.10(d) of the Seller Disclosure Letter (in response to clause (i) above) grants any third party exclusive rights to or under Seller IP Rights or grants any third party the right to sublicense Seller IP Rights.

(e) Seller is not, nor shall be as a result of the execution and delivery or effectiveness of this Agreement or the performance of Seller's obligations under this Agreement, in breach of any agreement governing Seller IP Rights (the "**Seller IP Rights Agreements**") and the consummation of the transactions contemplated by this Agreement will not result in the modification, cancellation, termination, suspension of, or acceleration of any payments with respect to the Seller IP Rights Agreements, or give any non-Seller party to Seller IP Rights Agreement the right to do any of the foregoing. Following the Closing, Acquiror will be permitted to exercise all of Seller's rights under the Seller IP Rights Agreements to the same extent Seller would have been able to had the transactions contemplated by this Agreement not occurred and without the payment of any additional amounts or consideration other than ongoing fees, royalties or payments which Seller would otherwise be required to pay. Neither the execution and delivery or effectiveness of this Agreement nor the performance of Seller's obligations under this Agreement will cause the forfeiture or termination of, or give rise to a right of forfeiture or termination of any Seller-Owned IP Right, or impair the right of Seller or Acquiror to use, possess, sell or license any Seller-Owned IP Right or portion thereof. There are no royalties,

honoraria, fees or other payments payable by Seller to any Person (other than salaries payable to employees, consultants and independent contractors not contingent on or related to use of their work product) as a result of the ownership, use, possession, license-in, license-out, sale, marketing, advertising or disposition of Seller-Owned IP Rights by Seller. Seller has not entered into any Contract to indemnify any other person against any charge of infringement or misappropriation of any intellectual property rights of any third party, other than indemnification provisions contained in purchase orders or license agreements arising in the ordinary course of business, in each case on Seller's standard, unmodified form purchase order, sale or license agreements (copies of which have been provided to Acquiror's counsel).

(f) To the knowledge of Seller and the Seller Shareholders, there is no unauthorized use, disclosure, infringement or misappropriation of Seller-Owned IP Rights, by any third party, including any employee or former employee of Seller. Seller has not brought any action, suit or proceeding for infringement or misappropriation of any Intellectual Property or breach of Seller IP Rights Agreement.

(g) Seller has not been sued in any suit, action or proceeding (or received any written notice or threat of any suit, action, or proceeding) which involves a claim of infringement or misappropriation of any Intellectual Property right of any third party or which contests the validity, ownership or right of Seller to exercise any Intellectual Property right or to otherwise develop, offer for sale, sell, distribute, or perform any Seller Product. Seller has not received any written communication that involves an offer to license or grant any other rights or immunities under any Intellectual Property of any third party. The operation of the Business as such Business is currently conducted and as proposed to be conducted by Seller, including (i) the design, development, manufacturing, reproduction, marketing, licensing, sale, offer for sale, importation, distribution, performance, and/or use of any Seller Product and (ii) Seller's use of any product, device or process used in the Business as currently conducted and as presently proposed to be conducted by Seller, does not and will not infringe or misappropriate the Intellectual Property of any third party and does not and will not constitute unfair competition or unfair trade practices under the laws of any jurisdiction and there is no substantial basis for a claim that the design, development, manufacturing, reproduction, marketing, licensing, sale, offer for sale, importation, distribution, performance, and/or use of any Seller Product or the operation of the business of Seller is infringing or has infringed on or misappropriated any Intellectual Property of a third party. None of the Seller-Owned IP Rights, the Seller Products or Seller is subject to any proceeding or outstanding order or stipulation (A) restricting in any manner the use, transfer, or licensing by Seller of Seller-Owned IP Rights or Seller Products, or which may affect the validity, use or enforceability of any Seller-Owned IP Right or Seller Product, or (B) restricting the conduct of the Business in order to accommodate Third Party Intellectual Property Rights. Except for restrictions contained in the license of Seller-Owned IP Rights exclusively licensed to Seller by third parties, none of the Seller-Owned IP Rights or Seller is subject to any contract restricting in any manner the use, transfer, or licensing by Seller of Seller-Owned IP Rights, or which may affect the validity, use or enforceability of any Seller-Owned IP Rights.

(h) Seller has not received any opinion of counsel that any third party patents or patent rights apply to any Seller Product or the operation of the Business as previously or currently conducted, or as presently proposed to be conducted by Seller.

(i) Seller has obtained proprietary information and invention disclosure assignments from each of its consultants, employees and independent contractors who independently or jointly made contributions to the conception, reduction to practice, creation or development of Seller-Owned IP Rights and such third party has not retained any rights or licenses with respect thereto. To the knowledge of Seller and the Seller Shareholders, no current or former employee, consultant or

independent contractor of Seller: (i) is in violation of any term or covenant of any Contract relating to employment, invention disclosure, invention assignment, non-disclosure or non-competition or any other Contract with any other party by virtue of such employee's, consultant's or independent contractor's being employed by, or performing services for, Seller or using trade secrets or proprietary information of others without permission; or (ii) has developed any technology, software or other copyrightable, patentable or otherwise proprietary work for Seller that is subject to any agreement under which such employee, consultant or independent contractor has assigned or otherwise granted to any third party any rights (including Intellectual Property rights) in or to such technology, software or other copyrightable, patentable or otherwise proprietary work. To the knowledge of Seller and the Seller Shareholders, the employment of any employee of Seller or the use by Seller of the services of any consultant or independent contractor does not subject Seller to any liability to any third party for improperly soliciting such employee, consultant or independent contractor to work for Seller, whether such liability is based on contractual or other legal obligations to such third party. No current or former employee, consultant or independent contractor of Seller has any right, license, claim or interest whatsoever in or with respect to Seller-Owned IP Rights. To the extent that any technology, software or other Intellectual Property developed or otherwise owned by a third party ("**Third Party Technology**") is incorporated into, integrated or bundled with, or used by Seller in the development, manufacture or compilation of any of the Seller Products, Seller has a written agreement with such third party with respect thereto pursuant to which Seller either (A) has obtained complete, unencumbered and unrestricted ownership of, and are the exclusive owners of, or (B) has obtained perpetual, non terminable licenses (sufficient for the conduct of its Business as currently conducted by Seller and as presently proposed to be conducted by Seller) to all such Third Party Technology by operation of law or by valid assignment, to the fullest extent it is legally possible to do so.

(j) Seller has taken all commercially reasonable steps to protect and preserve the confidentiality of all confidential or non-public information included in the Seller IP Rights ("**Confidential Information**"). All use, disclosure or appropriation of Confidential Information owned by Seller by or to a third party has been pursuant to the terms of a written agreement between Seller and such third party. All use, disclosure or appropriation of Confidential Information not owned by Seller has been pursuant to the terms of a written agreement or other legal binding arrangement between Seller and the owner of such Confidential Information, or is otherwise lawful. All current employees and consultants of Seller having access to Confidential Information or proprietary information of any of their respective customers or business partners have executed and delivered to Seller an agreement regarding the protection of such Confidential Information or proprietary information (in the case of proprietary information of Seller's customers and business partners, to the extent required by such customers and business partners).

(k) Section 2.10(k) of the Seller Disclosure Letter lists all software or other material that is distributed as "free software", "open source software" or under a similar licensing or distribution model (including but not limited to the GNU General Public License (GPL), GNU Lesser General Public License (LGPL), Mozilla Public License (MPL), BSD licenses, the Artistic License, the Netscape Public License, the Sun Community Source License (SCSL) the Sun Industry Standards License (SISL) and the Apache License) ("**Open Source Materials**") used by Seller in any way, and describes the manner in which such Open Source Materials were used (such description shall include whether (and, if so, how) the Open Source Materials were modified and/or distributed by Seller).

(l) Seller has not (i) incorporated Open Source Materials into, or combined Open Source Materials with Seller Products; (ii) distributed Open Source Materials in conjunction with Seller Products; or (iii) used Open Source Materials, that (in response to clauses (i), (ii) or (iii) above) create, or purport to create, obligations for Seller with respect to Seller IP Rights or grant, or purport to grant, to any third party, any rights or immunities under Seller IP Rights (including, but not limited to, using any

Open Source Materials that require, as a condition of use, modification and/or distribution of such Open Source Materials that other software incorporated into, derived from or distributed with such Open Source Materials be (A) disclosed or distributed in source code form, (B) be licensed for the purpose of making derivative works, or (C) be redistributable at no charge).

(m) All products sold, licensed, leased or delivered by Seller to customers and all services provided by or through Seller to customers on or prior to the Closing Date conform in all material respects to applicable contractual commitments, express and implied warranties, packaging, advertising and marketing materials and to any representations provided to customers and conform in all material respects to applicable product or service specifications or documentation. Seller has no liability (and, to the knowledge of Seller and the Seller Shareholders, there is no legitimate basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim or demand against Seller giving rise to any material liability relating to the foregoing Contracts) for replacement or repair thereof or other damages in connection therewith in excess of any reserves therefor reflected on the Seller Balance Sheet. Seller has provided Acquiror with all documentation and notes relating to the testing of all Seller Products. Seller has documented all bugs, errors and defects in all the Seller Products, and such documentation is retained and is available internally at Seller. For all software used by Seller in providing services, or in developing or making available any of the Seller Products, Seller has implemented any and all security patches or upgrades that are generally available for that software.

(n) No (i) government funding; (ii) facilities of a university, college, other educational institution or research center; or (iii) funding from any Person (other than funds received in consideration for the Seller Capital Stock) was used in the development of the Intellectual Property owned by Seller. No current or former employee, consultant or independent contractor of Seller, who was involved in, or who contributed to, the creation or development of any Intellectual Property of Seller, has performed any similar services for any 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.

(o) Neither Seller nor any Seller Shareholder or other Person acting on Seller's behalf has disclosed, delivered or licensed to any Person, agreed to disclose, deliver or license to any Person, or permitted the disclosure or delivery to any escrow agent or other Person of, Seller Source Code. No event has occurred, and no circumstance or condition exists, that (with or without notice or lapse of time, or both) will, or would reasonably be expected to, result in the disclosure, delivery or license by Seller or any Person acting on their behalf to any Person of Seller Source Code. Section 2.10(o) of the Seller Disclosure Letter identifies each Contract pursuant to which Seller has deposited, or is or may be required to deposit, with an escrow holder or any other Person, any of the Seller Source Code, and describes whether the execution of this Agreement or any of the transactions contemplated by this Agreement, in and of itself, would reasonably be expected to result in the release from escrow of Seller Source Code. As used in this Section 2.10(o), "**Seller Source Code**" means, collectively, any software source code or confidential manufacturing specifications or designs, any material portion or aspect of software source code or confidential manufacturing specifications or designs, or any material proprietary information or algorithm contained in or relating to any software source code or confidential manufacturing specifications or designs, of Seller-Owned IP Rights or Seller Products.

(p) Seller has not collected any personally identifiable information from any third parties, including without limitation individually identifiable health information or medical information, except as described on Section 2.10(p) of the Seller Disclosure Letter. Seller has complied with all applicable Legal Requirements and their respective internal privacy policies relating to the use, collection, storage, disclosure and transfer of any personally identifiable information collected by Seller

or by third parties having authorized access to the records of Seller. The execution, delivery and performance of this Agreement, will comply in all material respects with all applicable Legal Requirements relating to privacy and with Seller's privacy policies.

(q) Seller has not added, removed or otherwise changed the Ringtones displayed on and/or downloadable from Seller's website, www.3gupload.com, since October 31, 2005 other than the addition or removal of Ringtones in the ordinary course of the Business for which Seller has been granted a valid license, or is otherwise validly authorized, with respect to the use and distribution thereof, by the holder of any Third Party Intellectual Property Rights in such Ringtones.

2.11 Environmental Matters.

(a) As used in this Agreement, the following terms shall have the meanings indicated below:

(i) "**Hazardous Materials**" shall mean any toxic or hazardous substance, material or waste or any pollutant or contaminant, or infectious or radioactive substance or material, including those substances, materials and wastes defined in or regulated under any Environmental and Safety Laws, but excludes office and janitorial supplies properly and safely maintained.

(ii) "**Property**" shall mean all real property leased or owned by Seller either currently or in the past.

(iii) "**Facilities**" shall mean all buildings and improvements on the Property.

(b) (i) Seller has not received any notice of any noncompliance of the Facilities or Seller's past or present operations with Environmental and Safety Laws; (ii) no notices, administrative actions or suits are pending or, to the knowledge of Seller and the Seller Shareholders, threatened relating to an actual or alleged violation of any Environmental and Safety Laws by Seller; (iii) Seller is not a potentially responsible party under the United States Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or any analogous state, local or foreign laws arising out of events occurring prior to the Closing Date; (iv) there have not been in the past, and are not now, any Hazardous Materials on, under or migrating to or from any of the Facilities or any Property; (v) all Hazardous Materials and wastes of Seller have been disposed of in accordance with all Environmental and Safety Laws; (vi) there have not been in the past, and are not now, any underground tanks or underground improvements at, on or under any Property, including treatment or storage tanks, sumps, or water, gas or oil wells; (viii) there are no polychlorinated biphenyls deposited, stored, disposed of or located on any Property or in any of the Facilities or any equipment on the Property; (ix) there is no formaldehyde on any Property or in any of the Facilities, nor is any insulating material containing urea formaldehyde in any of the Facilities; (x) no methylene chloride or asbestos is contained in or has been used at or released from the Facilities; (xi) Seller's uses of the Facilities and activities in the Facilities have at all times materially complied with all Environmental and Safety Laws; and (xii) Seller holds all the permits and licenses required to be held with respect to the conduct of the Business under federal, state, local or foreign laws regarding Environmental and Safety Laws and is in material compliance with the terms and conditions of such permits and licenses.

2.12 Taxes.

(a) Seller has timely filed all Tax Returns required to be filed by it. All such Tax Returns are correct and complete in all respects and have been prepared in substantial compliance with all applicable Legal Requirements. All Taxes owed by Seller (whether or not shown or required to be

shown on any Tax Return) have been paid or properly accrued in the Financial Statements. No claim has ever been made by an authority in a jurisdiction where Seller does not file Tax Returns that Seller is or may be subject to taxation by that jurisdiction. Seller has established an adequate accrual or reserve for Tax liability (in addition to any reserve for deferred Taxes established to reflect timing differences between book and Tax income) in accordance with GAAP for the payment of all Taxes payable in respect of the periods or portions thereof prior to the Balance Sheet Date (which accrual or reserve for Tax liability as of the Balance Sheet Date is fully reflected on the Seller Balance Sheet (rather than in any notes thereto)), has made (or will make on a timely basis) all estimated Tax payments required to be made, and has no Liability for Taxes in excess of the amount so paid or accruals or reserves so established except for Taxes subsequent to the Balance Sheet Date incurred in the ordinary course of business. Seller is not delinquent in the payment of any Tax or in the filing of any Returns, and no deficiencies for any Tax have been threatened, claimed, proposed or assessed against Seller or any of their respective officers, employees or agents of Seller in their capacity as such. There are no Tax liens on any of the Purchased Assets. At the Closing, and upon the date of any subsequent transfer of Purchased Assets to Acquiror in accordance with this Agreement, there will be no Tax liens on any of the Purchased Assets to be transferred to Acquiror hereunder. Seller has paid or will pay, when due, any Taxes with respect to the Purchased Assets. There is (a) no claim for Taxes being asserted or, to the knowledge of Seller and the Seller Shareholders, threatened against Seller, (b) no audit or pending audit of, or Tax controversy associated with, any Tax Return of Seller being conducted by a Tax Authority and any such past audits (if any) have been completed and fully resolved to the satisfaction of the applicable Tax Authority conducting such audit and all Taxes determined by such audit to be due from Seller have been paid in full to the applicable Tax Authorities, and (c) not in effect any waiver by Seller of any statute of limitations with respect to any Taxes, and no agreement to any extension of time for filing any Tax Return or for the assessment or collection of any Tax.

(b) Seller has not received any notification from the Internal Revenue Service or any other Tax Authority regarding any material issues that (a) are currently pending before the Internal Revenue Service or any other Tax Authority (including any sales or use Tax Authority) regarding Seller, or (b) have been raised by the Internal Revenue Service or other Tax Authority and not yet finally resolved. Seller has within the time and in the manner prescribed by law withheld and paid (and until the Closing Date will withhold and pay) all Taxes (including withholding of Taxes pursuant to Sections 1441, 1442, 1445 and 1446 of the Code or similar provisions under any foreign law, Federal Insurance Contribution Act, Medicare, Federal Unemployment Tax Act and relevant state income and employment Tax withholding laws) in connection with any amounts paid or owing to any creditor, stockholder, employee, or other third party, and all withholding Tax Returns and Forms 1099 required with respect thereto have been properly completed and timely filed. Seller is not a party to or bound by any Tax sharing, Tax indemnity, or Tax allocation agreement nor does Seller have any liability or potential liability to another party under any such agreement. Seller has not filed any disclosures under Section 6662 of the Code or comparable provisions of state, local or foreign law to prevent the imposition of penalties with respect to any Tax reporting position taken on any Return. Seller has not consummated, has not participated in, or is not currently participating in any transaction which was or is a "tax shelter" transaction as defined in Sections 6662, 6011, 6012 or 6111 of the Code or the Treasury Regulations promulgated thereunder. Seller has not been and will not be required to include any item of income in, or exclude any item of deduction from, taxable income for any taxable period (or portion thereof) ending after the Closing Date as a result of any: (a) change in method of accounting for a taxable period ending on or prior to the Closing Date; (b) "closing agreement" as described in Section 7121 of the Code (or any corresponding or similar provision of state, local or foreign income Tax law) executed on or prior to the Closing Date installment sale or open transaction disposition made on or prior to the Closing Date; or (c) prepaid amount received on or prior to the Closing Date.

(c) No benefit payable or which may become payable by Seller or Acquiror pursuant to any employee plan, Contract or arrangement or as a result of or arising under this Agreement or any subsequent event will constitute an "excess parachute payment" (as defined in Section 280G(b)(1) of the Code) which is subject to the imposition of an excise Tax under Section 4999 of the Code or which would not be deductible by reason of Section 280G of the Code.

(d) Seller has been, since its inception date ("***Inception Date***"), is, and will be an S corporation within the meaning of Section 1361(a) of the Code and within the meaning of comparable state or local law. For federal and applicable state and local income Tax purposes, Seller has properly qualified as an S corporation since the effective date of such election through the date of this Agreement, and will properly qualify as an S corporation through and until the Closing Date in all jurisdictions in which it is subject to Tax. Since the Inception Date, Seller has never been subject to income Tax as a C corporation within the meaning of Section 1361(a) of the Code or within the meaning of comparable state or local provisions. Seller and the Seller Shareholders since the Inception Date, at no time took, and will not take, any action or Tax return position inconsistent with the treatment of Seller as an S corporation from the Inception Date. Similarly, neither Seller nor any Seller Shareholder, at any time on or after the Inception Date, failed to take, and will not take, any action required in order to maintain Seller's S corporation status under the Code or any other Tax law. Seller has documentary evidence of its S corporation election from the IRS (and other relevant Tax Authorities), and Seller has made available copies of such documents to Acquiror.

2.13 Employee Benefit Plans and Employee Matters.

(a) Section 2.13(a) of the Seller Disclosure Letter contains a complete and accurate list of all Seller Employee Plans. Seller has furnished to Acquiror's counsel a true, correct and complete copy of each of the Seller Employee Plans.

(b) Benefit Plans. Seller and any ERISA Affiliate have never 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. 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. Seller has never maintained, established, sponsored, participated in or contributed to any multiple employer plan or to any plan described in Section 413 of the Code. Seller and any ERISA Affiliate has never maintained, established, sponsored, participated in or contributed to any self-insured Seller Employee Plan or a funded welfare plan within the meaning of Section 419 of the Code.

(c) No Post-Employment Obligations. No Seller Employee 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 ERISA Affiliate upon retirement or termination of employment for any reason, except as may be required by applicable Legal Requirements.

(d) Compliance with Applicable Law. Each Seller Employee Plan is now and always has been operated in accordance with its terms and in compliance in all material respects with the requirements of all Legal Requirements, including, without limitation, ERISA and the Code. No action is pending or, to the knowledge of Seller and the Seller Shareholders, threatened with respect to any Seller Employee Plan (other than claims for benefits in the ordinary course) and no fact or event exists that could give rise to any such action. Each Seller Employee Plan, to the extent applicable, is in compliance, in all material respects, with the continuation coverage requirements of Section 4980B of the Code, Sections 601 through 608 of ERISA, the applicable health care continuation and notice provisions of COBRA and the regulations (including proposed regulations) thereunder.

(e) Absence of Certain Liabilities and Events. Neither Seller nor any ERISA Affiliate has ever incurred any liability for any excise tax arising under Section 4971, 4972, 4980 or 4980B of the Code and to the knowledge of Seller and the Seller Shareholders, no fact or event exists which could give rise to any such liability. No complete or partial termination has occurred with respect to any Seller Employee Plan within the meaning of Section 3(2) of ERISA.

(f) Warn Act. Seller and each ERISA Affiliate is in compliance with the requirements of WARN or similar Legal Requirement and has never triggered any liability pursuant to WARN or other similar Legal Requirement and has no liabilities pursuant to WARN or other similar Legal Requirements with respect to employees.

(g) Effect of Transaction. None of the execution and delivery of this Agreement, the consummation of the Asset Purchase or any other transaction contemplated hereby or any termination of employment or service in connection therewith or subsequent thereto will, individually or together with the occurrence of some other event, (i) result in any payment (including severance, unemployment compensation, golden parachute, bonus or otherwise) becoming due to any Person other than the Leonard Bonus, (ii) materially increase or otherwise enhance any benefits otherwise payable by Seller, (iii) result in the acceleration of the time of payment or vesting of any such benefits, except as required under Section 411(d)(3) of the Code, (iv) increase the amount of compensation due to any Person, or (v) result in the forgiveness in whole or in part of any outstanding loans made by Seller to any Person.

(h) Employment Matters. Seller and its ERISA Affiliates: (i) are in material compliance with all Legal Requirements respecting employment, employment practices, terms and conditions of employment and wages and hours, in each case, with respect to 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 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; and (iv) are not liable for any payment to any trust or other fund or to any Governmental Entity, with respect to unemployment compensation benefits, social security or other benefits or obligations for 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 and the Seller Shareholders, any threatened or reasonably anticipated claims or actions against Seller or any ERISA Affiliate under any Seller Employee Plan.

(i) Labor. No work stoppage or labor strike against Seller or any ERISA Affiliate is pending or, to the knowledge of Seller and the Seller Shareholders, threatened by any employee. Neither Seller nor any ERISA Affiliate is involved in or, to the knowledge of Seller and the Seller Shareholders, 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 any liability to Acquiror. Neither Seller nor any ERISA Affiliate has 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 any liability to Acquiror. Neither Seller nor any ERISA Affiliate is presently, nor has been in the past, a party to, or bound by, any collective bargaining agreement, union organizing effort or union contract with respect to employees and no collective bargaining agreement is being negotiated with respect to employees. No employee of Seller has been dismissed in the last 12 month period.

(j) Seller has provided to Acquiror a true, correct and complete list of the names, positions and rates of compensation of all officers, directors, and employees of Seller as of the Agreement Date, showing each such person's name, position, annual remuneration, status as exempt/non-exempt, bonuses and fringe benefits for the current fiscal year.

(k) To the knowledge of Seller and the Seller Shareholders, no employee or consultant of Seller is in violation of (i) any Contract or (ii) any restrictive covenant relating to the right of any such employee or consultant to be employed by Seller or to use trade secrets or proprietary information of others.

(l) No Seller Employee Plan or arrangement that has been established or maintained, or that is required to be maintained or contributed to by the law or applicable custom or rule of the relevant jurisdiction, outside of the United States (each, a "**Foreign Plan**").

2.14 Interested Party Transactions. None of the officers and directors of Seller and, to the knowledge of Seller and the Seller Shareholders, none of the employees of Seller, nor any immediate family member of an officer, director, employee or shareholder of Seller, has any direct or indirect ownership, participation, royalty or other interest in, or is an officer, director, employee of or consultant or contractor for any firm, partnership, entity or corporation that competes with, or does business with, or has any contractual arrangement with, Seller (except with respect to any interest in less than 5% of the stock of any corporation whose stock is publicly traded). None of said officers and directors, shareholders or, to the knowledge of Seller and the Seller Shareholders any employee or any member of the immediate families of any such Persons, is a party to, or to the knowledge of Seller and the Seller Shareholders, otherwise directly or indirectly interested in, any Contract to which Seller is a party or by which Seller or any of their respective assets or properties may be bound or affected, except for normal compensation for services as an officer, director or employee thereof. To the knowledge of Seller and the Seller Shareholders, none of said officers, directors, employees, shareholders or immediate family members has any interest in any property, real or personal, tangible or intangible (including any Intellectual Property) that is used in, or that relates to, the business of Seller, except for the rights of shareholders under applicable Legal Requirements.

2.15 Insurance. Seller maintains the policies of insurance and bonds set forth in Section 2.15 of the Seller Disclosure Letter, including all legally required workers' compensation insurance and errors and omissions, casualty, fire and general liability insurance. Section 2.15 of the Seller Disclosure Letter sets forth the name of the insurer under each such policy and bond, the type of policy or bond, the coverage amount and any applicable deductible as of the date hereof as well all material claims made under such policies and bonds since the date that is two years prior to the Agreement Date. Seller has provided to Acquiror true, correct and complete copies of all such policies of insurance and bonds issued at the request or for the benefit of Seller. There is no claim pending under any of such policies or bonds as to which coverage has been questioned, denied or disputed by the underwriters of such policies or bonds. All premiums due and payable under all such policies and bonds have been timely paid and Seller is otherwise in compliance with the terms of such policies and bonds.

2.16 Books and Records. Seller's written responses delivered to Acquiror on the general due diligence questionnaire provided by Acquiror to Seller in connection with the transactions contemplated by this Agreement are true, correct and complete. Without limiting the foregoing, Seller has provided to Acquiror or its counsel complete and correct copies of (a) all documents identified on the Seller Disclosure Letter, (b) the Articles of Incorporation, Bylaws or similar charter documents of Seller, each as currently in effect, (c) the minute books containing records of all proceedings, consents, actions and meetings of the Board of Directors, committees of the Board of Directors and shareholders of Seller, (d) the stock ledger, journal and other records reflecting all stock issuances and transfers of Seller, and (e) all

permits, orders and consents issued by any regulatory agency with respect to Seller, or any securities of Seller, and all applications for such permits, orders and consents. The minute books of Seller provided to Acquiror contain a complete and accurate summary of all meetings of directors and shareholders or actions by written consent since the time of incorporation of Seller through the Agreement Date, and reflect all transactions referred to in such minutes accurately in all material respects. The books, records and accounts of Seller (i) are true, correct and complete in all material respects, (ii) have been maintained in accordance with reasonable business practices on a basis consistent with prior years, (iii) are stated in reasonable detail and accurately and fairly reflect the transactions and dispositions of the assets and properties of Seller, and (iv) accurately and fairly reflect the basis for the Financial Statements.

2.17 Brokers' and Finders' Fees. Neither Seller, any Seller Shareholder nor other Affiliate of Seller is obligated for the payment of any fees or expenses of any investment banker, broker, advisor, finder or similar party in connection with the origin, negotiation or execution of this Agreement or in connection with the Asset Purchase or any other transaction contemplated by this Agreement. Acquiror will not incur any liability, either directly or indirectly, to any such investment banker, broker, advisor, finder or similar party as a result of this Agreement, the Asset Purchase or any act or omission of Seller, any Seller Shareholder or any of Seller's other Affiliates or directors, officers, employees, or agents.

2.18 Material Contracts.

(a) Except for this Agreement and the Contracts specifically identified in Section 2.18 of the Seller Disclosure Letter, Seller is not a party to or bound by, and the Purchased Assets are not subject to any of the following Contracts (each a "**Material Contract**"):

(i) any distributor, original equipment manufacturer, reseller, value added reseller, sales, advertising, agency or manufacturer's representative Contract;

(ii) any continuing Contract for the purchase, sale or license of materials, supplies, equipment, services, software, Intellectual Property or other assets involving in the case of any such Contract payment(s) of $25,000 or more over the life of the Contract;

(iii) any Contract that expires or may be renewed at the option of any Person other than Seller so as to expire more than one year after the Agreement Date;

(iv) any trust indenture, mortgage, promissory note, loan agreement or other Contract for the borrowing of money, any currency exchange, commodities or other hedging arrangement or any leasing transaction of the type required to be capitalized in accordance with GAAP;

(v) any Contract for capital expenditures in excess of $25,000 in the aggregate;

(vi) any Contract limiting the freedom of Seller to engage or participate, or compete with any other Person, in any line of business, market or geographic area, or to make use of Seller-Owned IP Rights, or any Contract granting most favored nation pricing, exclusive sales, distribution, marketing or other exclusive rights, rights of refusal, rights of first negotiation or similar rights and/or terms to any Person, or any Contract otherwise limiting the right of Seller to sell, distribute or manufacture any products or services or to purchase or otherwise obtain any software, components, parts, subassemblies or services;

(vii) any Contract pursuant to which Seller is a lessor or lessee of any real property or of any machinery, equipment, motor vehicles, office furniture, fixtures or other personal property involving aggregate payments in excess of $25,000 per annum;

(viii) any Contract (i) with any Affiliate or (ii) with any Person with whom Seller does not deal at arm's length;

(ix) any agreement of guarantee, support, assumption or endorsement of, or any similar commitment with respect to, the obligations, liabilities (whether accrued, absolute, contingent or otherwise) or indebtedness of any other Person;

(x) any Contract under which Seller is a licensor of Intellectual Property or provider of services (other than under its unmodified form of standard subscription agreement, the form of which has been made available to counsel to Acquiror), or agrees to encumber, not assert, transfer or sell rights in or with respect to any Intellectual Property or to provide source code to any third party, or under which Seller is a licensee of any Intellectual Property (except for "shrink wrap" and similar widely available commercial end-user licenses that have an individual acquisition cost of $5,000 or less) or providing for the development of any software, content, technology or Intellectual Property, independently or jointly, by or for Seller;

(xi) any Contract to license or authorize any third party to manufacture or reproduce any of the Seller Products;

(xii) (1) any joint venture Contract or (2) any other Contract that involves a sharing of revenues, profits, cash flows, expenses or losses with other Persons or the payment of royalties to any other Person;

(xiii) any agreement of indemnification or warranty or any Contract containing any support, maintenance or service obligation or cost on the part of Seller (other than under its unmodified form of standard subscription agreement, the form of which has been made available to counsel to Acquiror);

(xiv) any Contract for the employment of any director, officer, employee or consultant of Seller or any other type of Contract with any officer, employee or consultant of Seller that is not immediately terminable by Seller without cost or liability, including any Contract requiring it to make a payment to any director, officer, employee or consultant on account of the Asset Purchase, any transaction contemplated by this Agreement or any Contract that is entered into in connection with this Agreement;

(xv) any Contract under which Seller provides any advice or services to any third party, including any consulting Contract, professional Contract or software implementation, deployment or development services Contract, or support services Contract;

(xvi) any Contract with any labor union or any collective bargaining agreement or similar contract with Seller's employees;

(xvii) any Contract with any investment banker, broker, advisor or similar party, or any accountant, legal counsel or other Person retained by Seller, in connection with this Agreement and the transactions contemplated hereby;

(xviii) any Contract pursuant to which Seller has acquired or divested a business or entity, or assets of a business or entity, whether by way of merger, consolidation, purchase of stock, purchase or sale of assets, license or otherwise, or any Contract pursuant to which Seller has any material ownership interest in any other Person;

(xix) any Contract with any Governmental Entity or any Seller Authorization;

(xx) any confidentiality, secrecy or non-disclosure Contract other than any such Contract entered into with subscribers or customers in the ordinary course of business pursuant to Seller's standard unmodified form (a copy of which has been provided to counsel to Acquiror);

(xxi) any settlement agreement entered into within five years prior to the date hereof;

(xxii) any Contract pursuant to which rights of any third party are triggered or become exercisable, or under which any other consequence, result or effect arises, in connection with or as a result of the execution of this Agreement or the consummation of the Asset Purchase or other transactions contemplated hereunder, either alone or in combination with any other event; or

(xxiii) any other oral or written Contract or obligation not listed in clauses (i) through (xxii) that individually has a value in excess of $25,000 or is otherwise material to Seller or its respective business, operations, financial condition, properties or assets.

(b) All Material Contracts are in written form. Seller has performed all of the obligations required to be performed by it and is entitled to all benefits under, and to the knowledge of Seller and the Seller Shareholders, is not alleged to be in default in respect of, any Material Contract. Each of the Material Contracts is in full force and effect. There exists no default or event of default or event, occurrence, condition or act, with respect to Seller or to the knowledge of Seller and the Seller Shareholders, with respect to any other contracting party, which, with the giving of notice, the lapse of time or the happening of any other event or conditions, would reasonably be expected to (i) become a default or event of default under any Material Contract or (ii) give any third party (A) the right to declare a default or exercise any remedy under any Material Contract, (B) the right to accelerate the maturity or performance of any obligation of Seller under any Material Contract, or (C) the right to cancel, terminate or modify any Material Contract. Seller has not received any notice or other communication regarding any actual or possible violation or breach of, default under, or intention to cancel or modify any Material Contract. True, correct and complete copies of all Material Contracts have been provided to Acquiror or its counsel prior to the Agreement Date.

2.19 Customers and Suppliers.

(a) Seller has no outstanding material disputes concerning its products and/or services with any subscriber, customer or other third party, and Seller has no knowledge of any material dissatisfaction on the part of any subscriber, customer or other third party.

(b) Seller has no outstanding material dispute with any supplier or licensor of any content, musical compositions, software, or technology, and Seller has no knowledge of any material dissatisfaction on the part of any such supplier or licensor. Seller has received no written, or the knowledge of Seller, oral notice from any supplier or licensor that such supplier or licensor shall not continue as a supplier or licensor to the Business after the Closing or that such supplier or licensor intends to terminate or materially modify existing Contracts with Seller (or Acquiror).

2.20 Accounts Receivable. The accounts receivable of Seller have arisen in the ordinary course of business, consistent with past practices, represent bona fide claims against debtors for sales and other charges, and have been collected or are collectible in the book amounts thereof, less an amount not in excess of the allowance for doubtful accounts provided for in the Seller Balance Sheet. Allowances for doubtful accounts and warranty returns have been determined in accordance with GAAP consistently applied and in accordance with Seller's past practices. None of the accounts receivable of Seller is subject to any claim of offset, recoupment, setoff or counter-claim, and Seller has no knowledge of any specific facts or circumstances (whether asserted or unasserted) that could give rise to any such claim. No material amount of accounts receivable is contingent upon the performance by a Seller of any obligation or Contract. No Person has any lien on any of such accounts receivable, and no agreement for deduction or discount has been made with respect to any of such accounts receivable.

2.21 Inventory. The inventories shown on the Seller Balance Sheet (net of any reserve on the Seller Balance Sheet) or thereafter acquired by Seller, consisted of items of a quantity and quality usable or salable in the ordinary course of business consistent with past practice. Since the Seller Balance Sheet Date, Seller has continued to replenish inventories in a normal and customary manner consistent with past practices. Seller has received no written, or the knowledge of Seller and the Seller Shareholders, oral notice that it will experience in the foreseeable future any difficulty in obtaining, in the desired quantity and quality and at a reasonable price and upon reasonable terms and conditions, the raw materials, supplies or component products required for the manufacture, assembly or production of its products. The values at which inventories are carried reflect the inventory valuation policy of Seller, which is consistent with its past practices and in accordance with GAAP. Since the Seller Balance Sheet Date, due provision was made on the books of Seller in the ordinary course of business consistent with past practices to provide for all slow-moving, obsolete, or unusable inventories to their estimated useful or scrap values and such inventory reserves are adequate to provide for such slow-moving, obsolete or unusable inventory and inventory shrinkage. As of the date hereof, Seller has no commitments to purchase inventory. Section 2.21 of the Seller Disclosure Letter sets forth a list of the inventories of Seller as of November 13, 2005 and the value at which the inventories are carried.

2.22 Takeover Statutes. Seller and its Board of Directors and shareholders have taken all actions such that the restrictive provisions of any "fair price," "moratorium," "control share acquisition," "business combination," "interested shareholder" or other similar anti-takeover statute or regulation, and any anti-takeover provision in the governing documents of Seller will not be applicable to Seller, Acquiror, or to the execution, delivery of, or performance of the transactions contemplated by this Agreement, including the consummation of the Asset Purchase or any of the other transactions contemplated hereby or thereby.

2.23 Liabilities; Solvency. Seller is not now insolvent nor will Seller be rendered insolvent by this Agreement or the consummation of any other transaction contemplated hereby. As used in this Section 2.23, "insolvent" means that the sum of the present fair saleable value of the assets of an entity do not and will not exceed its debts and other probable Liabilities. Immediately after giving effect to the consummation of the Asset Purchase, (i) Seller will be able to pay its Liabilities as they become due in the usual course of business, (ii) Seller will not have unreasonably small capital with which to conduct its proposed business, and (iii) Seller will have assets (calculated at fair market value) that exceed Liabilities. The cash available to Seller, after taking into account all other anticipated uses of the cash, will be sufficient to pay all such Liabilities promptly in accordance with their terms. The Purchase Price constitutes reasonably equivalent value for the Purchased Assets, and the consummation of the Asset Purchase shall not constitute a fraudulent transfer or fraudulent conveyance under applicable laws relating to bankruptcy and insolvency. Seller has not, at any time, (i) made a general assignment for the benefit of creditors, (ii) filed, or had filed against it, any bankruptcy petition or similar filing, (iii) admitted in writing its inability to pay its debts as they become due, (iv) been convicted of, or pleaded guilty or no

contest to, any felony, or (v) taken or been the subject of any action that could reasonably be expected to have an adverse effect on its ability to comply with or perform any of its covenants or obligations under this Agreement or any of the Ancillary Agreements.

2.24 Third Party Consents. Section 2.24 of the Seller Disclosure Letter lists or describes all Assumed Contracts that may require a novation or consent to assignment, as the case may be, in connection with the Asset Purchase or any other transaction contemplated by this Agreement (Schedule 1.11(b)(x) lists each Assumed Contract that may require such a novation or consent to assignment that is material to the conduct of the Business and that provides for the grant of rights to Seller that would not be readily obtainable by Acquiror on substantially similar terms promptly following the Closing by execution of a new replacement contract between Acquiror and the other party to such Assumed Contract without Acquiror incurring liabilities, costs or expenses in excess of those provided to be paid or incurred by Seller under such Assumed Contract and/or granting rights to any such party that differ in any material respect to those granted by Seller in such Assumed Contract).

2.25 Seller Shareholder Authority; Ownership. Each Seller Shareholder has all requisite power, capacity and authority to enter into this Agreement and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement by the Seller Shareholders and the consummation of the transactions contemplated hereby have been duly authorized by all necessary action, if any, on the part of the Seller Shareholders. Each Seller Shareholder is the beneficial owner of all shares held by such Seller Shareholder (the "**Principal Seller Shares**") and no person other than such Seller Shareholder (or such Seller Shareholder's spouse for purposes of applicable community property laws) has a beneficial interest in or right to acquire or vote any of the Principal Seller Shares. The Principal Seller Shares are not subject to any Encumbrances.

2.26 Representations Complete. None of the representations or warranties made by Seller or the Seller Shareholders herein or in any exhibit or schedule hereto, including the Seller Disclosure Letter, or in any certificate furnished by Seller or the Seller Shareholders pursuant to this Agreement, when all such documents are read together in their entirety, contains or will contain at the Closing any untrue statement of a material fact, or omits or will omit at the Closing to state any material fact necessary in order to make the statements contained herein or therein, in the light of the circumstances under which made, not misleading.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF ACQUIROR

Acquiror represents and warrants to Seller as follows:

3.1 Organization and Standing. Acquiror is a corporation duly organized, validly existing and in good standing under the laws of Delaware. Acquiror is not in violation of any of the provisions of its Certificate of Incorporation, as applicable, or Bylaws.

3.2 Authority; Noncontravention.

(a) Acquiror has all requisite corporate power and authority to enter into this Agreement and the Acquiror Ancillary Agreements and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the Acquiror Ancillary Agreements and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate action on the part of Acquiror. This Agreement and the Acquiror Ancillary Agreements have been duly executed and delivered by Acquiror and, assuming due execution and

delivery by Seller, constitute the valid and binding obligation of Acquiror enforceable against Acquiror in accordance with their terms, subject only to the effect, if any, of (i) applicable bankruptcy and other similar laws affecting the rights of creditors generally and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies.

(b) The execution and delivery of this Agreement and the Acquiror Ancillary Agreements do not, and the consummation of the transactions contemplated hereby and thereby will not, conflict with, or result in any violation of, or default under (with or without notice or lapse of time, or both), or give rise to a right of termination, cancellation or acceleration of any obligation or loss of a benefit under (i) any provision of the Certificate of Incorporation or Bylaws of Acquiror, as amended to date, or (ii) any applicable Legal Requirement, except where such conflict, violation, default, termination, cancellation or acceleration, individually or in the aggregate, would not be material to Acquiror's ability to consummate the Asset Purchase or to perform its obligations under this Agreement and the Acquiror Ancillary Agreements.

(c) The execution and delivery of this Agreement and the Acquiror Ancillary Agreements by Acquiror does not, and the performance of this Agreement and the Acquiror Ancillary Agreement and the transactions contemplated hereby and thereby by Acquiror will not require any consent, approval, authorization or permit of, or filing with or notification to, any Governmental Entity with respect to Acquiror, or any other Person.

ARTICLE IV

CONDUCT PRIOR TO THE CLOSING

4.1 Conduct of Business of the Seller. During the period from the date hereof and continuing until the earlier of the termination of this Agreement and the Closing:

(a) Seller shall conduct its business in the usual, regular and ordinary course in substantially the same manner as heretofore conducted (except to the extent expressly provided otherwise in this Agreement or as consented to in writing by Acquiror);

(b) Seller shall (A) pay all of its debts and Taxes when due, subject to good faith disputes over such debts or Taxes, (B) pay or perform its other obligations when due, and (C) use its commercially reasonable efforts consistent with past practice and policies to preserve intact its present business organization, keep available the services of its present officers and key employees and preserve its relationships with customers, suppliers, distributors, licensors, licensees, and others having business dealings with it;

(c) Seller shall promptly notify Acquiror in writing of any (a) event occurring subsequent to the Agreement Date that would render any representation or warranty of Seller contained in this Agreement, if made on or as of the date of such event or the Closing Date, untrue or inaccurate in any material respect, (b) breach of any covenant or obligation of Seller pursuant to this Agreement or any Seller Ancillary Agreement, (c) change, occurrence or event that would cause any of the conditions set forth in Article VI to not be satisfied, or (d) any Material Adverse Effect with respect to Seller, the Business or the Purchased Assets;

(d) Seller shall use its commercially reasonable efforts to assure that each of its Contracts (other than with Acquiror) entered into after the date hereof will not require the procurement of any consent, waiver or novation for the assignment thereof as an Assumed Contract hereunder, or provide for any change in the obligations of any party in connection with, or terminate as a result of the

consummation of, the Asset Purchase, and shall give reasonable advance notice to Acquiror prior to allowing any Material Contract or right thereunder to lapse or terminate by its terms; and

(e) Seller shall maintain each of its leased premises in accordance with the terms of the applicable lease.

4.2 Restrictions on Conduct of Business of the Seller. Without limiting the generality or effect of the provisions of Section 4.1, during the period from the date hereof and continuing until the earlier of the termination of this Agreement and the Closing, Seller shall not do, cause or permit any of the following (except to the extent expressly provided otherwise in this Agreement or as consented to in writing by Acquiror):

(a) Articles of Incorporation. Cause or permit any amendments to its Articles of Incorporation or Bylaws or other governing documents;

(b) Dividends; Changes in Capital Stock. Declare or pay any dividends on or make any other distributions (whether in cash, stock or property) in respect of any of its capital stock other than the Permitted Distribution and the Share Repurchase, or split, combine or reclassify any of its capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock, or repurchase or otherwise acquire, directly or indirectly, any shares of its capital stock except from former employees, non-employee directors and consultants in accordance with agreements providing for the repurchase of shares in connection with any termination of service;

(c) Material Contracts. Enter into any Contract that would constitute (i) a Material Contract, (ii) other material Contract or (iii) a Contract requiring a novation or consent in connection with assignment thereof as an Assumed Contract hereunder, or violate, terminate, amend, or otherwise modify (including by entering into a new Contract with such party or otherwise) or waive any of the terms of any of its Material Contracts;

(d) Issuance of Securities. Issue, deliver or sell or authorize or propose the issuance, delivery or sale of, or purchase or propose the purchase of, any shares of its capital stock or securities convertible into, or subscriptions, rights, warrants or options to acquire, or other Contracts of any character obligating it to issue, any such shares or other convertible securities, other than the repurchase of any shares of Seller Capital Stock from former employees, non-employee directors and consultants in accordance with Contracts providing for the repurchase of shares in connection with any termination of service and other than the Share Repurchase;

(e) Employees; Consultants; Independent Contractors. Hire any additional officers or other employees, or any consultants or independent contractors, or enter into, or extend the term of, any employment or consulting agreement with any officer, employee, consultant or independent contractor, or enter into any Contract with a labor union or collective bargaining agreement (unless required by applicable Legal Requirements);

(f) Loans and Investments. Make any loans or advances (other than routine expense advances to employees of Seller consistent with past practice) to, or any investments in or capital contributions to, any Person or form any subsidiary, or forgive or discharge in whole or in part any outstanding loans or advances, or prepay any indebtedness for borrowed money;

(g) Intellectual Property. Transfer or license from any Person any rights to any Intellectual Property other than licenses of third-party content in the ordinary course of the Business

upon terms consistent with past practice, or transfer or license to any Person any rights to Seller IP Rights (other than non-exclusive licenses in connection with the sale of Seller Products in the ordinary course of business), or transfer or provide a copy of Seller Source Code to any Person (including any current or former employee or consultant of Seller or any contractor or commercial partner of Seller) (other than providing access to Seller Source Code to current employees and consultants of Seller involved in the development of the Seller Products on a need to know basis, consistent with past practices);

(h) Exclusive Rights and Most Favored Party Provisions. Enter into or amend any agreement pursuant to which any other party is granted exclusive rights or "most favored party" rights of any type or scope with respect to any Seller Products, technology, Intellectual Property or business, or containing any non-competition covenants or other restrictions relating to Seller's or Acquiror's business activities;

(i) Dispositions. Sell, lease, license or otherwise dispose of or encumber any of the Purchased Assets, other than sales and nonexclusive licenses of Seller Products in the ordinary course of business consistent with its past practice;

(j) Indebtedness. Incur any indebtedness for borrowed money or guarantee any such indebtedness or issue or sell any debt securities or guarantee any debt securities of others;

(k) Leases. Enter into any operating lease involving payments in excess of $25,000 or any leasing transaction of the type required to be capitalized in accordance with GAAP;

(l) Payment of Obligations. Pay, discharge or satisfy, (i) any amounts due under any promissory note issued by Seller to any Person who is an officer or director of Seller as of the date hereof, (ii) any amount in excess of $25,000 in any one case or $50,000 in the aggregate, or (iii) any claim or Liability arising otherwise than in the ordinary course of business consistent with Seller's past practices;

(m) Capital Expenditures. Make any capital expenditures, capital additions or capital improvements in excess of $10,000 individually or $50,000 in the aggregate;

(n) Termination or Waiver. Terminate or waive any right of substantial value;

(o) Employee Benefit Plans. Adopt or amend any employee or compensation benefit plan, including any stock issuance or stock option plan, or amend any compensation, benefit, entitlement, grant or award provided or made under any such plan, except in each case as required under ERISA or as necessary to maintain the qualified status of such plan under the Code or pay any special bonus or special remuneration to any employee or non-employee director or consultant (including the Leonard Bonus);

(p) Pay Increases. Increase the salaries, wage rates or fees of its employees or consultants (other than any increase of up to 10% of the salary of any employee ranking below the director level pursuant to preexisting plans, policies or Contracts which have been disclosed to Acquiror and are set forth on Section 4.2(o) of the Seller Disclosure Letter provided that the compensation of all employees in the aggregate shall not be increased by an amount in excess of 1% of the aggregate compensation of all employees as of Seller as of September 28, 2005), or add any new members to the Board of Directors of Seller;

(q) Severance Arrangements. Grant or pay, or enter into any Contract providing for the granting of any severance, bonuses, retention or termination pay to any Person (other than payments made pursuant to preexisting plans, policies or Contracts which have been disclosed to Acquiror and are set forth on Section 4.2(q) of the Seller Disclosure Letter);

(r) Lawsuits; Settlements. (i) Commence a lawsuit other than (A) for the routine collection of bills, (B) in such cases where Seller in good faith determines that failure to commence suit would result in the material impairment of a valuable aspect of the Business (provided that Seller consults with Acquiror prior to the filing of such a suit), or (C) for a breach of this Agreement or (ii) settle or agree to settle any pending or threatened lawsuit or other dispute, other than a settlement of, or an agreement to settle, any Seller Infringement Claim in the ordinary course of the Business consistent with past practices which provide for a settlement amount for each unauthorized download of a Ringtone not to exceed $0.13 and the aggregate amount of which settlement is reflected in the Seller Closing Liabilities to the extent not paid by the Closing;

(s) Acquisitions. Acquire or agree to acquire by merging or consolidating with, or by purchasing a substantial portion of the assets of, or by any other manner, any business or any corporation, partnership, association or other business organization or division thereof, or otherwise acquire or agree to acquire any assets which are material, individually or in the aggregate, to the Business, or enter into any Contract with respect to a joint venture, strategic alliance or partnership;

(t) Taxes. Make or change any election in respect of Taxes, adopt or change any accounting method in respect of Taxes, file any Tax Return or any amendment to a Tax Return, enter into any Tax sharing or similar agreement or closing agreement, settle any claim or assessment in respect of Taxes, or consent or any extension or waiver of the limitation period applicable to any claim or assessment in respect of Taxes;

(u) Accounting. Change accounting methods or revalue any of Seller's assets (including writing down the value of inventory or writing off notes or accounts receivable otherwise than in the ordinary course of business), except in each case as required by changes in GAAP as concurred with its independent accountants and after notice to Acquiror;

(v) Encumbrances. Place or allow the creation of any Encumbrance (other than a Permitted Encumbrance) on any of the Purchased Assets;

(w) Warranties, Discounts. Materially change the manner in which it extends warranties, discounts or credits to subscribers or other customers;

(x) Interested Party Transactions. Enter into any Contract in which any officer, director, employee, agent or shareholder of Seller (or any member of their immediate families) has an interest under circumstances that, if entered immediately prior to the date hereof, would require that such Contract be listed on Section 2.14 of the Seller Disclosure Letter;

(y) Actions. Take any action, or omit to take any action that would render any representation or warranty of Seller contained in this Agreement, if made on or as of the date of such action or omission or the Closing Date, untrue or inaccurate in any material respect.

(z) Other. Take or agree in writing or otherwise to take, any of the actions described in clauses (a) through (x) in this Section 4.2, or any action which would reasonably be expected to make any of Seller's representations or warranties contained in this Agreement untrue or incorrect (such that the condition set forth in the first sentence of Section 6.3(a) would not be satisfied)

or prevent Seller from performing or cause Seller not to perform one or more covenants required hereunder to be performed by Seller (such that the condition set forth in the second sentence of Section 6.3(a) would not be satisfied).

ARTICLE V

ADDITIONAL AGREEMENTS

5.1 Shareholder Approval and Board Recommendation

The Seller Shareholders shall not withdraw, amend or modify, or propose or resolve to withdraw, amend or modify in a manner adverse to Acquiror the Seller Shareholder Approval.

5.2 No Solicitation.

(a) From and after the Agreement Date until the Closing or termination of this Agreement pursuant to Article VII, neither Seller nor any Seller Shareholder will, nor will any of them authorize or permit any of their respective officers, directors, Affiliates, shareholders or employees or any investment banker, attorney or other advisor or representative retained by any of them (all of the foregoing collectively being the "**Seller Representatives**") to, directly or indirectly, (i) solicit, initiate, seek, entertain, knowingly encourage, knowingly facilitate, support or induce the making, submission or announcement of any inquiry, expression of interest, proposal or offer that constitutes, or would reasonably be expected to lead to, an Acquisition Proposal (as hereinafter defined), (ii) enter into, participate in, maintain or continue any communications (except solely to provide written notice as to the existence of these provisions) or negotiations regarding, or deliver or make available to any Person any non-public information with respect to, or take any other action regarding, any inquiry, expression of interest, proposal or offer that constitutes, or would reasonably be expected to lead to, an Acquisition Proposal, (iii) agree to, accept, approve, endorse or recommend (or publicly propose or announce any intention or desire to agree to, accept, approve, endorse or recommend) any Acquisition Proposal, (iv) enter into any letter of intent, term sheet, memorandum of understanding or any other Contract contemplating or otherwise relating to any Acquisition Proposal, or (v) submit any Acquisition Proposal to the vote of any securityholders of Seller. Seller will immediately cease and cause to be terminated any and all existing activities, discussions or negotiations with any Persons conducted prior to or on the Agreement Date with respect to any Acquisition Proposal. If any Seller Representative, whether in his or her capacity as such or in any other capacity, takes any action that Seller or the Seller Shareholders are obligated pursuant to this Section 5.2 to cause Seller Representative not to take, then Seller and the Seller Shareholders shall be deemed for all purposes of this Agreement to have breached this Section 5.2.

"**Acquisition Proposal**" shall mean, with respect to Seller, any agreement, offer, proposal or bona fide indication of interest (other than this Agreement or any other offer, proposal or indication of interest by Acquiror), or any public announcement of intention to enter into any such agreement or of (or intention to make) any offer, proposal or bona fide indication of interest, relating to, or involving: (A) any acquisition or purchase from Seller, or from the shareholders of Seller, by any Person or Group (as hereinafter defined) of more than a 10% interest in the total outstanding voting securities of Seller or any tender offer or exchange offer that if consummated would result in any Person or Group beneficially owning 10% or more of the total outstanding voting securities of Seller or any merger, consolidation, business combination or similar transaction involving Seller; (B) any sale, lease, mortgage, pledge, exchange, transfer, license (other than in the ordinary course of business), acquisition, or disposition of more than 10% of the assets of Seller in any single transaction or series of related

transactions; or (C) any liquidation, dissolution, recapitalization or other significant corporate reorganization of Seller, or any extraordinary dividend, whether of cash or other property.

"**Group**" shall have the definition ascribed to such term under Section 13(d) of the Exchange Act, the rules and regulations thereunder and related case law.

(b) Seller or a Seller Shareholder, as applicable, shall immediately notify Acquiror orally and in writing after receipt by Seller or such Seller Shareholder (or, to the knowledge of Seller and the Seller Shareholders or such Seller Shareholder, by any of the Seller Representatives), of (i) any Acquisition Proposal, (ii) any inquiry, expression of interest, proposal or offer that constitutes, or would reasonably be expected to lead to, an Acquisition Proposal, (iii) any other notice that any Person is considering making an Acquisition Proposal, or (iv) any request for nonpublic information relating to Seller or for access to any of the properties, books or records of Seller by any Person or Persons other than Acquiror. Such notice shall describe (1) the material terms and conditions of such Acquisition Proposal, inquiry, expression of interest, proposal, offer, notice or request, and (2) the identity of the Person or Group making any such Acquisition Proposal, inquiry, expression of interest, proposal, offer, notice or request. Seller shall keep Acquiror fully informed of the status and details of, and any modification to, any such inquiry, expression of interest, proposal or offer and any correspondence or communications related thereto and shall provide to Acquiror a true, correct and complete copy of such inquiry, expression of interest, proposal or offer and any amendments, correspondence and communications related thereto, if it is in writing, or a reasonable written summary thereof, if it is not in writing. Seller shall provide Acquiror with 48 hours prior notice (or such lesser prior notice as is provided to the members of the Board of Directors of Seller) of any meeting of the Board of Directors of Seller at which the Board of Directors of Seller is reasonably expected to discuss any Acquisition Proposal.

5.3 Confidentiality; Public Disclosure.

(a) The parties hereto acknowledge that VantagePoint and Seller have previously executed a confidentiality agreement dated September 26, 2005 (the "**Confidentiality Agreement**") which shall continue in full force and effect in accordance with its terms. Acquiror hereby agrees to be bound by all obligations of VantagePoint under the Confidentiality Agreement as if Acquiror were an original party thereto. The parties hereto acknowledge that the Disclosure Letter shall be provided subject to the Confidentiality Agreement provided that a copy of the disclosure letter may be provided to any Affiliate, employee, officer, director, agent, consultant or advisor of Acquiror or VantagePoint, or to any other party with whom Acquiror or VantagePoint proposes to enter into any strategic relationship, who, in each case, is informed by Acquiror or VantagePoint, as applicable, of the confidential nature of the information contained in the Disclosure Letter and either (1) has entered into a written agreement with Acquiror, VantagePoint or any of their Affiliates, as applicable, obligating such person to protect the confidentiality of such information to at least the same extent provided for in the Confidentiality Agreement, (2) agrees to be bound by the terms of the Confidentiality Agreement, or (3) is otherwise bound by a statutory or common law duty of confidentiality with respect to the information contained in the Disclosure Letter.

(b) Neither Seller nor any Seller Shareholder shall cause the Seller Representatives to, directly or indirectly, issue any press release or other public statement relating to the terms of this Agreement or the transactions contemplated hereby or use Acquiror's name or refer to Acquiror directly or indirectly in connection with Acquiror's relationship with Seller in any media interview, advertisement, news release, press release or professional or trade publication, or in any print media, whether or not in response to an inquiry, without the prior written approval of Acquiror, unless required by law (in which event a satisfactory opinion of counsel to that effect shall be first delivered to Acquiror

prior to any such disclosure) and except as reasonably necessary for Seller to obtain the consents and approvals of shareholders and other third parties contemplated by this Agreement. Notwithstanding anything herein or in the Confidentiality Agreement, Acquiror may issue such press releases or make such other public statements regarding this Agreement or the transactions contemplated hereby as Acquiror may, in its reasonable discretion, determine.

5.4 Regulatory Approvals.

(a) Seller shall promptly execute and file, or join in the execution and filing of, any application, notification or other document that may be necessary in order to obtain the authorization, approval or consent of any Governmental Entity, whether federal, state, local or foreign, which may be reasonably required, or which Acquiror may reasonably request, in connection with the consummation of the Asset Purchase and the other transactions contemplated by this Agreement. Seller shall use commercially reasonable efforts to obtain, and to cooperate with Acquiror to promptly obtain, all such authorizations, approvals and consents and shall pay any associated filing fees payable by Seller with respect to such authorizations, approvals and consents. Seller shall promptly inform Acquiror of any material communication between Seller and any Governmental Entity regarding any of the transactions contemplated hereby. If a Seller or any Affiliate of Seller receives any formal or informal request for supplemental information or documentary material from any Governmental Entity with respect to the transactions contemplated hereby, then Seller shall make, or cause to be made, as soon as reasonably practicable, a response in compliance with such request. Seller shall direct, in its sole discretion, the making of such response, but shall consider in good faith the views of Acquiror.

(b) Acquiror shall promptly execute and file, or join in the execution and filing of, any application, notification (or other document that may be necessary in order to obtain the authorization, approval or consent of any Governmental Entity, whether foreign, federal, state, local or municipal, which may be reasonably required in connection with the consummation of the Asset Purchase and the other transactions contemplated by this Agreement. Acquiror shall use commercially reasonable efforts to obtain all such authorizations, approvals and consents and shall pay any associated filing fees payable by Acquiror with respect to such authorizations, approvals and consents. Acquiror shall promptly inform Seller of any material communication between Acquiror and any Governmental Entity regarding any of the transactions contemplated hereby. If Acquiror or any Affiliate of Acquiror receives any formal or informal request for supplemental information or documentary material from any Governmental Entity with respect to the transactions contemplated hereby, then Acquiror shall make, or cause to be made, as soon as reasonably practicable, a response in compliance with such request. Acquiror shall direct, in its sole discretion, the making of such response, but shall consider in good faith the views of Seller.

(c) Notwithstanding anything in this Agreement to the contrary, if any administrative or judicial action or proceeding is instituted (or threatened to be instituted) challenging any transaction contemplated by this Agreement as violative of any applicable federal, state or foreign statutes, rules, regulations, orders or decrees that are designed to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade, it is expressly understood and agreed that: (i) Acquiror shall not have any obligation to litigate or contest any administrative or judicial action or proceeding or any decree, judgment, injunction or other order, whether temporary, preliminary or permanent; and (ii) Acquiror shall be under no obligation to make proposals, execute or carry out agreements or submit to orders providing for (1) the sale, license or other disposition or holding separate (through the establishment of a trust or otherwise) of any assets or categories of assets of Acquiror or any of its Affiliates or any Purchased Assets, (2) the imposition of any limitation or regulation on the ability of Acquiror or any of its Affiliates to freely conduct their business or own such assets, or (3) the holding separate of the Purchased Assets or any limitation or regulation on the ability of Acquiror or any

of its Affiliates to exercise full rights of ownership with respect to the Purchased Assets (any of the foregoing, an "**Antitrust Restraint**").

5.5 Reasonable Efforts. Subject to the limitations set forth in Section 5.4, each of the parties hereto agrees to use its commercially reasonable efforts, and to cooperate with each other party hereto, to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, appropriate or desirable to consummate and make effective, in the most expeditious manner practicable, the Asset Purchase and the other transactions contemplated hereby, including the satisfaction of the respective conditions set forth in Article VI, and including the execution and delivery of such other instruments and the performance of such other acts and things as may be necessary or reasonably desirable for effecting completely the consummation of the Asset Purchase and the other transactions contemplated hereby.

5.6 Third Party Consents; Notices. Seller shall use its commercially reasonable efforts to obtain as promptly as possible, and deliver to Acquiror at or prior to the Closing, all consents, waivers and approvals from third parties necessary to effect the assignment and transfer to Acquiror of good and marketable title to all of the Purchased Assets free and clear of all Encumbrances other than Permitted Encumbrances, including all consents, waivers and approvals under each Contract, if any, listed or described on Section 2.3(b) and Section 2.3(c) of the Seller Disclosure Letter; provided, however, that Seller shall not be required to incur any expenses in connection with obtaining consents, waivers or approvals under such Contracts, except for postage expenses and Seller's attorneys' fees.

5.7 Litigation. Seller will (i) notify Acquiror in writing promptly after learning of any action, suit, arbitration, mediation, proceeding, claim, or investigation by or before any Governmental Entity or arbitrator initiated by or against Seller, or known by Seller to be threatened against Seller or any of its directors, officers, employees or shareholders in their capacity as such (a "**New Litigation Claim**"), (ii) notify Acquiror of ongoing material developments in any New Litigation Claim, and (iii) consult in good faith with Acquiror regarding the conduct of the defense of any New Litigation Claim.

5.8 Access to Information.

(a) During the period commencing on the date hereof and continuing until the earlier of the termination of this Agreement and the Closing, (i) Seller shall afford Acquiror and its accountants, counsel and other representatives, reasonable access during business hours to (A) all of Seller's properties, books, Contracts and records and (B) all other information concerning the business, properties and personnel of Seller as Acquiror may reasonably request, and (ii) Seller shall provide to Acquiror and its accountants, counsel and other representatives true, correct and complete copies of Seller's (A) internal financial statements and (B) Tax Returns, Tax elections and all other records and work papers relating to Taxes and receipts for any Taxes paid to Tax Authorities.

(b) Subject to compliance with applicable Legal Requirements, from the date hereof until the earlier of the termination of this Agreement and the Closing, Seller shall confer from time to time as requested by Acquiror with one or more representatives of Acquiror to discuss any material changes or developments in the operational matters of Seller and the general status of the ongoing operations of Seller.

(c) No information or knowledge obtained in any investigation pursuant to this Section 5.8 shall affect or be deemed to modify any representation or warranty contained herein or the conditions to the obligations of the parties hereto to consummate the Asset Purchase.

5.9 Expenses. Whether or not the Asset Purchase is consummated, all costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby (including Seller

Transaction Expenses) shall be paid by the party incurring such expense. Seller shall discharge the Seller Transaction Expenses, the Leonard Bonus and the Additional Employee Bonuses from the proceeds of the transactions contemplated by this Agreement. To the extent that Seller discharges any Seller Transaction Expenses or pays the Leonard Bonus, or any portion thereof, prior to the Closing (collectively, "**Paid Transaction Expenses**"), the amount of such Paid Transaction Expenses will be deducted from the Purchase Price and if not so deducted shall constitute Acquiror Indemnifiable Damages for purposes of Article VIII without regard to the Acquiror Threshold. Notwithstanding anything herein to the contrary, the parties acknowledge and agree that Acquiror shall have no obligation to pay any Seller Transaction Expenses.

5.10 Employees; Employee Benefits.

(a) At or prior to the Closing, Acquiror shall offer employment to all employees and contractors employed or engaged by Seller as of the Closing Date except for Leonard (in each case such offer of employment or consultancy being contingent upon the Closing). Acquiror shall offer such employment at the same yearly salary or hourly rate, as applicable, that such employee or contractor receives from Seller as set forth on Schedule 5.10(a). Hereinafter, for purposes of this Section 5.10, employees or contractors of Seller that accept employment with Acquiror (or an Affiliate of Acquiror) as of the Closing Date pursuant to this Section 5.10 shall be referred to as "**Transferred Employees**". Effective as of the Closing Date, each employee or contractor of Seller shall have his or her employment or consultancy, as applicable, with Seller terminate as of the Closing Date. Seller agrees to use its reasonable best efforts to (i) retain its employees and contractors as of the Agreement Date through the Closing Date, and (ii) assist Acquiror in securing the employment or engagement of such employees and contractors on the Closing Date.

(b) Seller hereby consents to the hiring of such employees and contractors by Acquiror and waives, with respect to the employment or engagement by Acquiror of such employee or contractor, any claims or rights Seller may have against Acquiror or any such employee or contractor under any non-competition, confidentiality or employment agreement or consulting agreement to the extent such employees or contractors will perform services for Acquiror (or an Affiliate of Acquiror). Any employee or contractor of Seller who does not become a Transferred Employee shall be terminated by Seller effective upon the Closing.

(c) Notwithstanding anything in this Agreement to the contrary, prior to the Closing Date, Seller shall be permitted to make bonus payments to its employees and contractors (other than to the Seller Shareholders) up to an aggregate amount not exceeding $186,000 ("**Seller Employee Bonus Payments**"). In the event Seller does not make all Seller Employee Bonus Payments to all employees or contractors who are to receive such bonus prior to the Closing Date, Acquiror shall make such Employee Bonus Payments to Seller's former employees and contractors on or before January 31, 2006, regardless of whether such employees or contractors are Transferred Employees, provided that the aggregate amount of such unpaid Employee Bonus Payments, together with all applicable employer taxes payable with respect to such Employee Bonus Payments, are reflected as Seller Closing Liabilities on the Closing Financial Certificate. In such case, Seller shall advise Acquiror in writing of the names of those former employees and contractors of Seller (whether or not Transferred Employees) who are eligible to receive Seller Employee Bonus Payments from Acquiror and the amount to be received by each such former employee or contractor

(d) Seller shall be responsible for paying any withholding or employment taxes with respect to any of the Transferred Employees that accrue or become payable during the period of such person's employment or service with Seller or arise out of the termination of such person's employment or service with Seller, and shall be responsible for filing all employment Tax returns with respect to such

Transferred Employees attributable to periods of employment or service with Seller; provided, however, that Seller shall be entitled to retain an amount of Seller's cash assets equal to the sum of the accrued payroll of Seller with respect to the last pay period that occurs immediately prior to the Closing and accrued but unpaid employer taxes payable by Seller with respect to the employment of any Transferred Employee for any period through the Closing.

(e) Subject to the provisions of Section 1.5, Seller shall be liable for any and all damages, expenses, claims, Contracts, suits, and other Liabilities of any nature whatsoever, directly or indirectly, with respect to: (i) any of Seller's obligations under this Section 5.10; (ii) the employment or termination of employment of any current or future employee or contractor of Seller, including without limitation Transferred Employees, whether in connection with the transactions contemplated hereby or otherwise; (iii) any claims of discrimination under applicable Legal Requirements provided such claims arise from such employee's employment or service with, or termination by, Seller; (iv) any other Liabilities arising out of the terms and conditions of employment (including under any employment agreement with Seller) of any person by Seller or associated with the Business, whether for salary, wages, bonuses, profit sharing, commissions, severance, vacation pay, sick pay, wrongful termination or otherwise; (v) any duties or Liabilities of Seller or administrators under any existing or future Employee Plans or any employment agreement of Seller or other employee benefit plans of Seller or under WARN or FSLA with respect to any actions taken by Seller or COBRA; or (vi) any present or future Liabilities of Seller to prior, existing or future employees of Seller, whether or not specifically described in this Section 5.10. Seller shall be responsible for and pay any liability for severance payments to any employee of Seller, including Transferred Employees, that accrues or becomes payable during the period of such employee's employment or service with Seller or arise out of the termination of such person's employment with Seller.

(f) Seller shall pay to the Transferred Employees employed by it any Liability for salary, wages, bonuses, profit sharing, commissions, severance, accrued vacation, sick leave or similar benefits with respect to such Transferred Employee attributable to periods of employment or service of such Transferred Employee with Seller and shall make such payment within the statutory time period therefor but in no event later than ten days after such Transferred Employee's employment with Seller is terminated; provided, however, that Seller shall be entitled to retain an amount of Seller's cash assets as of the Closing equal to sum of the accrued payroll of Seller with respect to the last pay period that occurs immediately prior to the Closing, all accrued but unpaid employer taxes payable by Seller with respect to the employment of any Transferred Employee for any period through the Closing and all accrued vacation benefits payable to the Transferred Employees upon termination of their employment with Seller as of the Closing and provided further, however, that notwithstanding the foregoing, in the event that Seller obtains the written consent of the Transferred Employee to the transfer of any accrued vacation benefit of such Transferred Employee to Acquiror and such accrued vacation benefit is reflected as a Seller Closing Liability on the Closing Financial Certificate, Acquiror shall assume the Liability with respect to such accrued vacation benefit.

(g) The parties hereby acknowledge that nothing in this Agreement shall confer any rights or remedies on any of Seller's employees or contractors and no person shall be a third party beneficiary with respect to any provision in this Section 5.10.

5.11 Payment of Taxes. Seller shall, to the extent that failure to do so could adversely affect or result in any Encumbrance on the Purchased Assets or otherwise result in Acquiror having any liability for payment of any amount, (i) continue to file all Tax Returns within the time period for filing, and such Tax Returns shall be true, correct and complete in all material respects, (ii) pay when due any and all Taxes attributable to or levied or imposed upon the Purchased Assets for periods (or portions thereof) through and including the Closing Date.

5.12 Noncompetition. As a material inducement and consideration for Acquiror to enter into this Agreement, Seller agrees that from and after and subject to the occurrence of the Closing until three years following the Closing Date (the "**Noncompetition Period**"), Seller shall not, within any jurisdiction in the world, own, operate, advise, assist or lend funds to or invest funds in any Person in any manner that would aid or assist any Person to compete, in any material respect, with the Business or any substantially similar business (the "**Restricted Business**"). During the Noncompetition Period, Seller further agrees not to, directly or indirectly, interfere with, disrupt or attempt to disrupt the relationship between Acquiror or any of its Affiliates and any third party, including any subscriber, customer, vendor, collaborator, supplier or employee of Acquiror or any of its Affiliates, with respect to the Restricted Business. The parties hereto agree that the duration and geographic scope of the noncompetition provisions set forth in this Section are reasonable. If any covenant in this Section is held to be invalid, illegal or unenforceable by any court of competent jurisdiction or any other Governmental Entity, it is agreed and understood that such covenant will not be voided but rather will be construed to impose limitations upon the activities of Seller that are no greater than allowable under then applicable laws.

5.13 Certain Closing Certificates and Documents. Seller shall prepare and in good faith deliver to Acquiror, a draft of the Closing Financial Certificate not later than three (3) Business Days prior to the Closing Date. Seller shall prepare and deliver to Acquiror at or prior to the Closing the final form of the Closing Financial Certificate. Without limiting the generality or effect of the foregoing, Seller shall provide to Acquiror, promptly after Acquiror's request, copies of the documents or instruments evidencing the amounts set forth on any such draft or final certificate.

5.14 Post-Closing Audits and Governmental Inquiries. Seller shall be responsible for responding to any audits, compliance reviews or other inquiries or actions if any Governmental Entity related to the conduct of the Business prior to and through the Closing Date.

5.15 No Post-Closing Retention of Copies. Immediately after the Closing, Seller shall deliver to Acquiror or destroy copies of Purchased Assets in Seller's possession that are in addition to copies delivered to Acquiror as part of the transfer, whether such copies are in paper form, on computer media or stored in another form. Notwithstanding the foregoing, Seller may retain, on a confidential basis, one copy of the business, accounting and financial records and analyses pertaining to the operation of the Business solely for Seller's use for tax reporting purposes or in connection with the defense or settlement by Seller or the Seller Shareholders of any claims against Seller. In the event that Seller intends to share all or a portion of such records with a third party, Seller shall obtain written consent from Acquiror, which consent shall not be unreasonably withheld.

5.16 Use of Names and Trademarks. From and after the Closing Date, Seller shall cease to use the name "3GUpload.com" or any similar name and the trademark CELLULARSKIN. Promptly following the Closing, the Seller Shareholders shall cause the corporate name of Seller to be changed to a name other than 3GUpload.com or any derivative thereof.

5.17 Employee Bonus Program. In connection with the consummation of the Asset Purchase, a portion of the Purchase Price in an aggregate amount equal to $100,000 shall be used by Seller to pay bonuses and related employment taxes to certain Transferred Employees (other than the Seller Shareholders) (the "**Additional Employee Bonuses**"), which bonus payments will be made by Seller to such Transferred Employees immediately following the Closing. Prior to the Closing Date, the Seller Shareholders will determine, in consultation with and subject to the approval of Acquiror, those Transferred Employees who are eligible to receive an Additional Employee Bonus and the amount of the Additional Employee Bonus to be received by such Transferred Employee.

5.18 Tax Cooperation. Seller agrees to provide all reasonable assistance to, and to cooperate with, Acquiror from and after the Closing Date in connection with any and all matters which may rise with respect to Tax documents or any Tax issues related to the Purchased Assets.

5.19 Acquiror Funding. Upon the satisfaction or waiver of each of the conditions set forth in Sections 6.1 and 6.3, VantagePoint shall provide Acquiror with sufficient funds to pay the Purchase Price to Seller. VantagePoint represents and warrants to Seller and the Seller Shareholders that it has sufficient available assets to provide such funding.

5.20 Restrictions on Asset Transfers. In the event that Acquiror enters into any merger, consolidation, corporate reorganization or similar transaction with, or sells or otherwise transfers all or substantially all of its assets to, any controlled Affiliate of VantagePoint (a "**VPVP Affiliate**"), VantagePoint shall cause such VPVP Affiliate to assume all obligations of Acquiror under this Agreement (with the same effect as if such VPVP Affiliate were the Acquiror herein) and the Acquiror shall continue to be remain liable for all of such obligations.

5.21 Survival of Covenants. Each of the covenants set forth in this Article V shall survive the Closing.

ARTICLE VI

CONDITIONS TO THE ASSET PURCHASE

6.1 Conditions to Obligations of Acquiror and Seller to Effect the Asset Purchase. The respective obligations of each party hereto to consummate the transactions contemplated hereby shall be subject to the satisfaction at or prior to the Closing of each of the following conditions:

(a) Seller Shareholder Approval. The Asset Purchase shall have been duly and validly approved and shall not have been rescinded and this Agreement shall have been duly and validly adopted, as required by all applicable Legal Requirements, and Seller's Articles of Incorporation, each as in effect on the date of such approval and adoption, by the requisite approval of the Seller Shareholders.

(b) No Injunctions or Restraints; Illegality. No temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal or regulatory restraint or prohibition preventing the consummation of the Asset Purchase shall be in effect, nor shall any action have been taken by any Governmental Entity seeking any of the foregoing, and no Legal Requirements shall have been enacted, entered, enforced or deemed applicable to the Asset Purchase, which makes the consummation of the Asset Purchase illegal.

(c) Governmental Approvals. Acquiror and Seller shall have timely obtained from each Governmental Entity all approvals, clearances, waivers and consents, if any, necessary for consummation of, or in connection with, the Asset Purchase and the other transactions contemplated hereby.

6.2 Additional Conditions to Obligations of the Seller. The obligations of Seller to consummate the transactions contemplated hereby shall be subject to the satisfaction at or prior to the Closing of each of the following conditions (it being understood that each such condition is solely for the benefit of Seller and may be waived by Seller in writing in its sole discretion without notice, liability or obligation to any Person):

(a) Representations, Warranties and Covenants. The representations and warranties of Acquiror in this Agreement shall be true and correct in all material respects (except for such representations and warranties that are qualified by their terms by a reference to materiality or Material Adverse Effect, which representations and warranties as so qualified shall be true and correct in all respects) on and as of the date hereof and on and as of the Closing Date as though such representations and warranties were made on and as of such date (except for representations and warranties which address matters only as to a specified date, which representations and warranties shall be true and correct with respect to such specified date). Acquiror shall have (i) paid to Seller the Purchase Price (less the Escrow Cash which shall have been paid to the Escrow Agent) at the Closing and (ii) performed and complied in all material respects with all other covenants, obligations and conditions of this Agreement required to be performed and complied with by it at or prior to the Closing.

(b) Receipt of Closing Deliveries. Seller shall have received each of the agreements, instruments and other documents set forth in Section 1.11(a).

6.3 Additional Conditions to the Obligations of Acquiror. The obligations of Acquiror to consummate the transactions contemplated hereby shall be subject to the satisfaction at or prior to the Closing of each of the following conditions (it being understood that each such condition is solely for the benefit of Acquiror and may be waived by Acquiror in writing in its sole discretion without notice, liability or obligation to any Person):

(a) Representations, Warranties and Covenants. The representations and warranties of Seller and the Seller Shareholders in this Agreement shall be true and correct in all material respects (except for such representations and warranties that are qualified by their terms by a reference to materiality or a Material Adverse Effect, which representations and warranties as so qualified shall be true and correct in all respects) on and as of the date hereof and on and as of the Closing Date as though such representations and warranties were made on and as of such date (except for representations and warranties which address matters only as to a specified date, which representations and warranties shall be true and correct with respect to such specified date). Seller and the Seller Shareholders shall have performed and complied in all material respects with all covenants, obligations and conditions of this Agreement required to be performed and complied with by Seller or such Seller Shareholders at or prior to the Closing.

(b) Receipt of Closing Deliveries. Acquiror shall have received each of the agreements, instruments and other documents set forth in Section 1.11(b); provided, however, that such receipt shall not be deemed to be an agreement by Acquiror that the Closing Financial Certificate or any of the other agreements, instruments or documents set forth in Section 1.11(b) is accurate and shall not diminish Acquiror's remedies hereunder if any of the foregoing documents is not accurate.

(c) Injunctions or Restraints on Conduct of Business. No temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal or regulatory restraint provision limiting or restricting Acquiror's ownership, conduct or operation of the Business, following the Closing shall be in effect, nor shall there be pending or threatened any suit, action or proceeding seeking (i) any of the foregoing or any other Antitrust Restraint or (ii) material damages in connection with the Asset Purchase.

(d) Third Party Consents. Seller shall have obtained and delivered to Acquiror duly executed copies of all consents, waivers and approvals from third parties necessary to effect the assignment and transfer to Acquiror of good and marketable title to those Contracts set forth in Schedule 1.11(b)(x) hereto.

(e) No Material Adverse Effect. During the period from the Seller Balance Sheet until the Closing Date, there shall not have occurred a Material Adverse Effect with respect to Seller.

(f) No Encumbrances. All Encumbrances (except for Permitted Encumbrances) with respect to the Purchased Assets shall have been released, or commitments to do shall have been obtained in writing from the Person with authority to release any such Encumbrance.

(g) Employees. (i) The Seller Shareholders shall have remained continuously employed with Seller from the date of this Agreement through the Closing and shall have signed each of the documents set forth in Recital D, and no action shall have been taken by any such individual to rescind any such document; (ii) Scrofano shall have remained continuously employed with Seller from the date of this Agreement through the Closing and shall have become a Transferred Employee; and (iii) no fewer than a number equal to 70% of the other employees of Seller shall have become Transferred Employees.

ARTICLE VII

TERMINATION, AMENDMENT AND WAIVER

7.1 Termination. At any time prior to the Closing, this Agreement may be terminated and the Asset Purchase abandoned by authorized action taken by the terminating party, whether before or after the Seller Shareholder Approval:

(a) by mutual written consent duly authorized by Seller's Board of Directors and the Board of Directors of Acquiror (or a duly authorized committee thereof);

(b) by either Acquiror or Seller, if the Closing shall not have occurred on or before 60 days after the Agreement Date or such other date that Acquiror and Seller may agree upon in writing (the "**Termination Date**"); provided, however, that the right to terminate this Agreement under this clause (b) of Section 7.1 shall not be available to any party whose breach of this Agreement has resulted in the failure of the Closing to occur on or before the Termination Date;

(c) by either Acquiror or Seller, if any permanent injunction or other order of a Governmental Entity of competent authority preventing the consummation of the Asset Purchase shall have become final and nonappealable;

(d) by Acquiror, if (i) Seller or any of the Seller Shareholders shall have breached any representation, warranty, covenant or agreement contained herein and (A) such breach shall not have been cured within five Business Days after receipt by Seller and the Seller Shareholders of written notice of such breach (provided, however, that no such cure period shall be available or applicable to any such breach which by its nature cannot be cured) and (B) if not cured within the timeframe in clause (A) above and at or prior to the Closing, such breach would result in the failure of any of the conditions set forth in Section 6.1 or Section 6.3 to be satisfied, (ii) Seller shall have breached Section 5.1 or Section 5.2, or (iii) there shall have been a Material Adverse Effect with respect to Seller or with respect to the Business or the Purchased Assets which has not been cured within five Business Days after receipt by Seller and the Seller Shareholders of written notice of such Material Adverse Effect (provided, however, that no such cure period shall be available or applicable to any such Material Adverse Effect which by its nature cannot be cured); or

(e) by Seller, if Acquiror or VantagePoint, as applicable, shall have breached any representation, warranty, covenant or agreement contained herein and (i) such breach shall not have been

cured within five Business Days after receipt by Acquiror of written notice of such breach (provided, however, that no such cure period shall be available or applicable to any such breach which by its nature cannot be cured) and (ii) if not cured within the timeframe in clause (i) above and at or prior to the Closing, such breach would result in the failure of any of the conditions set forth in Section 6.1 or Section 6.2 to be satisfied.

7.2 Effect of Termination. In the event of termination of this Agreement as provided in Section 7.1, this Agreement shall forthwith become void and there shall be no liability or obligation on the part of Acquiror, Seller or their respective officers, directors, shareholders or Affiliates; provided, however, that (a) the provisions of this Section 7.2 (Effect of Termination), Article IX (General Provisions) and the Confidentiality Agreement shall remain in full force and effect and survive any termination of this Agreement and (b) nothing herein shall relieve any party hereto from liability in connection with any willful breach of any of such party's representations, warranties or covenants contained herein.

7.3 Amendment. Subject to the provisions of applicable Legal Requirements, the parties hereto may amend this Agreement by authorized action at any time before or after the Seller Shareholder Approval pursuant to an instrument in writing signed on behalf of each of the parties hereto (provided that after such approval, no amendment shall be made which by law required further approval by such shareholders without such further shareholder approval). To the extent permitted by applicable Legal Requirements, Acquiror and the Shareholders' Agent may cause this Agreement to be amended at any time after the Closing by execution of an instrument in writing signed on behalf of Acquiror and the Shareholders' Agent.

7.4 Extension; Waiver. At any time prior to the Closing, any party hereto may, to the extent legally allowed, (a) extend the time for the performance of any of the obligations or other acts of the other parties hereto, (b) waive any inaccuracies in the representations and warranties made to such party contained herein or in any document delivered pursuant hereto, and (c) waive compliance with any of the agreements or conditions for the benefit of such party contained herein. At any time after the Closing, the Shareholders' Agent and Acquiror may, to the extent legally allowed, (i) extend the time for the performance of any of the obligations or other acts of the other, (ii) waive any inaccuracies in the representations and warranties made to such party contained herein or in any document delivered pursuant hereto, and (iii) waive compliance with any of the agreements or conditions for the benefit of such Person contained herein. Any agreement on the part of a party hereto or the Shareholders' Agent to any such extension or waiver shall be valid only if set forth in an instrument in writing signed on behalf of such party. Without limiting the generality or effect of the preceding sentence, no delay in exercising any right under this Agreement shall constitute a waiver of such right, and no waiver of any breach or default shall be deemed a waiver of any other breach or default of the same or any other provision in this Agreement.

ARTICLE VIII

ESCROW FUND AND INDEMNIFICATION

8.1 Escrow Fund. All Escrow Cash shall be deposited with Greater Bay Trust Company (or another institution selected by Acquiror and reasonably satisfactory to Seller) as escrow agent (the "**Escrow Agent**"), such deposit, together with all accrued interest thereon, to constitute an escrow fund (the "**Escrow Fund**") and to be governed by the provisions set forth herein and in the Escrow Agreement. The Escrow Fund shall be available to compensate Acquiror (on behalf of itself or any other Acquiror Indemnified Person (as such term is defined in Section 8.2 below)) for Acquiror Indemnifiable Damages (as such term is defined in Section 8.2 below) pursuant to the indemnification obligations of Seller and the Seller Shareholders and as security for certain other obligations of the Seller Shareholders.

8.2 Indemnification. Subject to the limitations set forth in this Article VIII, Seller and the Seller Shareholders shall indemnify and hold harmless Acquiror and its officers, directors, agents and employees, and each person, if any, who controls or may control Acquiror within the meaning of the Securities Act (each of the foregoing being referred to individually as an "**Acquiror Indemnified Person**" and collectively as "**Acquiror Indemnified Persons**") from and against any and all losses, liabilities, reductions in value, damages, costs and expenses, including costs of investigation and defense and reasonable fees and expenses of lawyers, experts and other professionals, that are not in any such case actually reimbursed to the Acquiror Indemnified Persons from insurance proceeds or other third-party sources (collectively, "**Acquiror Indemnifiable Damages**"), directly or indirectly arising out of, resulting from or in connection with (i) any failure of any representation or warranty made by Seller or any Seller Shareholder in this Agreement or the Seller Disclosure Letter (including any exhibit or schedule to the Seller Disclosure Letter) to be true and correct as of the Agreement Date and as of the Closing Date as though such representation or warranty were made as of the Closing Date (except in the case of representations and warranties which by their terms speak only as of a specific date or dates), (ii) any failure of any certification, representation or warranty made by Seller or any Seller Shareholder in any certificate (other than the Closing Financial Certificate) delivered to Acquiror pursuant to any provision of this Agreement to be true and correct as of the date such certificate is delivered to Acquiror, (iii) any breach of or default in connection with any of the covenants or agreements made by Seller or any Seller Shareholder in this Agreement (other than the covenants of Seller in Section 5.11) or the Seller Disclosure Letter (including any exhibit or schedule to the Seller Disclosure Letter), (iv) any breach of or default in connection with any of the covenants of Seller in Section 5.12 (Noncompetition), (v) subject to the provisions of Section 1.5, any Excluded Liabilities, including any amounts with respect to Excluded Liabilities that Acquiror is required to pay pursuant to Section 1.5, (vi) any liability of Seller or the Seller Shareholders for Content Infringement Claim Damages pursuant to Section 1.6, (vii) any Paid Transaction Expenses to the extent not deducted from the Purchase Price at the Closing, (viii) any inaccuracies in the Closing Financial Certificate, and/or (ix) any noncompliance with any bulk sales, bulk transfer or similar laws applicable to the transactions contemplated hereby, provided, however, that notwithstanding the foregoing, the term "Acquiror Indemnifiable Damages" shall not include any of the foregoing that Acquiror has expressly agreed to pay pursuant to the provisions of Section 1.4, Section 1.5 or Section 1.6. In determining the amount of any Acquiror Indemnifiable Damages in respect of the failure of any representation or warranty to be true and correct as of any particular date, any materiality standard or qualification contained in such representation or warranty shall be disregarded.

8.3 Acquiror Indemnifiable Damage Threshold; Other Limitations.

(a) Notwithstanding anything contained herein to the contrary, no Acquiror Indemnified Person may make a claim for any cash from the Escrow Fund in respect of any claim for indemnification that is made pursuant to clauses (i) – (iii) of the first sentence of Section 8.2 (and that does not involve fraud, willful breach or intentional misrepresentation by Seller or any Seller Shareholder), unless and until Acquiror Indemnifiable Damages in an aggregate amount greater than $100,000 (the "**Acquiror Threshold**") have been incurred, paid or accrued, in which case the Acquiror Indemnified Person may make claims for indemnification and may receive cash from the Escrow Fund for all Acquiror Indemnifiable Damages (including the amount of the Acquiror Threshold) and the Acquiror Threshold shall not apply to any Acquiror Indemnifiable Damages identified in subsequent claims.

(b) If the Asset Purchase is consummated, recovery from the Escrow Fund shall be the sole and exclusive remedy under this Agreement for the matters listed in clauses (i) – (iii) of the first sentence of Section 8.2, except in the case of fraud, willful breach or intentional misrepresentation by Seller or by any Seller Shareholder.

8.4 Period for Claims Against Escrow Fund. The period during which claims for Acquiror Indemnifiable Damages may be made (the "**Claims Period**") against the Escrow Fund shall commence at the Closing and terminate on the date that is one (1) year following the Closing Date (the "**Escrow Period**"). Notwithstanding anything contained herein to the contrary, such portion of the Escrow Fund at the conclusion of the Claims Period as in the reasonable judgment of Acquiror may be necessary to satisfy any unresolved or unsatisfied existing claims for Acquiror Indemnifiable Damages specified in any Officer's Certificate (as defined in Section 8.5), or any unresolved claims with respect to a Forfeiture Event Certificate (as defined in Section 8.9), delivered to the Escrow Agent prior to expiration of the Claims Period shall remain in the Escrow Fund until such claims have been resolved or satisfied. The remainder of the Escrow Fund, if any, shall be paid to Seller, or if a dissolution or liquidation of Seller has occurred, if applicable, to the liquidator or other duly appointed representative of Seller charged with the dissolution or liquidation of Seller for distribution in accordance with the applicable Legal Requirements.

8.5 Claims Upon Escrow Fund.

(a) On or before the last day of the Escrow Period, Acquiror may deliver to the Escrow Agent and to the Shareholders' Agent a certificate signed by any officer of Acquiror (an "**Officer's Certificate**"):

(i) stating that an Acquiror Indemnified Person has incurred, paid or accrued or reasonably anticipates that it may incur, pay or accrue, Acquiror Indemnifiable Damages;

(ii) stating the amount of such Acquiror Indemnifiable Damages (which, in the case of Acquiror Indemnifiable Damages not yet incurred, paid or accrued, may be the maximum amount reasonably anticipated to be incurred, paid or accrued); and

(iii) specifying in reasonable detail (based upon the information then possessed by Acquiror) the individual items of such Acquiror Indemnifiable Damages included in the amount so stated and the nature of the claim to which such Acquiror Indemnifiable Damages are related.

A copy of each Officer's Certificate shall be provided to Barnes & Thornburg LLP, Seller's counsel ("**B & T**") in accordance with Section 9.2. No delay in providing such Officer's Certificate within the Escrow Period shall affect an Acquiror Indemnified Person's rights hereunder, unless (and then only to the extent that) Seller or the Seller Shareholders are materially prejudiced thereby.

(b) At the time of delivery of any Officer's Certificate to the Escrow Agent, and for a period of thirty (30) days after such delivery to the Escrow Agent of such Officer's Certificate, the Escrow Agent shall make no payment pursuant to this Section 8.5 unless the Escrow Agent shall have received written authorization from the Shareholders' Agent to make such delivery. After the expiration of such 30-day period, the Escrow Agent shall make delivery of cash held in the Escrow Fund having a value equal to such Acquiror Indemnifiable Damages from the Escrow Fund to Acquiror in accordance with this Section 8.5; provided, however, that no such delivery may be made if and to the extent the Shareholders' Agent shall object in a written statement to any claim or claims made in the Officer's Certificate, and such statement shall have been delivered to the Escrow Agent and to Acquiror prior to the expiration of such 30-day period.

8.6 Resolution of Objections to Claims.

(a) If the Shareholders' Agent objects in writing to any claim or claims by Acquiror made in any Officer's Certificate within such 30-day period, Acquiror and the Shareholders' Agent shall

attempt in good faith for twenty (20) days after Acquiror's receipt of such written objection to resolve such objection. If Acquiror and the Shareholders' Agent shall so agree, a memorandum setting forth such agreement shall be prepared and signed by both parties and delivered to the Escrow Agent. The Escrow Agent shall be entitled to conclusively rely on any such memorandum and the Escrow Agent shall distribute Escrow Cash from the Escrow Fund in accordance with the terms of such memorandum.

(b) If no such agreement can be reached during the 20-day period for good faith negotiation, but in any event upon the expiration of such 20-day period, either Acquiror or the Shareholders' Agent may submit the dispute to mandatory, final and binding arbitration to be held in the City and County of San Francisco in the State of California unless otherwise agreed by Acquiror and the Shareholders' Agent. The dispute shall be resolved in accordance with Section 9.9 below and the decision of the arbitrator as to the validity and amount of any claim in the relevant Officer's Certificate shall be nonappealable, binding and conclusive upon the parties to this Agreement and the Escrow Agent shall distribute Escrow Cash from the Escrow Fund in accordance with the terms of such arbitration decision.

8.7 Shareholders' Agent.

(a) At the Closing, Michael L. Slate shall be constituted and appointed as the Shareholders' Agent. For purposes of this Agreement, the term "**Shareholders' Agent**" shall mean the agent for and on behalf of Seller and the Seller Shareholders to: (i) give and receive notices and communications to or from Acquiror (on behalf of itself or any other Acquiror Indemnified Person) relating to this Agreement or any of the transactions and other matters contemplated hereby or thereby (except to the extent that this Agreement expressly contemplates that any such notice or communication shall be given or received by such shareholders individually); (ii) authorize deliveries to Acquiror of cash from the Escrow Fund in satisfaction of claims asserted by Acquiror (on behalf of itself or any other Acquiror Indemnified Person, including by not objecting to such claims); (iii) object to such claims pursuant to Section 8.5 or Section 8.9, as applicable; (iv) consent or agree to, negotiate, enter into settlements and compromises of, and comply with orders of courts with respect to, such claims; (v) consent or agree to any amendment to this Agreement, and (vi) take all actions necessary or appropriate in the judgment of the Shareholders' Agent for the accomplishment of the foregoing, in each case without having to seek or obtain the consent of any Person under any circumstance. The Person serving as the Shareholders' Agent may be replaced from time to time by the Seller Shareholders. No bond shall be required of the Shareholders' Agent, and the Shareholders' Agent shall receive no compensation for his services.

(b) The Shareholders' Agent shall not be liable to Seller or any holder of Seller Capital Stock for any act done or omitted hereunder as the Shareholders' Agent while acting in good faith (and any act done or omitted pursuant to the advice of counsel shall be conclusive evidence of such good faith) and without gross negligence or willful misconduct. Seller (or the Seller Shareholders, in the event that Seller has made any distribution after the Closing Date) shall indemnify the Shareholders' Agent and hold him harmless against any loss, liability or expense incurred without gross negligence, willful misconduct or bad faith on the part of the Shareholders' Agent and arising out of or in connection with the acceptance or administration of his duties hereunder, including any out-of-pocket costs and expenses and legal fees and other legal costs reasonably incurred by the Shareholders' Agent. If not paid directly to the Shareholders' Agent by Seller or the Seller Shareholders, such losses, liabilities or expenses may be recovered by the Shareholders' Agent from Escrow Cash otherwise payable to Seller hereunder (and not paid or payable to an Acquiror Indemnified Person or subject to a pending indemnification claim of an Acquiror Indemnified Person) upon release (if any) of the Escrow Fund, or any portion thereof following the one year anniversary of the Closing Date pursuant to the terms hereof

and any such recovery from each Seller Shareholder shall be in accordance with such Seller Shareholders Pro Rata Share.

(c) Any notice or communication given or received by, and any decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction of, the Shareholders' Agent that is within the scope of the Shareholders' Agent's authority under Section 8.7(a) shall constitute a notice or communication to or by, or a decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction of Seller and the Seller Shareholders and shall be final, binding and conclusive upon Seller and each such Seller Shareholder; and each Acquiror Indemnified Person shall be entitled to rely upon any such notice, communication, decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction as being a notice or communication to or by, or a decision, action, failure to act within a designated period of time, agreement, consent, settlement, resolution or instruction of, Seller and each such Seller Shareholder.

8.8 Third-Party Claims Against Acquiror Indemnified Persons. In the event Acquiror becomes aware of a third-party claim which Acquiror believes may result in a claim against the Escrow Fund by or on behalf of an Acquiror Indemnified Person, Acquiror shall promptly notify the Shareholders' Agent and B & T of such third-party claim. Acquiror shall have the right in its sole discretion to conduct the defense of and to settle any such claim (and the costs and expenses incurred by Acquiror in connection with such defense or settlement (including reasonable attorneys' fees, other professionals' and experts' fees and court or arbitration costs) shall be included in the Acquiror Indemnifiable Damages for which Acquiror may seek indemnification pursuant to a claim made hereunder). The Shareholders' Agent shall have the right to receive copies of all pleadings, notices and communications with respect to the third-party claim to the extent that receipt of such documents does not affect any privilege relating to any Acquiror Indemnified Person and shall be entitled, at its expense, to participate in, but not to determine or conduct, any defense of the third-party claim or settlement negotiations with respect to the third-party claim. However, except with the consent of the Shareholders' Agent, which consent shall not be unreasonably withheld, conditioned or delayed and which shall be deemed to have been given unless the Shareholders' Agent shall have objected within 15 days after a written request for such consent by Acquiror, no settlement of any such claim with any third-party claimant shall be determinative of the existence of or amount of Acquiror Indemnifiable Damages relating to such matter. In the event that the Shareholders' Agent has consented to any such settlement, neither the Shareholders' Agent, Seller nor any Seller Shareholder shall have any power or authority to object under Section 8.5 or any other provision of this Article VIII to the amount of any claim by or on behalf of any Acquiror Indemnified Person against the Escrow Fund for indemnity with respect to such settlement.

8.9 Forfeiture of Escrow Fund.

(a) In the event that (i) any Seller Shareholder voluntarily terminates his employment with Acquiror, or any Affiliate of Acquiror, as applicable (the "**Acquiror Employer**") for any reason other than "Good Reason" (as defined below) prior to the one year anniversary of the Closing, or (ii) such Seller Shareholder's employment with the Acquiror Employer is terminated for "Cause" (as defined below) prior to the one year anniversary of the Closing, or (iii) any Seller Shareholder fails to materially perform his obligations under, or otherwise materially breaches any provision of, the Invention Assignment Agreement or the Noncompetition Agreement between the Acquiror Employer and such Seller Shareholder, which failure or material breach has not been cured within 10 Business Days after such Seller Shareholder receives written notice of such failure or breach (provided however that no such cure period shall be available or applicable to any such failure or breach which by its nature cannot be cured) (any of such events described in subclauses (i), (ii), or (iii) being referred to herein as a "**Forfeiture Event**"), (A) upon any Forfeiture Event described in subclause (i) or (ii) above, a portion of

the Escrow Fund up to a maximum amount of $1,000,000 then held by the Escrow Agent, shall be forfeited by Seller and paid to Acquiror in an amount equal to the Seller Shareholder's Pro Rata Share of such amount with respect to the Seller Shareholder whose employment has terminated, and (B) upon any Forfeiture Event described in subclause (iii) above, the Escrow Fund in its entirety shall be forfeited by Seller and paid to Acquirer. Forfeiture of any portion of the Escrow Fund shall not be in lieu of damages in excess of such amount incurred in the event of breach by any Seller Shareholder of his Employment Agreement, Invention Assignment Agreement or the Noncompetition Agreement.

(b) A termination of a Seller Shareholder for "**Cause**" under this Section 8.9 means a termination for any of the following reasons: (i) such Seller Shareholder's continued material failure to perform his duties to the Acquiror Employer after there has been delivered to such Seller Shareholder a written demand for performance which describes the specific material deficiencies in performance and the specific manner in which such Seller Shareholder's performance must be improved and which provides twenty (20) Business Days from the date of the demand to remedy such performance deficiencies; (ii) such Seller Shareholder engaging in an act of willful misconduct that has had or will have a material adverse effect on Acquiror's or the Acquiror Employer's reputation or business; (iii) such Seller Shareholder being convicted of, or pleading no contest to, a felony; (iv) such Seller Shareholder committing an act of fraud against, or willful misappropriation of property belonging to, Acquiror or the Acquiror Employer; or (v) such Seller Shareholder's material breach of the Employment Agreement, the Noncompetition Agreement, the Invention Assignment Agreement which has not been cured within ten (10) Business Days after such Seller Shareholder receives written notice of such breach (provided however that no such cure period shall be available or applicable to any such breach which by its nature cannot be cured).

(c) A termination by a Seller Shareholder for "Good Reason" under this Section 8.9 means a termination for any of the following reasons: (i) nonpayment of any sums due to the Seller Shareholder which is not cured within ten (10) Business Days after written notice thereof is given to the Acquiror, or a material breach by the Acquiror of any of the other terms of an applicable employment agreement, which breach is not cured or rectified, if such breach is curable or rectifiable, within ten (10) Business Days after the Acquiror receives written notice of such breach from the Seller Shareholder; (ii) any material reduction of the Seller Shareholder's annual base salary (other than in connection with the implementation by Acquiror of an equivalent percentage reduction in the annual base salaries of all employees of Acquiror); (iii) requiring the Seller Shareholder to relocate his place of residence or to establish an additional place of residence; or (iv) if the Acquiror becomes bankrupt or discontinues its business operations (other than in connection with a reorganization, transfer or assumption of operations or other similar transaction in which such business operations are transferred to an Affiliate of Acquiror).

(d) If Acquiror wishes to assert that a Forfeiture Event has occurred for the purposes of this Section 8.9, Acquiror shall deliver to the Escrow Agent and to Shareholders' Agent a certificate signed by any officer of Acquiror stating that a Forfeiture Event has occurred and specifying the date of occurrence and the nature of the Forfeiture Event (a "**Forfeiture Event Certificate**"), including, if applicable, the portion of the Escrow Cash subject to forfeiture, and shall provided a copy of such Forfeiture Event Certificate to B&T in accordance with Section 9.2. At the time of delivery of any Forfeiture Event Certificate to the Escrow Agent, and after such delivery to the Escrow Agent, the Escrow Agent shall make no payment pursuant to this Section 8.9 unless the Escrow Agent shall have received written authorization from the Shareholders' Agent to make such delivery. After the expiration of a period of thirty (30) days from the date of delivery of any Forfeiture Event Certificate to the Escrow Agent, the Escrow Agent shall make delivery of all remaining cash held in the Escrow Fund, up to that portion of the Escrow Fund to be forfeited as provided in Section 8.9(a), to Acquiror unless the Shareholders' Agent shall have disputed the existence of a Forfeiture Event in a written statement

delivered to the Escrow Agent and to Acquiror prior to the expiration of such 30-day period. Any such dispute shall be resolved pursuant to the provisions of Section 8.6 in the same manner as disputes with respect to Acquiror's indemnification claims hereunder.

8.10 Indemnification of Seller and Seller Shareholders.

(a) Subject to the applicable limitations set forth in this Article VIII, (1) Acquiror shall indemnify and hold harmless Seller and the Seller Shareholders (each of the foregoing being referred to individually as a "**Seller Indemnified Person**" and collectively as "**Seller Indemnified Persons**"), from and against any and all losses, liabilities, reductions in value, damages, costs and expenses, including costs of investigation and defense and reasonable fees and expenses of lawyers, experts and other professionals (collectively, "**Seller Indemnifiable Damages**") directly or indirectly arising out of, resulting from or in connection with (i) any failure of any representation or warranty made by Acquiror in this Agreement to be true and correct as of the Agreement Date and as of the Closing Date as though such representation or warranty were made as of the Closing Date (except in the case of representations and warranties which by their terms speak only as of a specific date or dates), (ii) any failure of any certification, representation or warranty made by Acquiror in any certificate delivered to Seller and/or the Seller Shareholders pursuant to any provision of this Agreement to be true and correct as of the date such certificate is delivered to Acquiror, (iii) any breach of or default in connection with any of the covenants or agreements made by Acquiror in this Agreement, and (iv) any Assumed Liabilities or other amounts Acquiror has agreed to pay or indemnify Seller and the Seller Shareholders pursuant to Sections 1.4, 1.5 and 1.6, and (2) VantagePoint shall indemnify and hold harmless the Seller Indemnified Persons from and against any and all Seller Indemnifiable Damages directly or indirectly arising out of, resulting from or in connection with any breach of or default in connection with any of the covenants or agreements made by VantagePoint in this Agreement. In determining the amount of any Seller Indemnifiable Damages in respect of the failure of any representation or warranty of Acquiror to be true and correct as of any particular date, any materiality standard or qualification contained in such representation or warranty shall be disregarded. The indemnification provisions in Section 8.10 shall be the exclusive remedy of Seller and the Seller Shareholders for the recovery by them of Seller Indemnifiable Damages.

(b) A claim for indemnification under this Section 8.10 shall be asserted by a Seller Indemnified Person by written notice to Acquiror or VantagePoint, as applicable, describing the basis for and, to the extent known, the amount of the claim. If Acquiror does not pay the claim and objects in a written statement to the claim during the thirty (30) day period after receipt of the claim by Acquiror or VantagePoint, as applicable, the Seller Indemnified Person and Acquiror or VantagePoint, as applicable, shall attempt in good faith for twenty (20) days after the Seller Indemnified Person's receipt of such written objection to resolve such claim. If Acquiror or VantagePoint, as applicable, and the Seller Indemnified Person resolve the claim, a memorandum setting forth such agreement shall be prepared and signed by both parties and Acquiror or VantagePoint, as applicable, shall pay such amount, if any, as is provided therein.

(c) If, during the 20-day period for good faith negotiation, but in any event upon the expiration of such 20-day period, no such agreement can be reached, either Acquiror or VantagePoint, as applicable, or the Seller Indemnified Person may thereafter submit the claim to mandatory, final and binding arbitration to be held in the City and County of San Francisco in the State of California unless otherwise agreed by Acquiror or VantagePoint, as applicable, and the Shareholders' Agent. The claim shall be resolved in accordance with Section 9.9 below and the decision of the arbitrator as to the validity and amount of any claim in the relevant claim notice shall be nonappealable, binding and conclusive upon the parties to this Agreement.

8.11 Third-Party Claims Against Seller Indemnified Persons. In the event Seller becomes aware of a third-party claim which Seller or any of the Seller Shareholders believes may result in a claim by or on behalf of a Seller Indemnified Person, Seller or any of the Seller Shareholders shall promptly notify Acquiror or VantagePoint, as applicable, of such third-party claim. Acquiror or VantagePoint, as applicable, shall have the right, at its expense, to participate in or assume control of the negotiation, settlement or defense of such third-party claim. If Acquiror or VantagePoint, as applicable, elects to assume such control, the Seller Indemnified Persons shall have the right to participate in, but not control, the negotiation, settlement or defense of such third party claim and to retain counsel to act on its behalf at its sole cost and expense. If Acquiror or VantagePoint, as applicable, does not elect to assume such control, Acquiror or VantagePoint, as applicable, shall have the right to participate in, but not control, the negotiation, settlement or defense of such third party claim and to retain counsel to act on its behalf at its sole cost and expense. The party who is not in control of the defense of such third-party claim shall be entitled to receive copies of all pleadings, notices and communications with respect to the third-party claim to the extent that receipt of such documents does not affect any privilege of the other party. The Seller Indemnified Person shall not settle a claim or demand for which it seeks or may seek to be indemnified by Acquiror or VantagePoint, as applicable, without the prior written consent of Acquiror or VantagePoint, as applicable, which consent will not be unreasonably withheld or delayed and which consent shall be deemed to have been given unless Acquiror or VantagePoint, as applicable, shall have objected within 15 days after a written request for such consent by the Seller Indemnified Person. If Acquiror, or VantagePoint, as applicable, having elected to assume control of such defense, thereafter fails to defend such third party claim within a reasonable time, the Seller Indemnified Person shall be entitled to assume control of such defense, subject to the right of the Acquiror or VantagePoint, as applicable, at any time to re-assume control of the defense, and the amount of any such third party claim (so long as it is a claim or demand in respect of which indemnification is available hereunder) or, if the same be contested by the Seller Indemnified Person, then that portion thereof as to which such defense is unsuccessful (and the reasonable costs and expenses pertaining to such defense) shall be the liability of Acquiror or VantagePoint, as applicable, hereunder. Neither the Acquiror, nor VantagePoint, as applicable, shall settle any third-party claim without the prior written consent of the Shareholder's Agent (which consent shall not be unreasonably withheld, conditioned or delayed), unless such settlement includes an unconditional release of the Seller Indemnified Person.

8.12 Seller Infringement Claims.

(a) Notwithstanding anything in this Agreement to the contrary, all Seller Infringement Claims, whether asserted against Seller or Acquiror, shall be subject to this Section 8.12.

(b) In the event either Shareholders' Agent, Seller or any Seller Shareholder, on the one hand, or Acquiror, on the other hand, becomes aware of a Seller Infringement Claim, such party shall promptly notify the other party in writing of such claim. Acquiror shall control the negotiation, settlement or defense of such Seller Infringement Claim and shall keep the Shareholders' Agent reasonably informed as to the status of the Seller Infringement Claim. The Shareholders' Agent shall have the right to receive copies of all pleadings, notices and communications with respect to the Seller Infringement Claim to the extent that receipt of such documents does not affect any privilege of Acquiror.

(c) Acquiror shall have authority to settle, on behalf of itself and/or Seller and/or the Seller Shareholders, any Seller Infringement Claim if the settlement amount with respect to such Seller Infringement Claim does not exceed an amount equal to the number of allegedly infringing downloads of Ringtones multiplied by $0.13 for each such alleged infringing download of a Ringtone (the "**Ringtone Infringement Threshold**"), provided that the same settlement terms are applied to that portion of any allegedly infringing activity of Acquiror relating to such Ringtones alleged to have

occurred in the conduct of the Business following the Closing ("**Post-Closing Infringement**"). Acquiror shall obtain the prior written consent of the Shareholders' Agent, which consent shall not be unreasonably withheld, conditioned or delayed , with respect to the settlement of any Seller Infringement Claim for which Seller or the Seller Shareholders are to directly or indirectly bear the expense thereof pursuant to Section 1.6 for an amount exceeding the Ringtone Infringement Threshold with respect to each alleged infringing download of a Ringtone. In the event that a Seller Infringement Claim is settled by Acquiror in accordance with this Section 8.12(c), the Seller and the Seller Shareholders shall promptly pay the Content Infringement Claim Damages that such parties are required to bear liability for under Section 1.6 with respect to such settlement, including all fees and expenses of Acquiror, Seller and the Seller Shareholders incurred in relation to the settlement (or such Content Infringement Claim Damages shall be deducted by Acquiror from the Escrow Fund as contemplated by Section 1.6(c)(ii)).

(d) Acquiror and/or Seller, as applicable, shall use reasonable commercial efforts to ensure that all settlements entered into under this Section 8.12 fully release the allegedly infringing party, whether Seller or Acquiror or both, from any and all liability with respect to its use of the Ringtones that are the subject of the settled Seller Infringement Claim.

ARTICLE IX

GENERAL PROVISIONS

9.1 Survival of Representations and Warranties. If the Asset Purchase is consummated, the representations and warranties of the parties hereto contained in this Agreement, the Seller Disclosure Letter (including any exhibit or schedule to the Seller Disclosure Letter), and the other certificates contemplated hereby shall survive the Closing and remain in full force and effect, regardless of any investigation or disclosure made by or on behalf of any of the parties to this Agreement, until the date that is one year following the Closing Date; provided, however, that no right to indemnification pursuant to Article VIII in respect of any claim based upon any misrepresentation or breach of a representation or warranty that is set forth in an Officer's Certificate delivered to the Escrow Agent prior to the expiration of the Escrow Period shall be affected by the expiration of such representations and warranties; and provided, further, that such expiration shall not affect the rights of any Acquiror Indemnified Person or Seller Indemnified Person, as applicable, under Article VIII or otherwise to seek recovery of Acquiror Indemnifiable Damages or Seller Indemnifiable Damages, as applicable, arising out of any fraud, willful breach or intentional misrepresentation by a party hereto until the expiration of the applicable statute of limitations.

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

(i) if to Acquiror, to:

VantagePoint Mobile, Inc.
c/o VantagePoint Venture Partners
1001 Bayhill Drive, Suite 300
San Bruno, California 94066
Attention: General Counsel
Facsimile No.: (650)-869-6078
Telephone No.: (650) 866-3100
with a copy (which shall not constitute notice) to:

Fenwick & West LLP
275 Battery Street
San Francisco, CA 94111
Attention: Mark Stevens, Esq.
Lynda Twomey, Esq.
Facsimile No.: (415) 281-1350
Telephone No.: (415) 875-2300

(ii) if to Seller prior to the Closing, to:

3GUpload.com, Inc.
3020 North Post Road, Suite D
Indianapolis, IN 46226
Attention: Michael L. Slate, President
Facsimile No.: (317) 472-4977
Telephone No.: (317) 472-4963

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

Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, IN 46204
Attention: David B. Millard, Esq.
Facsimile No.: (317) 231-7433
Telephone No.: (317) 231-7803

(iii) If to the Shareholders' Agent or to Seller after the Closing, to:

Michael L. Slate
10428 Starboard Way
Indianapolis, IN 46256
Telephone No.: (317) 414-8972

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

Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, IN 46204
Attention: David B. Millard, Esq.
Facsimile No.: (317) 231-7433
Telephone No.: (317) 231-7803

9.3 Interpretation. When a reference is made in this Agreement to Articles, Sections or Exhibits, such reference shall be to an Article or Section of, or an Exhibit to this Agreement unless otherwise indicated. The headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. The words "include," "includes" and "including" when used herein shall be deemed in each case to be followed by the words "without limitation." The phrases "provided to," "furnished to," and phrases of similar import when used herein, unless the context otherwise requires, shall mean that a true, correct and complete paper copy of the information or material referred to has been provided to the party to whom such information or material is to be provided. Unless the context of this Agreement otherwise requires: (i) words of any gender include

each other gender; (ii) words using the singular or plural number also include the plural or singular number, respectively; and (iii) the terms "hereof," "herein," "hereunder" and derivative or similar words refer to this entire Agreement.

9.4 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same instrument and shall become effective when one or more counterparts have been signed by each of the parties hereto and delivered to the other parties hereto; it being understood that all parties hereto need not sign the same counterpart.

9.5 Entire Agreement; Nonassignability; Parties in Interest. This Agreement and the documents and instruments and other agreements specifically referred to herein or delivered pursuant hereto, including all the exhibits attached hereto, the schedules, including the Seller Disclosure Letter, (a) constitute the entire agreement among the parties hereto with respect to the subject matter hereof and supersede all prior agreements and understandings, both written and oral, among the parties hereto with respect to the subject matter hereof (including that certain letter of Intent between VantagePoint, Seller and the Seller Shareholders dated as of September 28, 2005), except for the Confidentiality Agreement, which shall continue in full force and effect, and shall survive any termination of this Agreement, in accordance with its terms, (b) are not intended to confer, and shall not be construed as conferring, upon any Person other than the parties hereto any rights or remedies hereunder (except that Article VIII is intended to benefit Acquiror Indemnified Persons and Seller Indemnified Persons, as applicable) and (c) shall not be assigned by operation of law or otherwise except as otherwise specifically provided herein.

9.6 Assignment. Neither this Agreement nor any of the rights, interests or obligations under this Agreement may be assigned or delegated, in whole or in part, by operation of law or otherwise by any of the parties hereto without the prior written consent of the other parties hereto, and any such assignment without such prior written consent shall be null and void, except that, subject to Section 5.20, Acquiror may assign this Agreement to any Affiliate of Acquiror or VantagePoint without the prior consent of Seller. Subject to the preceding sentence, this Agreement shall be binding upon, inure to the benefit of, and be enforceable by, the parties hereto and their respective successors and assigns.

9.7 Severability. In the event that any provision of this Agreement, or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void or unenforceable, the remainder of this Agreement shall continue in full force and effect and shall be interpreted so as reasonably to effect the intent of the parties hereto. The parties hereto shall use all reasonable efforts to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that shall achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision.

9.8 Remedies Cumulative. Except as otherwise provided herein, any and all remedies herein expressly conferred upon a party hereto shall be deemed cumulative with and not exclusive of any other remedy conferred hereby, or by law or equity upon such party, and the exercise by a party hereto of any one remedy shall not preclude the exercise of any other remedy and nothing in this Agreement shall be deemed a waiver by any party of any right to specific performance or injunctive relief.

9.9 Governing Law; Arbitration. This Agreement shall be governed by and construed in accordance with the laws of the State of California without reference to such state's principles of conflicts of law. Except as otherwise expressly provided herein, the following binding dispute resolution procedure shall be the exclusive means used by the parties to resolve all disputes, differences, controversies and claims arising out of or relating to this Agreement, the Seller Ancillary Agreements to be executed in connection with this Agreement or the transactions contemplated by this Agreement and

such Seller Ancillary Agreements (collectively, "**Disputes**"). Any party may, by written notice to the other party, refer any Disputes for resolution in the manner set forth below in this Section 9.9. Affiliates of the parties are also intended beneficiaries of and may enforce this dispute resolution procedure. Any Disputes shall be referred to arbitration under the Comprehensive Arbitration Rules & Procedures of Judicial Arbitration & Mediation Services/EnDispute (or its successor) (referred to herein as "**J.A.M.S.**" or the "**Arbitration Administrator**"), as such rules shall be in effect on the Closing Date, except to the extent that such rules are inconsistent with this Section 9.9, in which case this Section 9.9 shall govern. Unless otherwise mutually agreed to by the parties to a Dispute, the place of arbitration shall be San Francisco, California.

(a) Selection of Arbitrator. The parties to a Dispute shall agree on a single arbitrator (the "**Arbitrator**"). The Arbitrator shall be selected by the parties from a roster of arbitrators provided by the Arbitration Administrator. If the parties cannot agree on an Arbitrator within seven (7) days of delivery of the demand for arbitration ("**Demand**") (or such other time period as the parties may agree), the Arbitration Administrator shall deliver a roster of ten names to the parties. Within seven (7) calendar days of service upon the parties of the list of names, each party may strike three (3) names and shall rank the remaining seven (7) arbitrator candidates in order of preference, from least to most preferred. The Arbitration Administrator will then appoint the remaining candidate with the highest composite ranking as the Arbitrator, or, in the event of a tie, the Arbitration Administrator will select an Arbitrator from among the tied candidates. The Arbitrator who will be compensated for his or her services at a rate to be determined by the parties or by J.A.M.S., but based upon reasonable hourly or daily consulting rates for the Arbitrator in the event the parties are not able to agree upon his or her rate of compensation.

(b) Applicable Rules and Procedures. The Federal Arbitration Act shall govern the arbitrability of all Disputes, and the Rules of the Arbitration Administrator shall, to the extent not inconsistent with this Agreement, govern the conduct of the arbitration. To the extent that the Federal Arbitration Act and Rules do not provide an applicable procedure, California law shall govern the procedures for arbitration and enforcement of an award, and then only to the extent not inconsistent with the terms of this Section 9.9. Disputes between the parties shall be subject to arbitration notwithstanding that a party to this Agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.

(c) Discovery. Unless otherwise mutually agreed to by the parties to a Dispute, each party shall allow and participate in discovery as follows:

(i) Expert Disclosure. If scientific, technical, or other specialized knowledge will assist the Arbitrator, each party may select a single witness who is retained or specially employed to provide such expert testimony. In addition, each party may select an additional retained or specially employed expert witness to testify with respect to damages issues, if any. Expert discovery shall consist of the following: (1) the parties shall exchange complete reports on all information to be provided by the expert(s) at the hearing no later than thirty (30) days before the first day of the hearing; (2) the parties shall depose the other party's experts; (3) the parties shall produce complete rebuttal reports, if any, no later than ten (10) days before the first day of the hearing; and (4) the parties shall be required to produce any and all documents reviewed by their expert(s) in performing work relating to the arbitration.

(ii) Additional Discovery. The Arbitrator may, on application by either party, authorize additional discovery. In the event that remote witnesses might otherwise be unable to attend the arbitration, arrangements shall be made to allow their live testimony by video conference during the arbitration hearing.

(d) Burden of Proof. For any Dispute submitted to arbitration, the burden of proof will be as it would be if the claim were litigated in a judicial proceeding.

(e) Terms of Arbitration. The Arbitrator chosen in accordance with the provisions of this Section 9.9 will not have the power to alter, amend or otherwise affect the provisions of this Agreement, including the terms of these arbitration provisions.

(f) Award. The Arbitrator shall render an award within six (6) months after the date of appointment, and a condition of the Arbitrator's appointment shall be commitment to comply with this six (6) month period. This period may be extended by mutual agreement of the parties. The award shall be accompanied by a written opinion setting forth the findings of fact, conclusions of law and reasoning relied upon by the Arbitrator in reaching his or her decision. The award (subject to clarification or correction by the Arbitrator as allowed by statute and/or the applicable Rules of the Arbitration Administrator) shall be final and binding upon the parties, subject solely to the review procedures provided in this Section 9.9.

(g) Arbitral Review. Either party to a Dispute may seek review of the award pursuant to the following procedure. Either party may seek arbitral review of the award pursuant to the J.A.M.S. Optional Arbitration Appeal Procedures then in force. Arbitral review may be had as to any element of the award as allowed by such Procedures.

(h) Enforcement. The arbitration provisions of this Agreement are to be performed in San Francisco, California. Any judicial proceeding arising out of or relating to this Agreement or the relationship of the parties, including without limitation any proceeding to enforce this Section 9.9 or to review or confirm the award in arbitration shall be brought exclusively in a court of competent jurisdiction in San Francisco, California (the "**Enforcing Court**"). Any judgment of the Enforcing Court may be enforced by any sister court of competent jurisdiction. By execution and delivery of this Agreement, each party (i) accepts, generally and unconditionally, the exclusive jurisdiction of the Enforcing Court and any related appellate court, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement, their relationship, or any arbitration relating thereto, (ii) irrevocably waives any objection it may now or hereafter have as to the venue of any such suit, action or proceeding brought in such a court or that such court is an inconvenient forum, and (iii) waives personal service of process and consents to service of process upon it by certified or registered mail, return receipt requested, at its address specified or determined in accordance with Section 9.2 hereof, and service so made shall be deemed completed on the third Business Day after such service is deposited in the mail. Each party shall bear their own attorney fees, expert witness costs and other expenses they incur. The fees and expenses of the Arbitrator and Arbitration Administrator shall be borne equally by the parties.

(i) Equitable Remedies. Notwithstanding anything herein to the contrary, the parties hereto agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the parties shall be entitled to seek an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof in the Enforcing Court, this being in addition to any other remedy to which they are entitled at law or in equity or under this Agreement for such breaches or failures of performance. The parties hereby irrevocably submit to the exclusive jurisdiction of the Enforcing Court with respect to any party seeking injunctive relief and/or specific performance hereunder and the provisions set forth in Section 9.9(h) with respect to such action.

(j) The parties agree that the conduct and detailed content of any arbitration pursuant to this Section 9.9 shall be kept confidential and no party shall disclose to any person such information, except (i) to the extent that the party has a good faith commercial reason for disclosing such information to a third party who has agreed to keep such information confidential, and (ii) as may be required by applicable Legal Requirements or by any Governmental Entity. At the request of any party, the Arbitrator, attorneys, parties to the arbitration, witnesses, experts, court reporters, or other persons present at the arbitration shall agree in writing to maintain the strict confidentiality of the proceedings.

(k) IN THE EVENT OF ANY DISPUTE BETWEEN THE PARTIES, WHETHER IT RESULTS IN PROCEEDINGS IN ANY COURT IN ANY JURISDICTION OR IN ARBITRATION, THE PARTIES HEREBY KNOWINGLY AND VOLUNTARILY, AND HAVING HAD AN OPPORTUNITY TO CONSULT WITH COUNSEL, WAIVE ALL RIGHTS TO TRIAL BY JURY, AND AGREE THAT ANY AND ALL MATTERS SHALL BE DECIDED BY A JUDGE OR ARBITRATOR, AS PROVIDED HEREIN, WITHOUT A JURY TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW.

(l) Emergency Relief. A party may apply either to the Enforcing Court, or to an arbitrator if one has been appointed, for prejudgment remedies and emergency relief pending final determination of a claim in accordance with this Section 9.9. The appointment of an arbitrator does not preclude a party from seeking prejudgment remedies and emergency relief from an Enforcing Court.

9.10 Rules of Construction. The parties hereto have been represented by counsel during the negotiation, preparation and execution of this Agreement and, therefore, hereby waive, with respect to this Agreement, each schedule and each exhibit attached hereto, the application of any law, regulation, holding or rule of construction providing that ambiguities in an agreement or other document shall be construed against the party drafting such agreement or document.

[SIGNATURE PAGE NEXT]

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

VANTAGEPOINT MOBILE, INC.

By:_____
Name: Eric Ver Ploeg
Title: President and Chief Executive Officer

VANTAGEPOINT VENTURE PARTNERS IV (Q), L.P.
(for purposes of Sections 5.19, 5.20, 7.1, 8.10 and 8.11 only)
By VantagePoint Venture Associates IV, L.L.C.,
Its General Partner

By:_____
Name:_____
Title: Managing Member

3GUPLOAD.COM, INC.

By:_____
Name: Michael Slate
Title: President

SELLER SHAREHOLDERS:

DAVID HOSEI

_____
David Hosei

MICHAEL SLATE

_____
Michael Slate

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

VANTAGEPOINT MOBILE, INC.

By:_____
Name: Eric Ver Ploeg
Title: President and Chief Executive Officer

VANTAGEPOINT VENTURE PARTNERS IV (Q), L.P.
(for purposes of Sections 5.19, ~~5.20, 7.1,~~ 8.10 and 8.11 only)
By VantagePoint Venture Associates IV, L.L.C.,
Its General Partner

By:_____
Name: Alan E. Salzman
Title: Managing Member

3GUPLOAD.COM, INC.

By:_____
Name: Michael Slate
Title: President

SELLER SHAREHOLDERS:

DAVID HOSEI

_____
David Hosei

MICHAEL SLATE

_____
Michael Slate

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

VANTAGEPOINT MOBILE, INC.

By:_____
Name: Eric Ver Ploeg
Title: President and Chief Executive Officer

VANTAGEPOINT VENTURE PARTNERS IV (Q), L.P.
(for purposes of Sections 5.19, 5.20, 7.1, 8.10 and 8.11 only)
By VantagePoint Venture Associates IV, L.L.C.,
Its General Partner

By:_____
Name:_____
Title: Managing Member

3GUPLOAD.COM, INC.

By:_____
Name: Michael Slate
Title: President

SELLER SHAREHOLDERS:

DAVID HOSEI

_____
David Hosei

MICHAEL SLATE

_____
Michael Slate

[SIGNATURE PAGE TO ASSET PURCHASE AGREEMENT]

Schedule 1.2(ii)

Tangible Assets

Schedule 1.9

Allocation of Purchase Price

Schedule 1.11(b)(x)

Required Third Party Consents

1. Master Ringtone Letter Agreement between Seller and Sony BMG Music Entertainment dated March 29, 2005

2. HIFI Ring Tone Agreement between Seller and Warner Music Group Inc. dated March 15, 2005

3. Mastertone Agreement between Seller and UMG Recordings, Inc. dated June 27, 2005

4. Ringtone License Agreement between Seller and EMI Entertainment World, Inc. dated January 24, 2004

Schedule 5.10(a)

Transferred Employees