SAMPLE AGREEMENT AND PLAN OF REORGANIZATION FOR TECHNOLOGY COMPANY

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The author wishes to thank her colleagues Eric Wang, Vicky Lee and William Choe for their contributions to this article.

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This is a form of merger agreement, typically called an agreement and plan of reorganization. Compared to a stock purchase agreement or an asset purchase agreement, a merger agreement provides for an exchange of some form of consideration for the shares of the target company upon the merger of the target with another corporation. Typical forms of consideration are shares of the parent company, or cash. The agreement and plan or reorganization provides exchange procedures following the filing of the Agreement of Merger (in the case of a California target) or Certificate of Merger (in the case of a Delaware target) with the Secretary of State of the target’s state of incorporation.

A merger always requires the vote of the target company’s shareholders, as well as board approval of all constituent companies. The shareholder vote required differs under California and Delaware law, and further approvals may be required by the target’s charter documents. Due diligence should focus on whether there are notice requirements for a merger, e.g. under the liquidation or conversion provisions of preferred stock provisions, and additional voting requirements. Depending on the structure of the transaction, approval of the shareholders of the buyer may also be required.

Our factual scenario is as follows:

The buyer, a Delaware corporation, is a publicly-traded technology company. The target, a California corporation, is a privately-held technology company with very attractive software technology strategically important to the buyer and other potential buyers. The target has no subsidiaries and owns no real property. The target wants the transaction to be a tax-free reorganization. Accordingly, the merger consideration is stock in the buyer, which is attractive to the target because it is currently undervalued. The transaction is intended to be exempt under Regulation D and also the California Corporate Securities Law of 1968. The buyer proposes to register the shares on a shelf registration statement immediately after the closing to provide the target’s shareholders desired liquidity. The buyer is to assume the target’s outstanding options.

The target intends to solicit all of its shareholders by a written consent of shareholders and a solicitation statement; the buyer does not need stockholder approval. Of course, the target could use a shareholder meeting and solicit by means of a proxy statement, but this process takes longer. [Note that under Section 603 of the Corporations Code of California, if the target solicits written consents, Target cannot close the merger without giving 10 days’ notice to shareholders unless ALL shareholders were solicited regarding the transaction.] The buyer requires the large shareholder(s) to enter into a shareholder agreement and a non-competition agreement. The transaction is also conditioned on certain key players accepting employment with the buyer.

This is intended as a buyer’s reasonable first draft.

The author wishes to thank her colleagues Eric Wang, Vicky Lee and William Choe for their contributions to this article.
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AGREEMENT AND PLAN OF REORGANIZATION

This AGREEMENT AND PLAN OF REORGANIZATION (the "Agreement") is made and entered into as of _______, 200_ by and among Acquiror, Inc., a Delaware corporation ("Acquiror"), Target Acquisition Corporation, a Delaware corporation ("Merger Sub") and wholly owned subsidiary of Acquiror, Target, Inc., a California corporation ("Target"), and, solely with respect to Sections 6.11 and 9 hereof, Principal Shareholder, the principal shareholder of Target ("Shareholders' Agent").

RECITALS

A. The Boards of Directors of Target, Acquiror and Merger Sub believe it is in the best interests of their respective companies and the shareholders of their respective companies that Target and Merger Sub combine into a single company through the statutory merger of [Merger Sub with and into Target] (the "Merger") and, in furtherance thereof, have approved the Merger.

[This agreement contemplates a reverse triangular merger -- that is, a merger of a wholly-owned subsidiary of Acquiror into the Target, where the Target survives. Another popular form is a forward triangular merger, where Target is merged into the wholly-owned subsidiary of Acquiror, where the wholly-owned subsidiary of Acquiror survives. In this case the language would change to "statutory merger of Target with and into Merger Sub." Still another structure is a direct merger of Target into Acquiror; this structure exposes Acquiror to risks of Target, but avoids the complications and administrative burdens of a subsidiary structure.]

B. Pursuant to the Merger, among other things, the outstanding shares of Target common stock, $__________ par value ("Target Common Stock"), shall be converted into the right to receive the Merger Consideration (as defined in Section 2.6(a)) (assuming the conversion of all outstanding shares of Target preferred stock, $__________ par value ("Target Preferred Stock")) upon the terms and subject to the conditions set forth herein.

[Most private companies with venture or other third party financing have two classes of stock. This Agreement assumes conversion of that preferred stock into common stock which is then exchanged for the same merger consideration as received by every holder of common. This is the simplest possible structure. Counsel must consider the effect of participation rights and special voting rights of any preferred stock on the Target's ability to obtain the necessary approvals. In the event that the Preferred Stock will not convert prior to the Effective Time, the following provision is appropriate:]

[B. Pursuant to the Merger, among other things, the outstanding shares of Target preferred stock, $__________ par value ("Target Preferred Stock"), and Target common stock, $__________ par value ("Target Common Stock") (collectively, the Target Preferred Stock and Target Common Stock are referred to herein as "Target Capital Stock"), shall be converted into the right to receive the Merger Consideration (as defined in Section 2.6(a)) upon the terms and subject to the conditions set forth herein.]
C. Target, Acquiror and Merger Sub desire to make certain representations and warranties and other agreements in connection with the Merger.

D. The parties intend, by executing this Agreement, to adopt a plan of reorganization within the meaning of Section 368 of the Internal Revenue Code of 1986, as amended (the "Code"), and to cause the Merger to qualify as a reorganization under the provisions of Section 368(a) of the Code.

NOW, THEREFORE, in consideration of the covenants and representations set forth herein, and for other good and valuable consideration, the parties agree as follows:

1. Definitions.

1.1 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"Acquiror" has the meaning set forth in the introductory paragraph.

"Acquiror Common Stock" has the meaning set forth in Section 2.6(a).

"Acquiror Directors' Option Plan" has the meaning set forth in Section 4.4.

"Acquiror Disclosure Schedule" has the meaning set forth in Section 4.

"Acquiror ESPP" has the meaning set forth in Section 4.4.

"Acquiror Financial Statements" has the meaning set forth in Section 4.3.

"Acquiror Indemnified Person" and "Acquiror Indemnified Persons" have the meanings set forth in Section 9.2(b).

"Acquiror Indemnitee" has the meaning set forth in Section 6.17(f).

"Acquiror Option Plan" has the meaning set forth in Section 4.4.

"Acquiror SEC Documents" has the meaning set forth in Section 4.3.

"Acquisition Proposal" has the meaning set forth in Section 5.2.

"Additional Escrow Shares" has the meaning set forth in Section 9.1(b).

["Agent Certificate" has the meaning set forth in Section 9.6(a).]

"Agreement of Merger" has the meaning set forth in Section 2.1.

"Average Closing Price" has the meaning set forth in Section 2.6(g).

"California Law" has the meaning set forth in Section 2.1.
“CERCLA” has the meaning set forth in Section 3.20(a)(i).

“Certificates” has the meaning set forth in Section 2.7(c).

“Closing” has the meaning set forth in Section 2.2.

“Closing Date” has the meaning set forth in Section 2.2.

“COBRA” has the meaning set forth in Section 3.22(e).

“Code” has the meaning set forth in Recital D.

["Common Exchange Ratio” has the meaning set forth in Section 2.6(c).]

["Common Stock Consideration” has the meaning set forth in Section 2.6(c).]

“Confidential Information” has the meaning set forth in Section 3.10(i).

“Confidentiality Agreement” has the meaning set forth in Section 6.5.

“Copyrights” has the meaning set forth in Section 3.10(a)(iii).

“Damages” has the meaning set forth in Section 9.2(b).

“Delaware Law” has the meaning set forth in Section 2.1.

“Dissenting Shares” has the meaning set forth in Section 2.6(h).

“Dissenting Shareholder” has the meaning set forth in Section 2.6(h).

“Effective Time” has the meaning set forth in Section 2.2.

“Environmental Laws” has the meaning set forth in Section 3.20(a)(i).

“ERISA” has the meaning set forth in Section 3.22(a).

“ERISA Affiliate” has the meaning set forth in Section 3.22(a).

“Escrow Agent” has the meaning set forth in Section 9.1(a).

“Escrow Agreement” has the meaning set forth in Section 6.11.

“Escrow Fund” has the meaning set forth in Section 2.7(b).

“Escrow Shares” has the meaning set forth in Section 2.7(i).

“Exchange Act” has the meaning set forth in Section 4.3.

“Exchange Agent” has the meaning set forth in Section 2.7(a).
“Exchange Fund” has the meaning set forth in Section 2.7(b).

“Exchange Ratio” has the meaning set forth in Section 2.6(a).

“Governmental Entity” has the meaning set forth in Section 3.2.

“Hazardous Materials” has the meaning set forth in Section 3.20(a)(ii).

“HIPAA” has the meaning set forth in Section 3.22(e).

“Holder” has the meaning set forth in Section 6.17(a).

“Holder Indemnitee” has the meaning set forth in Section 6.17(e).

“HSR” has the meaning set forth in Section 3.2.

“Indemnified Person” has the meaning set forth in Section 6.17(g).

“Indemnifying Person” has the meaning set forth in Section 6.17(g).

“Individuals” has the meaning set forth in Section 3.27(a)(ii).

“Intellectual Property” has the meaning set forth in Section 3.10(a).

“Issued Patents” has the meaning set forth in Section 3.10(a)(i).

“JAMS” has the meaning set forth in Section 9.7(a).

“Limitation” has the meaning set forth in Section 9.2(d).

“Material” has the meaning set forth in Section 10.2.

“Material Adverse Effect” has the meaning set forth in Section 10.2.

“Material Contract” has the meaning set forth in Section 3.14.

“Merger” has the meaning set forth in Recital A.

“Merger Consideration” has the meaning set forth in Section 2.6(a).

“Merger Sub” has the meaning set forth in the introductory paragraph.

“NASD” has the meaning set forth in Section 4.2.

“Officer’s Certificate” has the meaning set forth in Section 9.4.

“Patent Applications” has the meaning set forth in Section 3.10(a)(ii).

“Patents” has the meaning set forth in Section 3.10(a)(ii).
[“Preferred Stock Consideration” has the meaning set forth in Section 2.6(b).]

“Privacy Statements” has the meaning set forth in Section 3.27(a)(ii).

“Registrable Securities” has the meaning set forth in Section 6.17(a).

“Registration Statement” has the meaning set forth in Section 6.17(a).

“Release Date” has the meaning set forth in Section 9.3(b).

“Requested Confidential Exhibits” has the meaning set forth in Section 4.3.

“Resumption Notice” has the meaning set forth in Section 6.17(c).

“RCRA” has the meaning set forth in Section 3.20(a)(i).

“Returns” has the meaning set forth in Section 3.21(b).

“SEC” has the meaning set forth in Section 4.2.

“Securities Act” has the meaning set forth in Section 2.6(i).

“Shareholder Agreements” has the meaning set forth in Section 3.5.

“Shareholders’ Agent” has the meaning set forth in the introductory paragraph.

“Subsidiary” has the meaning set forth in Section 10.2.

“Surviving Corporation” has the meaning set forth in Section 2.1.

“Suspension Notice” has the meaning set forth in Section 6.17(c).

“Suspension Right” has the meaning set forth in Section 6.17(c).

“Target” has the meaning set forth in the introductory paragraph.

“Target Balance Sheet” has the meaning set forth in Section 3.7.

“Target Balance Sheet Date” has the meaning set forth in Section 3.6.

“Target Capital Stock” has the meaning set forth in Section 2.6(b).

“Target Common Stock” has the meaning set forth in Recital B.

“Target Disclosure Schedule” has the meaning set forth in Section 3.

“Target Employee Plans” has the meaning set forth in Section 3.22(a).

“Target Financial Statements” has the meaning set forth in Section 3.4.
“Target Indemnified Person” and “Target Indemnified Persons” shall have the meaning set forth in Section 9.2(c).

“Target International Employee Plans” has the meaning set forth in Section 3.22(a).

“Target Intellectual Property” has the meaning set forth in Section 3.10(c).

“Target Option Plan” has the meaning set forth in Section 3.5.

“Target Options” has the meaning set forth in Section 2.6(c).

“Target Products” has the meaning set forth in Section 3.10(c)(ii).

“Target Sites” has the meaning set forth in Section 3.27(a)(i).

“Target Warrants” has the meaning set forth in Section 2.6(d).

“Target Preferred Stock” has the meaning set forth in Recital B.

“Target Software” has the meaning set forth in Section 3.10(k).

“Target’s Current Facilities” has the meaning set forth in Section 3.20(b).

“Target’s Facilities” has the meaning set forth in Section 3.20(b).

“Tax” and “Taxes” have the meanings set forth in Section 3.21(a).

“Termination Date” has the meaning set forth in Section 9.2(a).

“Terms and Conditions” has the meaning set forth in Section 3.27(a)(iii).

“Third Party Intellectual Property” has the meaning set forth in Section 3.10(d).

“Trademarks” has the meaning set forth in Section 3.10(a)(iv).

“U.S. Person” has the meaning set forth in Section 7.2(k).

2. The Merger.

2.1 The Merger. At the Effective Time and subject to and upon the terms and conditions of this Agreement, the Agreement of Merger attached hereto as Exhibit A (the “Agreement of Merger”) and the applicable provisions of the Delaware General Corporation Law (“Delaware Law”) and the California Corporations Code (“California Law”), Merger Sub shall be merged with and into Target, the separate corporate existence of Merger Sub shall cease and Target shall continue as the surviving corporation (the “Surviving Corporation”).

(This is a reverse triangular merger, and Target will survive the Merger; typically this structure requires fewer third party consents to the transaction than a forward triangular merger where the Target does not survive. In a forward triangular merger the language
changes as follows: “Target shall be merged with and into Merger Sub, the separate corporate existence of Target shall cease and Merger Sub shall continue as the surviving corporation (the “Surviving Corporation”).

Here, Merger Sub is a Delaware corporation. The advantage of using a Delaware subsidiary is the speed of formation of the subsidiary (which can be formed the day of the signing if necessary). However, where Target is a California corporation, oftentimes Merger Sub will be formed as a California corporation. Although having a lengthier formation time, the advantage of utilizing a Merger Sub that is a California corporation is that the merger documentation would then only need to filed with the State of California, whereas using a Delaware Merger Sub would entail filing merger documentation with both the States of Delaware and California.

2.2 Closing; Effective Time. The closing of the transactions contemplated hereby (the “Closing”) shall take place as soon as practicable, but no later than two (2) business days, after the satisfaction or waiver of each of the conditions set forth in Section 7 hereof, or at such other time as the parties hereto agree (the “Closing Date”). The Closing shall take place at the offices of [Acquiror’s counsel’s office], or at such other location as the parties hereto agree. In connection with the Closing, the parties hereto shall cause the Merger to be consummated by filing the Agreement of Merger, together with any required certificates, with the Secretary of State of the State of California, in accordance with the relevant provisions of California Law (the time of such filing being the “Effective Time”). The parties shall also promptly cause a Certificate of Merger to be filed with the Secretary of State of the State of Delaware, in accordance with the relevant provisions of Delaware Law.

2.3 Effect of the Merger. At the Effective Time, the effect of the Merger shall be as provided in this Agreement, the Agreement of Merger and the applicable provisions of California Law and Delaware Law. Without limiting the generality of the foregoing, and subject thereto, at the Effective Time, all the property, rights, privileges, powers and franchises of Target and Merger Sub shall vest in the Surviving Corporation, and all debts, liabilities and duties of Target and Merger Sub shall become the debts, liabilities and duties of the Surviving Corporation.

2.4 Articles of Incorporation; Bylaws. [If Merger Sub is a Delaware corporation, and Target survives in a reverse triangular merger, then Acquiror should amend Target’s Articles of Incorporation, as follows:] (a) At the Effective Time, Article IV of the Articles of Incorporation of Target shall be amended to read in its entirety: “The total authorized capital stock of the corporation shall be ______ shares of Common Stock.”

        (b) The Bylaws of Target, as in effect immediately prior to the Effective Time, shall be the Bylaws of the Surviving Corporation until thereafter amended.

[If Merger Sub is a California corporation, and so is the Target, the formation of Merger Sub will take longer, but Acquiror can simply substitute Merger Sub’s charter documents, changing the name of Merger Sub to Target:]
[Alternative 2.4: “Articles of Incorporation; Bylaws.]

(a) At the Effective Time, the Articles of Incorporation of Merger Sub, as in effect immediately prior to the Effective Time, shall be the Articles of Incorporation of the Surviving Corporation until thereafter amended as provided by California Law and such Articles of Incorporation; provided, however, that Article I of the Articles of Incorporation of the Surviving Corporation shall be amended to read as follows: “The name of the corporation is Target, Inc.”

(b) The Bylaws of Merger Sub, as in effect immediately prior to the Effective Time, shall be the Bylaws of the Surviving Corporation until thereafter amended.”]

[Consider alternative provisions throughout if there is a direct merger of Target into Acquiror.]

2.5 Directors and Officers. At the Effective Time, the directors and officers of Merger Sub immediately prior to the Effective Time shall be the directors and officers of the Surviving Corporation, to serve until their respective successors are duly elected or appointed and qualified.

2.6 Effect on Capital Stock. At the Effective Time, by virtue of the Merger and without any action on the part of Merger Sub, Target or the holders of any of the following securities:

(a) Conversion of Target Capital Stock. Each share of Target Common Stock issued and outstanding immediately prior to the Effective Time (assuming the conversion of all Target Preferred Stock into Target Common Stock prior to the Effective Time) shall be converted and exchanged, without any action on the part of the holders thereof, into the right to receive the following (the “Merger Consideration”): that number of validly issued, fully paid and nonassessable shares of the common stock, $.001 par value, of Acquiror (“Acquiror Common Stock”) which equal the amount obtained by dividing ________ by the sum of (i) the number of shares of Target Common Stock issued and outstanding immediately prior to the Effective Time; and (ii) the aggregate number of shares of Target Common Stock that are subject to purchase upon exercise of all Target options and warrants and other Target instruments exercisable for or convertible into Target Common Stock issued and outstanding immediately prior to the Effective Time (the “Exchange Ratio”), subject to Section 2.6(g).

[This provision is in many ways the key to the agreement between the parties, because it establishes the merger consideration. There are many possible formulations of the exchange ratio to take into account the Acquiror’s desire not to be too diluted and the Target’s desire to achieve a reasonable value. The example here is a “fixed exchange ratio.’ That is, there is a set number of shares to be divided over the Target’s capital stock and rights to acquire capital stock. Another alternative is a “floating exchange ratio,” in which an aggregate dollar value is divided by a per share price of Acquiror Common Stock (as determined, usually by an average of trading prices over ten or twenty trading days prior to signing or the Effective Time). Often the parties will provide boundaries for the maximum or]
minimum number of shares to be issued in the case of floating exchange ratios, or in the case of a fixed exchange ratio, the minimum or maximum value of the transaction; these are known as “caps” and “collars.” Sample language for such provisions can be found by reviewing merger agreements used in public company acquisitions. Note that this provision assumes the fixed shares are spread over the fully diluted shares of Target. This is an important business issue; for example, the Target may not agree to be diluted by unvested options.

Note also that this provision becomes more complicated if the Preferred Stock is not converting into Common because different exchange ratios will be created:

[Alternative provisions where Preferred Stock receives different consideration:]

(a) Each share of Target Preferred Stock issued and outstanding immediately prior to the Effective Time (excluding shares to be cancelled in accordance with Section 2.6(d) and Dissenting Shares) shall be converted and exchanged into the right to receive a portion of _______ shares of common stock, $0.001 par value, of Acquiror (“Acquiror Common Stock”) (the “Merger Consideration” as follows:

(i) in the case of Target’s Series C Preferred Stock, a fraction of a share of Acquiror Common Stock equal to $_______, plus any declared and unpaid dividends thereon through the Effective Time;

(ii) in the case of Target’s Series B Preferred Stock, a fraction of a share of Acquiror Common Stock equal to $_______, plus any declared and unpaid dividends thereon through the Effective Time; and

(iii) in the case of Target’s Series A Preferred Stock, a fraction of a share of Acquiror Common Stock equal to $_______, plus any declared and unpaid dividends thereon through the Effective Time.

(b) The aggregate number of shares of Acquiror Common Stock issued pursuant to Section 2.6(a)(i) through 2.6(a)(iii) shall be referred to as the “Preferred Stock Consideration.”

(c) Each share of Target Common Stock issued and outstanding immediately prior to the Effective Time (excluding shares to be cancelled in accordance with Section 2.6(d) and any Dissenting Shares) shall be converted and exchanged into the right to receive a fraction (the “Common Exchange Ratio”) of a share of validly issued, fully paid and nonassessable Acquiror Common Stock which equals the amount obtained by dividing (i) excess of the Merger Consideration over the Preferred Stock Consideration (such excess, the “Common Stock Consideration”); by (ii) the sum of (A) the total number of shares of Target Common Stock issued and outstanding at the Effective Time, and (B) the aggregate number of shares of
Target Common Stock that are subject to purchase upon exercise of all Target options and warrants and other Target instruments exercisable for or convertible into Target Common Stock issued and outstanding immediately prior to the Effective Time, subject to Section 2.6(g) [but excluding the shares of Target Common Stock issuable upon exercise of options that are unvested immediately prior to the Effective Time.]  [*The last brackets demonstrate a provision under which Target shareholders are not diluted by unvested shares.*]

(b) Cancellation of Target Capital Stock Owned by Acquiror. At the Effective Time, each share of Target Common Stock and Target Preferred Stock (collectively, “Target Capital Stock”) owned by Acquiror or any direct or indirect wholly owned subsidiary of Acquiror immediately prior to the Effective Time shall be canceled and extinguished without any conversion thereof.

(c) Target Stock Options. At the Effective Time, all options to purchase Target Common Stock then outstanding under the Target Option Plan (as defined in Section 3.5) [*and all other options then outstanding*] (“Target Options”) at the Effective Time shall be assumed by Acquiror in accordance with Section 6.8(a). [*Consider whether option plan should also be assumed; typically this is not desirable.*]

(d) Target Warrants. At the Effective Time, all warrants to purchase Target Preferred Stock or Target Common Stock then outstanding (“Target Warrants”) shall be cancelled in accordance with Section 6.8(b).

(e) Capital Stock of Merger Sub. At the Effective Time, each share of common stock of Merger Sub issued and outstanding immediately prior to the Effective Time shall be converted into and exchanged for one validly issued, fully paid and nonassessable share of common stock of the Surviving Corporation. Each stock certificate of Merger Sub evidencing ownership of any such shares shall continue to evidence ownership of such shares of capital stock of the Surviving Corporation.

(f) Adjustments to Exchange Ratio. The [Common] Exchange [and Merger Consideration payable with respect to Target Preferred Stock] shall be adjusted to reflect fully the effect of any stock split, reverse split, stock dividend (including any dividend or distribution of securities convertible into Acquiror Common Stock[, Target Preferred Stock] or Target Common Stock), reorganization, recapitalization or other like change with respect to Acquiror Common Stock or Target Common Stock occurring after the date hereof and prior to the Effective Time.

(g) Fractional Shares. No fraction of a share of Acquiror Common Stock will be issued, but in lieu thereof each holder of shares of Target Common Stock [and Target Preferred Stock] who would otherwise be entitled to a fraction of a share of Acquiror Common Stock (after aggregating all fractional shares of Acquiror Common Stock to be received by such holder) shall receive from Acquiror an amount of cash (rounded to the nearest whole cent) equal to the product of (i) such fraction, multiplied by (ii) the average of the closing prices of Acquiror Common Stock as reported on the Nasdaq National Market during the twenty trading days ending one day prior to the Effective Time (the “Average Closing Price”). The fractional share
interests of each Target shareholder shall be aggregated, so that no Target shareholder shall receive cash in respect of fractional share interests in an amount greater than the value of one full share of Acquiror Common Stock.

(h) Dissenters' Rights. Notwithstanding any provision of this Agreement to the contrary, any shares of Target Common Stock or Target Preferred Stock held by a holder who has demanded and perfected such holder's right for appraisal of such shares in accordance with California Law and who, as of the Effective Time, has not effectively withdrawn or lost such right to appraisal ("Dissenting Shares"), if any, shall not be converted into the Merger Consideration but shall instead be converted into the right to receive such consideration as may be determined to be due with respect to such Dissenting Shares pursuant to California Law. Target shall give Acquiror prompt notice of any demand received by Target to require Target to purchase shares of Common Stock of Target, and Acquiror shall have the right to direct and participate in all negotiations and proceedings with respect to such demand. Target agrees that, except with the prior written consent of Acquiror, or as required under the California Law, it will not voluntarily make any payment with respect to, or settle or offer to settle, any such purchase demand. Each holder of Dissenting Shares ("Dissenting Shareholder") who, pursuant to the provisions of California Law, becomes entitled to payment of the fair value for shares of Target Capital Stock shall receive payment therefore (but only after the value therefore shall have been agreed upon or finally determined pursuant to such provisions). If, after the Effective Time, any Dissenting Shares shall lose their status as Dissenting Shares, Acquiror shall issue and deliver, upon surrender by such shareholder of a certificate or certificates representing shares of Target Capital Stock, the portion of the Merger Consideration to which such shareholder would otherwise be entitled under this Section 2.6 and the Agreement of Merger less the portion of the Merger Consideration allocable to such shareholder that has been deposited in the Escrow Fund in respect of such shares of Target Common Stock pursuant to Section 2.7(i) and Section 9 hereof.

(i) Certificate Legends. The shares of Acquiror Common Stock to be issued pursuant to this Section 2.6 shall not have been registered and shall be characterized as "restricted securities" under the federal securities laws, and under such laws such shares may be resold without registration under the Securities Act of 1933, as amended (the "Securities Act"), only in certain limited circumstances. Each certificate evidencing shares of Acquiror Common Stock to be issued pursuant to this Section 2.6 shall bear the following legend:

"THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE BEEN ACQUIRED FOR INVESTMENT AND HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933. SUCH SHARES MAY NOT BE SOLD OR OTHERWISE TRANSFERRED IN THE ABSENCE OF SUCH REGISTRATION WITHOUT AN EXEMPTION UNDER THE SECURITIES ACT OR AN OPINION OF LEGAL COUNSEL REASONABLY ACCEPTABLE TO THE COMPANY THAT SUCH REGISTRATION IS NOT REQUIRED."

and any legends required by state securities laws.
2.7 Surrender of Certificates.

(a) Exchange Agent. [Bank XXX] [or such other institution selected by Acquiror with the reasonable consent of Target] shall act as exchange agent (the “Exchange Agent”) in the Merger. [Sections 2.7(b) and (c) must be revised if the Merger consideration includes cash or securities other than Acquiror Common Stock.]

(b) Acquiror to Provide Common Stock and Cash. Promptly after the Effective Time, Acquiror shall supply or cause to be supplied to the Exchange Agent for exchange in accordance with this Section 2 through such reasonable procedures as Acquiror may adopt (i) certificates evidencing the shares of Acquiror Common Stock issuable pursuant to Section 2.6(a) in exchange for shares of Target Capital Stock outstanding immediately prior to the Effective Time, less the number of shares of Acquiror Common Stock to be deposited into an escrow fund (the “Escrow Fund”) pursuant to the requirements of Section 2.7(i) and Section 9; and (ii) cash in an amount sufficient to permit payment of cash in lieu of fractional shares pursuant to Section 2.6(a) (collectively, (i) and (ii) shall be referred to as the “Exchange Fund”).

(c) Exchange Procedures. Promptly after the Effective Time, the Surviving Corporation shall cause to be mailed to each holder of record of a certificate or certificates (the “Certificates”) that immediately prior to the Effective Time represented outstanding shares of Target Common [Capital] Stock, whose shares were converted into the right to receive shares of Acquiror Common Stock (and cash in lieu of fractional shares) pursuant to Section 2.6, (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Certificates shall pass, only upon receipt of the Certificates by the Exchange Agent, and shall be in such form and have such other provisions as Acquiror may reasonably specify); (ii) such other customary documents as may be required pursuant to such instructions; and (iii) instructions for use in effecting the surrender of the Certificates in exchange for certificates representing shares of Acquiror Common Stock (and cash in lieu of fractional shares). Upon surrender of a Certificate for cancellation to the Exchange Agent or to such other agent or agents as may be appointed by Acquiror, together with such letter of transmittal and other documents, duly completed and validly executed in accordance with the instructions thereto, the holder of such Certificate shall be entitled to receive in exchange therefore (i) a certificate representing the number of whole shares of Acquiror Common Stock less the number of shares of Acquiror Common Stock to be deposited in the Escrow Fund on such holder’s behalf pursuant to Sections 2.7(i) and 9 hereof; (ii) any dividends or other distributions to which such holder is entitled pursuant to Section 2.7(d); and (iii) cash (without interest) in respect of fractional shares as provided in Section 2.6(g), and the Certificate so surrendered shall forthwith be canceled. Until so surrendered, each outstanding Certificate that prior to the Effective Time represented shares of Target Common [Capital] Stock will be deemed from and after the Effective Time, for all corporate purposes other than the payment of dividends, to evidence the ownership of the number of full shares of Acquiror Common Stock into which such shares of Target Common [Capital] Stock shall have been so converted and the right to receive an amount in cash in lieu of the issuance of any fractional shares in accordance with Section 2.6.
(d) **Distributions With Respect to Unexchanged Shares.** No dividends or other distributions with respect to Acquiror Common Stock with a record date after the Effective Time will be paid to the holder of any unsurrendered Certificate with respect to the shares of Acquiror Common Stock represented thereby until the holder of record of such Certificate shall surrender such Certificate. Subject to applicable law, following surrender of any such Certificate, there shall be paid to the record holder of the certificates representing whole shares of Acquiror Common Stock issued in exchange therefor, without interest at the time of such surrender, the amount of any such dividends or other distributions with a record date after the Effective Time theretofore payable (but for the provisions of this Section 2.7(d)) with respect to such shares of Acquiror Common Stock.

(e) **Transfers of Ownership.** At the Effective Time, the stock transfer books of Target shall be closed, and there shall be no further registration of transfers of Target Common Stock or Target Preferred Stock thereafter on the records of Target. If any certificate for shares of Acquiror Common Stock is to be issued in a name other than that in which the Certificate surrendered in exchange therefor is registered, it will be a condition of the issuance thereof that the Certificate so surrendered will be properly endorsed and otherwise in proper form for transfer and that the person requesting such exchange will have paid to Acquiror or any agent designated by it any transfer or other taxes required by reason of the issuance of a certificate for shares of Acquiror Common Stock in any name other than that of the registered holder of the Certificate surrendered, or established to the satisfaction of Acquiror or any agent designated by it that such tax has been paid or is not payable.

(f) **Termination of Exchange Fund.** Any portion of the Exchange Fund which remains undistributed to the shareholders of Target one year after the Effective Time shall be delivered to Acquiror, upon demand, and any shareholders of Target who have not previously complied with this Section 2.7 shall thereafter look only to Acquiror for payment of their claim for the Merger Consideration and any dividends or distributions with respect to Acquiror Common Stock.

(g) **No Liability.** Notwithstanding anything to the contrary in this Section 2.7, none of the Exchange Agent, the Surviving Corporation or any party hereto shall be liable to any person for any amount properly paid to a public official pursuant to any applicable abandoned property, escheat or similar law.

(h) **Dissenting Shares.** The provisions of this Section 2.7 shall also apply to Dissenting Shares that lose their status as such, except that the obligations of Acquiror under this Section 2.7 shall commence on the date of loss of such status and the holder of such shares shall be entitled to receive in exchange for such shares the Merger Consideration to which such holder is entitled pursuant to Section 2.6 hereof.

(i) **Escrow.** As soon as practicable after the Effective Time, and subject to and in accordance with the provisions of Section 9 hereof, Acquiror shall cause to be distributed to the Escrow Agent (as defined in Section 9 hereof) a certificate or certificates representing [10% of the] shares of Acquiror Common Stock to be issued at the Closing (the “Escrow Shares”) (which shall be registered in the name of the Escrow Agent as nominee for the holders of Certificates canceled pursuant to this Section 2.7). Such shares shall be beneficially
owned by such holders and such shares shall be held in escrow and shall be available to
compensate Acquiror for certain damages as provided in Section 9. To the extent not used for
such purposes, such shares shall be released, all as provided in Section 9.

2.8 No Further Ownership Rights in Target Capital Stock. The Merger
Consideration delivered upon the surrender for exchange of shares of Target Capital Stock in
accordance with the terms hereof (including any dividends, distributions or cash paid in lieu of
fractional shares) shall be deemed to have been issued in full satisfaction of all rights pertaining
to such shares of Target Capital Stock, and there shall be no further registration of transfers on
the records of the Surviving Corporation of shares of Target Capital Stock which were
outstanding immediately prior to the Effective Time. If, after the Effective Time, Certificates are
presented to the Surviving Corporation for any reason, they shall be canceled and exchanged as
provided in this Section 2.

2.9 Lost, Stolen or Destroyed Certificates. In the event any Certificates shall have
been lost, stolen or destroyed, the Exchange Agent shall issue in exchange for such lost, stolen or
destroyed Certificates, upon the making of an affidavit of that fact by the holder thereof such
Merger Consideration (and dividends, distributions and cash in lieu of fractional shares) as may
be required pursuant to Section 2.6; provided, however, that Acquiror may, in its discretion and
as a condition precedent to the issuance thereof, require the owner of such lost, stolen or
destroyed Certificates to deliver a bond in such sum as it may reasonably direct as indemnity
against any claim that may be made against Acquiror, the Surviving Corporation or the
Exchange Agent with respect to the Certificates alleged to have been lost, stolen or destroyed.

2.10 Tax Consequences. It is intended by the parties hereto that the Merger
shall constitute a reorganization within the meaning of Section 368(a) of the Code.

2.11 Taking of Necessary Action; Further Action. Each of Acquiror, Merger
Sub and Target will take all such reasonable and lawful action as may be necessary or desirable
in order to effectuate the Merger in accordance with this Agreement as promptly as possible. If,
at any time after the Effective Time, any further action is necessary or desirable to carry out the
purposes of this Agreement and to vest the Surviving Corporation with full right, title and
possession to all assets, property, rights, privileges, powers and franchises of Target and Merger
Sub, the officers and directors of Target and Merger Sub are fully authorized in the name of their
respective corporations or otherwise to take, and will take, all such lawful and necessary action,
so long as such action is not inconsistent with this Agreement.

3. Representations and Warranties of Target. Target represents and warrants to
Acquiror and Merger Sub that the statements contained in this Section 3 are true and correct,
extcept as disclosed in a document of even date herewith and delivered by Target to Acquiror on
the date hereof referring to the representations and warranties in this Agreement (the “Target
Disclosure Schedule”). The Target Disclosure Schedule will be arranged in paragraphs
corresponding to the numbered and lettered paragraphs contained in this Section 3, and the
disclosure in any such numbered and lettered section of the Target Disclosure Schedule shall
qualify only the corresponding subsection in this Section 3 (except to the extent disclosure in any
numbered and lettered section of the Target Disclosure Schedule is specifically cross-referenced
in another numbered and lettered section of the Target Disclosure Schedule).
3.1 Organization, Standing and Power. Target is a corporation duly organized, validly existing and in good standing under the laws of the state of California. Target has the corporate power to own its properties and to carry on its business as now being conducted and as proposed to be conducted and is duly qualified to do business and is in good standing in each jurisdiction in which the failure to be so qualified and in good standing could reasonably be expected to have a Material Adverse Effect (as defined in Section 10.2) on Target. Target has delivered a true and correct copy of the Articles of Incorporation and Bylaws or other charter documents, as applicable, of Target, each as amended to date, to Acquiror. Target is not in violation of any of the provisions of its Articles of Incorporation or Bylaws or equivalent organizational documents. Target has no Subsidiaries (as defined in Section 10.2). Except as set forth on Section 3.1 of the Target Disclosure Schedule, Target does not directly or indirectly own any equity or similar interest in, or any interest convertible or exchangeable or exercisable for, any equity or similar interest in, any corporation, partnership, joint venture or other business association or entity.

3.2 Authority. Target 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 all necessary corporate action on the part of Target subject only to the approval of the Merger by Target’s shareholders as contemplated by Section 7.1(a). The affirmative vote of the holders of a majority of the shares of Target’s Common Stock and Preferred Stock, voting as separate classes, outstanding on the record date for the Written Consent of Shareholders relating to this Agreement is the only vote of the holders of any of Target’s Capital Stock necessary under California Law to approve this Agreement and the transactions contemplated hereby. The Board of Directors of Target has unanimously (a) approved this Agreement and the Merger; (b) determined that in its opinion the Merger is in the best interests of the shareholders of Target and is on terms that are fair to such shareholders; and (c) recommended that the shareholders of Target approve this Agreement and the Merger. This Agreement has been duly executed and delivered by Target and constitutes the valid and binding obligation of Target enforceable against Target in accordance with its terms, except that such enforceability may be limited by bankruptcy, insolvency, moratorium or other similar laws affecting or relating to creditors’ rights generally, and is subject to general principles of equity. The execution and delivery of this Agreement by Target does not, and the consummation of the transactions contemplated hereby 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 material obligation or loss of any material benefit under (a) any provision of the Articles of Incorporation or Bylaws of Target, as amended; or (b) any mortgage, indenture, lease, contract or other agreement or instrument, permit, concession, franchise, license, judgment, order, decree, statute, law, ordinance, rule or regulation applicable to Target or any of their properties or assets, in the case of clause (b), except for such conflicts, violations, defaults, rights of termination, cancellation or acceleration as could not individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on Target. No consent, approval, order or authorization of, or registration, declaration or filing with, any court, administrative agency or commission or other governmental authority or instrumentality (“Governmental Entity”) is required by or with respect to Target or its Subsidiaries in connection with the execution and delivery of this Agreement or the consummation of the transactions contemplated hereby, except for (a) the filing of the Agreement of Merger, together with the
required officers’ certificates, and the filing of the Certificate of Merger, each as provided in Section 2.2; (b) filings required under Regulation D of the Securities Act of 1933; (c) such consents, approvals, orders, authorizations, registrations, declarations and filings as may be required under applicable state securities laws and the securities laws of any foreign country; (d) such filings as may be required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR"); and (e) such other consents, authorizations, filings, approvals and registrations which, if not obtained or made, could not be reasonably expected to have a Material Adverse Effect on Target and could not reasonably be expected to prevent, or materially alter or delay, any of the transactions contemplated by this Agreement.

3.3 Governmental Authorization. Target has obtained each federal, state, county, local or foreign governmental consent, license, permit, grant, or other authorization of a Governmental Entity (a) pursuant to which Target currently operates or holds any interest in any of its properties; or (b) that is required for the operation of Target’s business or the holding of any such interest and all of such authorizations are in full force and effect except where the failure to obtain or have any such authorizations could not reasonably be expected to have a Material Adverse Effect on Target.

3.4 Financial Statements. Target has delivered to Acquiror its audited financial statements for each of the fiscal years ended [Date], [Date] and [Date], respectively, and its unaudited financial statements (balance sheet, statement of operations and statement of cash flows) on a consolidated basis as at and for the __________-month period ended [Date] (collectively, the "Target Financial Statements"). The Target Financial Statements have been prepared in accordance with generally accepted accounting principles (except as disclosed in the notes thereto and except that the unaudited financial statements do not contain footnotes and are subject to normal year-end audit adjustments) applied on a consistent basis throughout the periods indicated and with each other. The Target Financial Statements fairly present the consolidated financial condition and operating results of Target as of the dates, and for the periods, indicated therein, subject to normal year-end audit adjustments and the absence of footnotes in the case of the unaudited Target Financial Statements. Target maintains and will continue to maintain a standard system of accounting established and administered in accordance with generally accepted accounting principles.

3.5 Capital Structure. The authorized capital stock of Target consists of __________ shares of Target Common Stock, of which there were issued and outstanding as of the close of business on [Date], __________ shares, and __________ shares of Target Preferred Stock, of which as of that same date there were designated __________ shares of Series A Preferred Stock, __________ shares of Series B Preferred Stock, and __________ shares of Series C Preferred Stock. As of that same date, there were issued and outstanding, __________ shares of Series A Preferred Stock, convertible into __________ shares of Common Stock; __________ shares of Series B Preferred Stock, convertible into __________ shares of Common Stock; and __________ shares of Series C Preferred Stock, convertible into __________ shares of Common Stock. All outstanding shares of Target Common Stock and Target Preferred Stock are duly authorized, validly issued, fully paid and non-assessable and are free of any liens or encumbrances other than any liens or encumbrances created by or imposed upon the holders thereof, and are not subject to preemptive rights or rights of first refusal created by statute, the Articles of Incorporation or Bylaws of Target or any agreement to which Target is a party or by
which it is bound. As of that same date, there were _________ shares of Common Stock reserved for issuance under the Target [Year] Stock Option Plan (the “Target Option Plan”), of which _________ shares were subject to outstanding options and _________ shares were reserved for future option grants. As of that same date, there were _________ shares of [Series ___ Preferred Stock] reserved for issuance upon the exercise of outstanding Target Warrants, and the Target Warrants are held in the amounts and by the persons set forth in Section 3.5 of the Target Disclosure Schedule. Target has delivered to Acquiror true and complete copies of each warrant and warrant agreement evidencing each Target Warrant and each form of agreement or stock option plan evidencing each Target Option. Except for the rights created pursuant to this Agreement and the rights disclosed in the preceding three sentences, there are no other options, warrants, calls, rights, commitments or agreements of any character to which Target is a party or by which it is bound, obligating Target to issue, deliver, sell, repurchase or redeem or cause to be issued, delivered, sold, repurchased or redeemed, any shares of Target Capital Stock or obligating Target to grant, extend, accelerate the vesting of, change the price of, or otherwise amend or enter into any such option, warrant, call, right, commitment or agreement. All shares of Common Stock issuable upon conversion of the Preferred Stock or upon exercise of the options described in this Section 3.5, and all shares of [Series ___ Preferred Stock] issuable upon exercise of warrants described in this Section 3.5, will be, when issued pursuant to the respective terms of such Preferred Stock, options or warrants, duly authorized, validly issued, fully paid and nonassessable. There are no other contracts, commitments or agreements relating to voting, purchase or sale of Target Capital Stock (a) between or among Target and any of its shareholders; and (b) to Target’s knowledge, between or among any of Target’s shareholders, except for the shareholders delivering the Shareholder Agreements. Each officer and director and each holder of more than 5% of the outstanding voting stock of Target, and their affiliates, holding in the aggregate at least a majority of outstanding [(a)] Target Common Stock; [(b) Target Series A Preferred Stock; (c) Target Series B Preferred Stock; and (d) Target Series C Preferred Stock.] has executed and delivered to Acquiror a Shareholder Agreement substantially in the form attached hereto as Exhibit B (collectively, the “Shareholder Agreements”). All shares of outstanding Target Common Stock and Target Preferred Stock and rights to acquire Target Capital Stock were issued in compliance with all applicable federal and state securities laws.

3.6 Absence of Certain Changes. Since [Date] (the “Target Balance Sheet Date”), Target has conducted its business in the ordinary course consistent with past practice and there has not occurred (a) any change, event or condition (whether or not covered by insurance) that has resulted in, or could reasonably be expected to result in, a Material Adverse Effect on Target; (b) any acquisition, sale or transfer of any material asset of Target other than in the ordinary course of business and consistent with past practice; (c) any change in accounting methods or practices (including any change in depreciation or amortization policies or rates) by Target or any revaluation by Target of any of its assets; (d) any declaration, setting aside, or payment of a dividend or other distribution with respect to the shares of Target or any direct or indirect redemption, purchase or other acquisition by Target of any of its shares of capital stock; (e) any Material Contract entered into by Target, other than in the ordinary course of business and as provided to Acquiror, or any material amendment or termination of, or default under, any Material Contract (as defined in Section 3.14) to which Target is a party or by which it is bound; (f) any amendment or change to the Articles of Incorporation or Bylaws of Target; (g) any increase in or modification of the compensation or benefits payable or to become payable by
Target to any of its directors or employees[, other than in the ordinary course of business consistent with past practice]; or (h) any negotiation or agreement by Target to do any of the things described in the preceding clauses (a) through (g) (other than negotiations with Acquirer and its representatives regarding the transactions contemplated by this Agreement). At the Effective Time, there will be no accrued but unpaid dividends on shares of Target’s capital stock.

3.7 Absence of Undisclosed Liabilities. Target has no material obligations or liabilities of any nature (matured or unmatured, fixed or contingent) other than (a) those set forth or adequately provided for in the balance sheet of Target as of the Target Balance Sheet Date (the “Target Balance Sheet”); (b) those incurred in the ordinary course of business and not required to be set forth in the Target Balance Sheet under generally accepted accounting principles; (c) those incurred in the ordinary course of business since the Target Balance Sheet Date and consistent with past practice; and (d) those incurred in connection with the execution of this Agreement.

3.8 Litigation. There is no private or governmental action, suit, proceeding, claim, arbitration or investigation pending before any Governmental Entity, foreign or domestic, or, to the knowledge of Target, threatened against Target or any of its properties or any of its officers or directors (in their capacities as such) that, individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect on Target. There is no judgment, decree or order against Target, or, to the knowledge of Target, any of its respective directors or officers (in their capacities as such), that could prevent, enjoin, or materially alter or delay any of the transactions contemplated by this Agreement, or that could reasonably be expected to have a Material Adverse Effect on Target. All litigation to which Target is a party (or, to the knowledge of Target, threatened to become a party) is described in Section 3.8 of the Target Disclosure Schedule.

3.9 Restrictions on Business Activities. There is no agreement, judgment, injunction, order or decree binding upon Target that has or could reasonably be expected to have the effect of prohibiting or materially impairing any current or future business practice of Target, any acquisition of property by Target or the conduct of business by Target as currently conducted or as proposed to be conducted by Target.

3.10 Intellectual Property.

(a) For purposes of this Agreement, “Intellectual Property” means:

(i) all issued patents, reissued or reexamined patents, revivals of patents, utility models, certificates of invention, registrations of patents and extensions thereof, regardless of country or formal name (collectively, “Issued Patents”);

(ii) all published or unpublished nonprovisional and provisional patent applications, reexamination proceedings, invention disclosures and records of invention (collectively “Patent Applications” and, with the Issued Patents, the “Patents”);

(iii) all copyrights, copyrightable works, semiconductor topography and mask work rights, including all rights of authorship, use, publication, reproduction, distribution, performance transformation, moral rights and rights of ownership of
copyrightable works, semiconductor topography works and mask works, and all rights to register and obtain renewals and extensions of registrations, together with all other interests accruing by reason of international copyright, semiconductor topography and mask work conventions (collectively, "Copyrights");

(iv) trademarks, registered trademarks, applications for registration of trademarks, service marks, registered service marks, applications for registration of service marks, trade names, registered trade names and applications for registrations of trade names (collectively, "Trademarks") and domain name registrations;

(v) all technology, ideas, inventions, designs, proprietary information, manufacturing and operating specifications, know-how, formulae, trade secrets, technical data, computer programs, hardware, software and processes; and

(vi) all other intangible assets, properties and rights (whether or not appropriate steps have been taken to protect, under applicable law, such other intangible assets, properties or rights).

(b) Target owns and has good and marketable title to, or possess legally enforceable rights to use, all Intellectual Property used [or currently proposed to be used] in the business of Target as currently conducted [or as proposed to be conducted] by Target. The Intellectual Property owned by and licensed to Target collectively constitutes all of the Intellectual Property necessary to enable Target to conduct its business as such business is currently being conducted. No current or former officer, director, stockholder, employee, consultant or independent contractor has any right, claim or interest in or with respect to any Target Intellectual Property (as defined in Section 3.10(c) below).

(c) With respect to each item of Intellectual Property incorporated into any product of Target or otherwise used in the business of Target (except “off the shelf” or other software widely available through regular commercial distribution channels at a cost not exceeding [$10,000] on standard terms and conditions, as modified for Target’s operations) (“Target Intellectual Property”), Section 3.10 of the Target Disclosure Schedule lists:

(i) all Issued Patents and Patent Applications, all registered Trademarks, and pending trademark registrations and all registered Copyrights, including the jurisdictions in which each such Intellectual Property has been issued or registered or in which any such application for such issuance and registration has been filed; and

(ii) the following agreements relating to each of the products of Target (the “Target Products”) or other Target Intellectual Property: all (A) agreements granting any right to distribute or sublicense a Target Product on any exclusive basis; (B) any exclusive licenses of Intellectual Property to or from Target; (C) agreements pursuant to which the amounts actually paid or payable under firm commitments to Target are [$50,000] or more; (D) joint development agreements; (E) any agreement by which Target grants any ownership right to any Target Intellectual Property owned by Target; (F) any order relating to Intellectual Property; (G) any option relating to any Target Intellectual Property; and (H) agreements
pursuant to which any party is granted any rights to access source code or to use source code to create derivative works of Target Products.

(d) Section 3.10 of the Target Disclosure Schedule contains an accurate list as of the date of this Agreement of all licenses, sublicenses and other agreements to which Target is a party and pursuant to which Target is authorized to use any Intellectual Property owned by any third party, excluding “off the shelf” or other software widely available through regular commercial distribution channels at a cost not exceeding [§10,000] on standard terms and conditions (“Third Party Intellectual Property”).

(e) [To Target’s knowledge, ]there is no unauthorized use, disclosure, infringement or misappropriation of any Target Intellectual Property, including any Third Party Intellectual Property, by any third party, including any employee or former employee of Target. Target has not entered into any agreement to indemnify any other person against any charge of infringement of any Intellectual Property, other than indemnification provisions contained in standard sales or agreements to end users arising in the ordinary course of business, the forms of which have been delivered to Acquiror or its counsel. There are no royalties, fees or other payments payable by Target to any Person by reason of the ownership, use, sale or disposition of Intellectual Property.

(f) Target is not in [material] breach of any license, sublicense or other agreement relating to the Target Intellectual Property or Third Party Intellectual Property. Neither the execution, delivery or performance of this Agreement or any ancillary agreement contemplated hereby nor the consummation of the Merger or any of the transactions contemplated by this Agreement will contravene, conflict with or result in any [material] limitation on the Acquiror’s right to own or use any Target Intellectual Property, including any Third Party Intellectual Property.

(g) All Patents, registered Trademarks and registered Copyrights held by Target are valid and subsisting. All maintenance and annual fees have been fully paid and all fees paid during prosecution and after issuance of any Patent comprising or relating to such item have been paid in the correct entity status amounts. Target is not infringing, misappropriating or making unlawful use of, or received any notice or other communication (in writing or otherwise) of any actual, alleged, possible or potential infringement, misappropriation or unlawful use of any proprietary asset owned or used by any third party. There is no proceeding pending or [to Target’s knowledge] threatened, nor has any claim or demand been made that challenges the legality, validity, enforceability or ownership of any item of Target Intellectual Property or Third Party Intellectual Property or alleges a claim of infringement of any Patents, Copyrights or Trademarks, or violation of any trade secret or other proprietary right of any third party. Target has not brought a proceeding alleging infringement of Target Intellectual Property or breach of any license or agreement involving Intellectual Property against any third party.

(h) All current and former officers and employees of Target have executed and delivered to Target an agreement (containing no exceptions or exclusions from the scope of its coverage) regarding the protection of proprietary information and the assignment to Target of any Intellectual Property arising from services performed for Target by such persons, the form of which has been supplied to Acquiror. All current and former consultants and independent
contractors to Target involved in the development, modification, marketing and servicing of any Target Products or Target Intellectual Property have executed and delivered to Target an agreement in the form provided to Acquiror or its counsel (containing no exceptions or exclusions from the scope of its coverage) regarding the protection of proprietary information and the assignment to Target of any Intellectual Property arising from services performed for Target by such persons. **[To Target's knowledge,]** no employee or independent contractor of Target is in violation of any term of any patent disclosure agreement or employment contract or any other contract or agreement relating to the relationship of any such employee or independent contractor with Target. No current or former officer, director, stockholder, employee, consultant or independent contractor has any right, claim or interest in or with respect to any Target Intellectual Property.

(i) Target has taken all commercially reasonable and customary measures and precautions necessary to protect and maintain the confidentiality of all Target Intellectual Property (except such Target Intellectual Property whose value would be unimpaired by public disclosure) and otherwise to maintain and protect the full value of all Target Intellectual Property. All use, disclosure or appropriation of Intellectual Property not otherwise protected by patents, patent applications or copyright ("Confidential Information") owned by Target by or to a third party has been pursuant to the terms of a written agreement between Target and such third party. All use, disclosure or appropriation of Confidential Information not owned by Target has been pursuant to the terms of a written agreement between Target and the owner of such Confidential Information, or is otherwise lawful.

(j) No product liability claims have been communicated in writing to or, to Target's knowledge, threatened against Target.

(k) A complete list of each of the Target Products and Target's proprietary software ("Target Software"), together with a brief description of each, is set forth in Section 3.10 of the Target Disclosure Schedule. The Target Software and Target Products conform in all material respects with any [published] specification, [published] documentation, [written] performance standard, representation or statement provided with respect thereto by or on behalf of Target.

(l) Target is not subject to any proceeding or outstanding decree, order, judgment or stipulation restricting in any manner the use, transfer or licensing of any Target Intellectual Property by Target, or which may affect the validity, use or enforceability of such Target Intellectual Property. Target is not subject to any agreement that restricts in any material respect the use, transfer, delivery or licensing by Target of the Target Intellectual Property or Target Products.

(m) Except as set forth in Section 3.10(m) of the Target Disclosure Schedule, none of the Target Products contains any software that may be subject to an open source or general public license.

3.11 **Interested Party Transactions.** Target is not indebted to any director, officer, employee or agent of Target (except for amounts due as normal salaries and bonuses and in reimbursement of ordinary expenses), and no such person is indebted to Target. There have
been no transactions during the two-year period ending on the date hereof that would require disclosure if Target were subject to disclosure under Item 404 of Regulation S-K under the Securities Act.

3.12 **Minute Books.** The minute book of Target contains a materially complete and accurate summary of all meetings of directors and shareholders or actions by written consent since the time of incorporation of Target through the date of this Agreement, and reflect all transactions referred to in such minutes accurately in all material respects.

3.13 **Complete Copies of Materials.** Target has delivered or made available true and complete copies of each document that has been requested by Acquiror or its counsel in connection with their due diligence review of Target.

3.14 **Material Contracts.** All of Target’s Material Contracts (as defined in this Section 3.14 below) are listed in Section 3.14 of the Target Disclosure Schedule. With respect to each Material Contract: (a) the Material Contract is legal, valid, binding and enforceable and in full force and effect with respect to Target, and, to Target’s knowledge, is legal, valid, binding, enforceable and in full force and effect with respect to each other party thereto, in either case subject to the effect of bankruptcy, insolvency, moratorium or other similar laws affecting the enforcement of creditors’ rights generally and except as the availability of equitable remedies may be limited by general principles of equity; (b) the Material Contract will continue to be legal, valid, binding and enforceable and in full force and effect immediately following the Effective Time in accordance with its terms as in effect prior to the Effective Time, subject to the effect of bankruptcy, insolvency, moratorium or other similar laws affecting the enforcement of creditors’ rights generally and except as the availability of equitable remedies may be limited by general principles of equity; and (c) neither Target nor, to Target’s knowledge, any other party is in breach or default, and no event has occurred that with notice or lapse of time would constitute a breach or default by Target or, to Target’s knowledge, by any such other party, or permit termination, modification or acceleration, under such Material Contract, subject to such exceptions as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on Target. Target is not a party to any oral contract, agreement or other arrangement. “Material Contract” means any contract, agreement or commitment to which Target is a party (a) with expected receipts or expenditures in excess of [\$100,000]; (b) required to be listed pursuant to Section 3.10(c)(ii) or Section 3.10(d); (c) requiring Target to indemnify any Person; (d) granting any exclusive rights to any party; (e) evidencing indebtedness for borrowed or loaned money of [\$100,000] or more, including guarantees of such indebtedness; or (f) that could reasonably be expected to have a Material Adverse Effect on Target if breached by Target in such a manner as would (I) permit any other party to cancel or terminate the same (with or without notice of passage of time); (II) provide a basis for any other party to claim money damages (either individually or in the aggregate with all other such claims under that contract) from Target; or (III) give rise to a right of acceleration of any material obligation or loss of any material benefit under such Material Contract.

3.15 **Inventory.** The inventories shown on the Target Balance Sheet or thereafter acquired by Target, were acquired and maintained in the ordinary course of business, are of good and merchantable quality, and consist of items of a quantity and quality usable or salable in the ordinary course of business. Since the Target Balance Sheet Date, Target has
continued to replenish inventories in a normal and customary manner consistent with past practices. Target has not received 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 Target, which is consistent with its past practice and in accordance with generally accepted accounting principles applied on a consistent basis. Target is not under any liability or obligation with respect to the return of any item of inventory in the possession of wholesalers, retailers or other customers. Since the Target Balance Sheet Date, adequate provision has been made on the books of Target 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.

3.16 Accounts Receivable. Subject to any reserves set forth therein, the accounts receivable shown on the Target Financial Statements are valid and genuine, have arisen solely out of bona fide sales and deliveries of goods, performance of services, and other business transactions in the ordinary course of business consistent with past practices in each case with persons other than affiliates, are not subject to any prior assignment, lien or security interest, and [to Target's knowledge] are not subject to valid defenses, set-offs or counter claims. The accounts receivable are collectible in accordance with their terms at their recorded amounts, subject only to the reserve for doubtful accounts on the Target Financial Statements.

3.17 Customers and Suppliers. As of the date hereof, no customer [that individually accounted for more than 5% of Target's gross revenues during the 12-month period preceding the date hereof] and no supplier of Target [that individually accounted for more than 5% of Target's purchases during the 12-month period preceding the date hereof] has canceled or otherwise terminated, or made any written threat to Target to cancel or otherwise terminate its relationship with Target or has at any time on or after the Target Balance Sheet Date, decreased materially its services or supplies to Target in the case of any such supplier, or its usage of the services or products of Target in the case of such customer, and to Target's knowledge no such supplier or customer has indicated either orally or in writing that it intends to cancel or otherwise terminate its relationship with Target or to decrease materially its services or supplies to Target or its usage of the services or products of Target, as the case may be. Target has not knowingly breached, so as to provide a benefit to Target that was not intended by the parties, any agreement with, or engaged in any fraudulent conduct with respect to, any customer or supplier of Target.

3.18 Employees and Consultants. Section 3.18 of the Target Disclosure Schedule or a letter delivered to Acquirer by Target contains a list of the names of all employees (including without limitation part-time employees and temporary employees), leased employees, independent contractors and consultants of Target, together with their respective salaries or wages, other compensation, dates of employment and positions.

3.19 Title to Property. Target has good and marketable title to all of its properties, interests in properties and assets, real and personal, reflected in the Target Balance Sheet or acquired after the Target Balance Sheet Date (except properties, interests in properties
and assets sold or otherwise disposed of since the Target Balance Sheet Date in the ordinary course of business), or with respect to leased properties and assets, valid leasehold interests therein, free and clear of all mortgages, liens, pledges, charges or encumbrances of any kind or character, except (a) the lien of current taxes not yet due and payable; (b) such imperfections of title, liens and easements as do not and will not materially detract from or interfere with the use of the properties subject thereto or affected thereby, or otherwise materially impair business operations involving such properties; (c) liens securing debt that is reflected on the Target Balance Sheet; and (d) such other mortgages, liens, pledges, charges or encumbrances as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on Target. The plants, property and equipment of Target that are used in the operations of Target’s business are in all material respects in good operating condition and repair, subject to normal wear and tear. All properties used in the operations of Target are reflected in the Target Balance Sheet to the extent required by generally accepted accounting principles. All leases to which Target is a party are in full force and effect and are valid, binding and enforceable in accordance with their respective terms, except as such enforceability may be limited by bankruptcy, insolvency, moratorium or other similar laws affecting or relating to creditors’ rights generally; and general principles of equity, regardless of whether asserted in a proceeding in equity or at law. True and correct copies of all such leases have been provided to Acquiror. Target owns no real property.

3.20 Environmental Matters.

(a) The following terms shall be defined as follows:

(i) “Environmental Laws” shall mean any applicable foreign, federal, state or local governmental laws (including common laws), statutes, ordinances, codes, regulations, rules, policies, permits, licenses, certificates, approvals, judgments, decrees, orders, directives, or requirements that pertain to the protection of the environment, protection of public health and safety, or protection of worker health and safety, or that pertain to the handling, use, manufacturing, processing, storage, treatment, transportation, discharge, release, emission, disposal, re-use, recycling, or other contact or involvement with Hazardous Materials (as defined in Section 3.20(ii)), including, without limitation, the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601, et seq., as amended (“CERCLA”), and the federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., as amended (“RCRA”).

(ii) “Hazardous Materials” shall mean any material, chemical, compound, substance, mixture or by-product that is identified, defined, designated, listed, restricted or otherwise regulated under Environmental Laws as a “hazardous constituent,” “hazardous substance,” “hazardous material,” “acutely hazardous material,” “extremely hazardous material,” “hazardous waste,” “hazardous waste constituent,” “acutely hazardous waste,” “extremely hazardous waste,” “infectious waste,” “medical waste,” “biomedical waste,” “pollutant,” “toxic pollutant,” “contaminant” or any other formulation or terminology intended to classify or identify substances, constituents, materials or wastes by reason of properties that are deleterious to the environment, natural resources, worker health and safety, or public health and safety, including without limitation ignitability, corrosivity, reactivity, carcinogenicity, toxicity and reproductive toxicity. The term “Hazardous Materials” shall include without limitation any
“hazardous substances” as defined, listed, designated or regulated under CERCLA, any 
“hazardous wastes” or “solid wastes” as defined, listed, designated or regulated under RCRA, 
any asbestos or asbestos-containing materials, any polychlorinated biphenyls, and any petroleum 
or hydrocarbonic substance, fraction, distillate or by-product.

(b) Target is and has been in compliance with all Environmental Laws 
relating to the properties or facilities used, leased or occupied by Target at any time (collectively, 
“Target’s Facilities;” such properties or facilities currently used, leased or occupied by Target are 
defined herein as “Target’s Current Facilities”), and no discharge, emission, release, leak or spill 
of Hazardous Materials has occurred at any of Target’s Facilities that may or will give rise to 
liability of Target under Environmental Laws. To Target’s knowledge, there are no Hazardous 
Materials (including without limitation asbestos) present in the surface waters, structures, 
groundwaters or soils of or beneath any of Target’s Current Facilities. To Target’s knowledge, 
there neither are nor have been any aboveground or underground storage tanks for Hazardous 
Materials at Target’s Current Facilities. To Target’s knowledge, no Target employee or other 
person has claimed that Target is liable for alleged injury or illness resulting from an alleged 
exposure to a Hazardous Material. No civil, criminal or administrative action, proceeding or 
investigation is pending against Target, or, to Target’s knowledge, threatened against Target, 
with respect to Hazardous Materials or Environmental Laws; and Target is not aware of any facts 
or circumstances that could form the basis for assertion of a claim against Target or that could 
form the basis for liability of Target, regarding Hazardous Materials or regarding actual or 
potential noncompliance with Environmental Laws.

[Note: This Target is a software business with no owned real property. These 
representations should be reviewed by experienced environmental counsel after due diligence 
has been completed by the Acquiror to be sure the representations are supplemented as 
appropriate.]

3.21 Taxes.

(a) As used in this Agreement, the terms “Tax” and, collectively, “Taxes” 
mean any and all federal, state and local taxes of any country, assessments and other 
governmental charges, duties, impositions and liabilities, including taxes based upon or 
measured by gross receipts, income, profits, sales, use and occupation, and value added, ad 
valorem, stamp transfer, franchise, withholding, payroll, recapture, employment, excise and 
property taxes, together with all interest, penalties and additions imposed with respect to such 
amounts and any obligations under any agreements or arrangements with any other person with 
respect to such amounts and including any liability for taxes of a predecessor entity;

(b) Target has prepared and timely filed all returns, estimates, information 
statements and reports required to be filed by Target with any taxing authority (“Returns”) 
relating to any and all Taxes concerning or attributable to Target or its operations with respect to 
Taxes for any period ending on or before the Closing Date and such Returns are true and correct 
in all material respects and have been completed in accordance with applicable law;
(c) Target, as of the Effective Time, (i) will have paid all Taxes shown to be payable on such Returns covered by Section 3.21(a), and (ii) will have withheld with respect to its employees all Taxes required to be withheld;

(d) There is no [material] Tax deficiency outstanding or assessed or, to Target’s knowledge, proposed against Target that is not reflected as a liability on the Target Balance Sheet, nor has Target executed any agreements or waivers extending any statute of limitations on or extending the period for the assessment or collection of any Tax;

(e) Target has no [material] liabilities for unpaid Taxes that have not been accrued for or reserved on the Target Balance Sheet, whether asserted or unasserted, contingent or otherwise and Target has no knowledge of any basis for the assertion of any such liability attributable to Target, its assets or operations;

(f) Target is not a party to any tax-sharing agreement or similar arrangement with any other party, and Target has not assumed any obligation to pay any Tax obligations of, or with respect to any transaction relating to, any other person or agreed to indemnify any other person with respect to any Tax;

(g) Target’s Returns have never been audited by a government or taxing authority, nor is any such audit in process or pending, and Target has not been notified of any request for such an audit or other examination;

(h) Target has never been a member of an affiliated group of corporations filing a consolidated federal income tax return;

(i) Target has disclosed to Acquiror (i) any Tax exemption, Tax holiday or other Tax-sparing arrangement that Target has in any jurisdiction, including the nature, amount or lengths of such Tax exemption, Tax holiday or other Tax-sparing arrangement; and (ii) any expatriate tax programs or policies affecting Target. Target is in compliance [in all material respects] with all terms and conditions required to maintain such Tax exemption, Tax holiday or other Tax-sparing arrangement or order of any governmental entity and the consummation of the transactions contemplated hereby will not have any adverse effect on the continuing validity and effectiveness of any such Tax exemption, Tax holiday or other Tax-sparing arrangement or order;

(j) Target has made available to Acquiror copies of all Returns filed for all periods since Target’s inception;

(k) Target has not filed any consent agreement under Section 341(f) of the Code or agreed to have Section 341(f)(4) apply to any disposition of assets owned by Target;

(l) Target has not been at any time a United States Real Property Holding Corporation within the meaning of Section 897(c)(2) of the Code; and

(m) Target is not a party to any contract, agreement, plan or arrangement, including but not limited to the provisions of this Agreement, covering any employee or former employee of Target that, individually or collectively, could give rise to the payment of any
amount that would not be deductible pursuant to Sections 280G, 464 or 162(m) of the Code by Target or Merger Sub as an expense under applicable law.

[Note: Many tax practitioners prefer a separate representation related to tax liens (even though this is addressed at Section 3.19) and a separate representation regarding the adequacy of tax reserves (even though this is addressed by Sections 3.4 and 3.7). If Target is foreign owned, then it would be appropriate to add a representation regarding compliance with Code Section 6038A. If Target has favorable tax attributes that Acquiror expects to obtain, Acquiror may also want to consider adding a representation regarding accurate disclosure of Target’s tax basis in its assets and tax attributes and possibly a covenant that Target will not take any action to absorb the tax attributes during the preclosing period.]

[Note: If neither of the parties is obtaining a tax opinion, then the agreement should include additional tax representations of the type normally included in an officer’s certificate related to the tax opinion. In addition, Target’s counsel may request a covenant that Acquiror will not take any action that reasonably could be expected to jeopardize the treatment of the Merger as a reorganization within the meaning of Section 368 of the Code.]

3.22 Employee Benefit Plans.

(a) Section 3.22 of the Target Disclosure Schedule contains a complete and accurate list of each plan, program, policy, practice, contract, agreement or other arrangement providing for employment, compensation, retirement, deferred compensation, loans, severance, separation, relocation, repatriation, expatriation, visas, work permits, termination pay, performance awards, bonus, incentive, stock option, stock purchase, stock bonus, phantom stock, stock appreciation right, supplemental retirement, fringe benefits, cafeteria benefits or other benefits, whether written or unwritten, including without limitation each “employee benefit plan” within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), which is or has been sponsored, maintained, contributed to, or required to be contributed to by Target and, with respect to any such plans which are subject to Code Section 401(a), any trade or business (whether or not incorporated) that is or at any relevant time was treated as a single employer with Target within the meaning of Section 414(b), (c), (m) or (o) of the Code, (an “ERISA Affiliate”) for the benefit of any person who performs or who has performed services for Target or with respect to which Target or any ERISA Affiliate has or may have any liability (including without limitation contingent liability) or obligation (collectively, the “Target Employee Plans”). Section 3.22 of the Target Disclosure Schedule separately lists each Target Employee Plan that has been adopted or maintained by Target, whether formally or informally, for the benefit of employees outside the United States (collectively, the “Target International Employee Plans”).

(b) Documents. Target has furnished to Acquiror true and complete copies of documents embodying each of the Target Employee Plans and related plan documents, including without limitation trust documents, group annuity contracts, plan amendments, insurance policies or contracts, participant agreements, employee booklets, administrative service agreements, summary plan descriptions, compliance and nondiscrimination tests for the last three plan years, standard COBRA forms and related notices, registration statements and prospectuses and, to the extent still in its possession, any material employee communications
relating thereto. With respect to each Target Employee Plan that is subject to ERISA reporting requirements, Target has provided copies of the Form 5500 reports filed for the last five plan years. Target has furnished Acquiror with the most recent Internal Revenue Service determination or opinion letter issued with respect to each such Target Employee Plan, and to Target’s knowledge nothing has occurred since the issuance of each such letter that could reasonably be expected to cause the loss of the tax-qualified status of any Target Employee Plan subject to Code Section 401(a).

(c) Compliance. (i) Each Target Employee Plan has been administered in accordance with its terms and in compliance with the requirements prescribed by any and all statutes, rules and regulations (including ERISA and the Code), except as could not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect on Target; and Target and each ERISA Affiliate have performed all material obligations required to be performed by them under, are not in material respect in default under or violation of and have no knowledge of any material default or violation by any other party to, any of the Target Employee Plans; (ii) any Target Employee Plan intended to be qualified under Section 401(a) of the Code has either obtained from the Internal Revenue Service a favorable determination letter as to its qualified status under the Code, including all currently effective amendments to the Code, or has time remaining to apply under applicable Treasury Regulations or Internal Revenue Service pronouncements for a determination or opinion letter and to make any amendments necessary to obtain a favorable determination or opinion letter; (iii) none of the Target Employee Plans promises or provides retiree medical or other retiree welfare benefits to any person; (iv) there has been no “prohibited transaction,” as such term is defined in Section 406 of ERISA or Section 4975 of the Code, with respect to any Target Employee Plan; (v) none of Target or any ERISA Affiliate is subject to any liability or penalty under Sections 4976 through 4980 of the Code or Title I of ERISA with respect to any Target Employee Plan; (vi) all contributions required to be made by Target or any ERISA Affiliate to any Target Employee Plan have been paid or accrued; (vii) with respect to each Target Employee Plan, no “reportable event” within the meaning of Section 4043 of ERISA (excluding any such event for which the thirty (30) day notice requirement has been waived under the regulations to Section 4043 of ERISA) nor any event described in Section 4062, 4063 or 4041 or ERISA has occurred; (viii) each Target Employee Plan subject to ERISA has prepared in good faith and timely filed all requisite governmental reports, which were true and correct as of the date filed, and has properly and timely filed and distributed or posted all notices and reports to employees required to be filed, distributed or posted with respect to each such Target Employee Plan; (ix) no suit, administrative proceeding, action or other litigation has been brought, or to the knowledge of Target is threatened, against or with respect to any such Target Employee Plan, including any audit or inquiry by the IRS or United States Department of Labor; and (x) there has been no amendment to, written interpretation or announcement by Target or any ERISA Affiliate that would materially increase the expense of maintaining any Target Employee Plan above the level of expense incurred with respect to that Plan for the most recent fiscal year included in the Target Financial Statements.

(d) No Title IV or Multiemployer Plan. Neither Target nor any ERISA Affiliate has ever maintained, established, sponsored, participated in, contributed to, or is obligated to contribute to, or otherwise incurred any obligation or liability (including without limitation any contingent liability) under any “multiemployer plan” (as defined in Section 3(37)
of ERISA) or to any "pension plan" (as defined in Section 3(2) of ERISA) subject to Title IV of ERISA or Section 412 of the Code. None of Target or any ERISA Affiliate has any actual or potential withdrawal liability (including without limitation any contingent liability) for any complete or partial withdrawal (as defined in Sections 4203 and 4205 of ERISA) from any multiemployer plan.

(e) COBRA, FMLA, HIPAA, Cancer Rights. With respect to each Target Employee Plan, Target has complied with (i) the applicable health care continuation and notice provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") and the regulations thereunder or any state law governing health care coverage extension or continuation; (ii) the applicable requirements of the Family and Medical Leave Act of 1993 and the regulations thereunder; (iii) the applicable requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"); and (iv) the applicable requirements of the Cancer Rights Act of 1998, except to the extent that such failure to comply could not reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect on Target. Target has no material unsatisfied obligations to any employees, former employees or qualified beneficiaries pursuant to COBRA, HIPAA or any state law governing health care coverage extension or continuation.

(f) Effect of Transaction. The consummation of the transactions contemplated by this Agreement will not (i) entitle any current or former employee or other service provider of Target or any ERISA Affiliate to severance benefits or any other payment (including without limitation unemployment compensation, golden parachute, bonus or benefits under any Target Employee Plan), except as expressly provided in this Agreement; or (ii) accelerate the time of payment or vesting of any such benefits or increase the amount of compensation due any such employee or service provider. No benefit payable or that may become payable by Target pursuant to any Target Employee Plan or as a result of or arising under this Agreement shall constitute an "excess parachute payment" (as defined in Section 280G(b)(1) of the Code) subject to the imposition of an excise Tax under Section 4999 of the Code or the deduction for which would be disallowed by reason of Section 280G of the Code. Each Target Employee Plan can be amended, terminated or otherwise discontinued after the Effective Time in accordance with its terms, without material liability to Acquirer or Target other than ordinary administration expenses typically incurred in a termination event.

(g) International Employee Plans. Each of the Target International Employee Plans has been established, maintained and administered in compliance in all material respects with its terms and conditions and with the requirements prescribed by any and all statutory or regulatory laws applicable to such International Target Employee Plan. No Target International Employee Plan has unfunded liabilities that as of the Effective Time will not be offset by insurance or fully accrued. Except as required by law, no condition exists that would prevent Target or Acquirer from terminating or amending any International Target Employee Plan at any time for any reason.

3.23 Employee Matters. Target is in compliance with all currently applicable laws and regulations respecting terms and conditions of employment, including without limitation applicant and employee background checking, immigration laws, discrimination laws, verification of employment eligibility, employee leave laws, classification of workers as
employees and independent contractors, wage and hour laws, and occupational safety and health laws, except for such noncompliance that could not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect on Target. There are no proceedings pending or, to Target's knowledge, reasonably expected or threatened, between Target, on the one hand, and any or all of its current or former employees, on the other hand, which proceedings could reasonably be expected to have, a Material Adverse Effect on Target, including without limitation any claims for actual or alleged harassment or discrimination based on race, national origin, age, sex, sexual orientation, religion, disability, or similar tortious conduct, breach of contract, wrongful termination, defamation, intentional or negligent infliction of emotional distress, interference with contract or interference with actual or prospective economic disadvantage. There are no claims pending, or, to Target's knowledge, reasonably expected or threatened, against Target under any workers' compensation or long-term disability plan or policy. Target has no material unsatisfied obligations to any employees, former employees, or qualified beneficiaries pursuant to COBRA, HIPAA, or any state law governing health care coverage extension or continuation. Target is not a party to any collective bargaining agreement or other labor union contract, nor does Target know of any activities or proceedings of any labor union to organize its employees. Target has provided all employees with all wages, benefits, relocation benefits, stock options, bonuses and incentives, and all other compensation that became due and payable through the date of this Agreement.

3.24 Insurance. Target has policies of insurance and bonds of the type and in amounts customarily carried by persons conducting businesses or owning assets similar to those of Target. There is no material 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 paid and Target is otherwise in compliance [in all material respects] with the terms of such policies and bonds. Target has no knowledge of any threatened termination of, or material premium increase with respect to, any of such policies.

3.25 Compliance With Laws. Target has complied with, is not in violation of and has not received any notices of violation with respect to, any federal state, local or foreign statute, law or regulation with respect to the conduct of its business, or the ownership or operation of its business, except for such violations or failures to comply as could not reasonably be expected to have a Material Adverse Effect on Target.

3.26 Brokers' and Finders' Fee. Except for _________, no broker, finder or investment banker is entitled to brokerage or finders' fees or agents' commissions or investment bankers' fees or any similar charges in connection with the Merger, this Agreement or any transaction contemplated hereby. Target has provided a complete and correct copy of Target's agreement with _________ to Acquiror or its counsel.

3.27 Privacy Policies and Web Site Terms and Conditions.

(a) For purposes of this Section 3.27:

(i) "Target Sites" means all of Target's public sites on the World Wide Web.
(ii) “Privacy Statements” means, collectively, any and all of Target’s privacy policies published on the Target Sites or otherwise made available by Target regarding the collection, retention, use and distribution of the personal information of individuals, including, without limitation, from visitors of any of the Target Sites (“Individuals”); and

(iii) “Terms and Conditions” means any and all of the visitor terms and conditions published on the Target Sites governing Individuals’ use of and access to the Target Sites.

(b) A Privacy Statement is posted and is accessible to Individuals at all times on each Target Site. Target maintains a hypertext link to a Privacy Statement from the homepage of each Target Site, and Target uses its best efforts to include a hypertext link to a Privacy Statement from every page of the Target Sites on which personal information is collected from Individuals.

(c) The Privacy Statements are clearly written and include, at a minimum, accurate notice to Individuals about Target’s collection, retention, use and disclosure policies and practices with respect to Individuals’ personal information. The Privacy Statements are accurate and consistent with the Terms and Conditions and Target’s actual practices with respect to the collection, retention, use and disclosure of Individuals’ personal information.

(d) Target (i) complies with the Privacy Statements as applicable to any given set of personal information collected by Target from Individuals; (ii) complies with all applicable privacy laws and regulations regarding the collection, retention, use and disclosure of personal information; and (iii) takes all appropriate and industry standard measures to protect and maintain the confidential nature of the personal information provided to Target by Individuals. Target has adequate technological and procedural measures in place to protect personal information collected from Individuals against loss, theft and unauthorized access or disclosure. Target does not knowingly collect information from or target children under the age of thirteen. Target does not sell, rent or otherwise make available to third parties any personal information submitted by individuals.

(e) Target’s collection, retention, use and distribution of all personal information collected by Target from Individuals is governed by the Privacy Statement pursuant to which the data was collected. Each Privacy Statement contains rules for the review, modification and deletion of personal information by the applicable Individual, and Target is and has been at all times in compliance with such rules. All versions of the Privacy Statements are attached hereto in Section 3.27 of the Target Disclosure Schedule. Other than as constrained by the Privacy Statements and by applicable laws and regulations, Target is not restricted in its use and/or distribution of personal information collected by Target.

(f) Target has the full power and authority to transfer all rights Target has in all Individuals’ personal information in Target’s possession and/or control to Acquiror. The Privacy Statements expressly permit the transfer of all personal information collected from Individuals by Target in accordance with the acquisition or sale of all or substantially all of the assets of the Target. Target is not a party to any Material Contract, or is subject to any other
obligation that, following the Effective Time, would prevent Acquiror and/or its affiliates from using the information governed by the Privacy Statements in a manner consistent with applicable privacy laws and industry standards regarding the disclosure and use of information. No claims or controversies have arisen regarding the Privacy Statements or the implementation thereof or of any of the foregoing.

(g) The Terms and Conditions are posted and are accessible to Individuals at all times on the Target Site. The Terms and Conditions expressly permit the transfer of personal information collected from Individuals by Target in accordance with the acquisition or sale of all or substantially all of the assets of Target. No claims or controversies have arisen regarding the Terms and Conditions or the implementation thereof or of any of the foregoing.

[Note: This Section 3.27 is very pro-buyer and if the Target has bargaining power it will likely request modifications. However, the Section is comprehensive and will shape discussion of the issues.]

3.28 International Trade Matters. Target is, and at all times has been, in compliance with and has not been and is not in material violation of any International Trade Law (defined below), including but not limited to, all laws and regulations related to the import and export of commodities, software, and technology from and into the United States, and the payment of required duties and tariffs in connection with same. Target has no basis to expect, nor has any of them or any other person for whose conduct they are or may be held to be responsible received, any actual or threatened order, notice, or other communication from any governmental body of any actual or potential violation or failure to comply with any International Trade Law. “International Trade Law” shall mean U.S. statutes, laws and regulations applicable to international transactions, including, but not limited to, the Export Administration Act, the Export Administration Regulations, the Foreign Corrupt Practices Act, the Arms Export Control Act, the International Traffic in Arms Regulations, the International Emergency Economic Powers Act, the Trading with the Enemy Act, the U.S. Customs laws and regulations, the Foreign Asset Control Regulations, and any regulations or orders issued thereunder.

3.29 Representations Complete. None of the representations or warranties made by Target herein or in any Schedule or Exhibit hereto, including the Target Disclosure Schedule, or certificate furnished by Target pursuant to this Agreement or any written statement furnished to Acquiror pursuant hereto or in connection with the transactions contemplated hereby, when all such documents are read together in their entirety, contain, or will contain at the Effective Time any untrue statement of a material fact, or omits or will omit at the Effective Time 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.

4. Representations and Warranties of Acquiror and Merger Sub. Acquiror and Merger Sub represent and warrant to Target that the statements contained in this Section 4 are true and correct, except as disclosed in a document of even date herewith and delivered by Acquiror to Target on the date hereof referring to the representations and warranties in this Agreement (the “Acquiror Disclosure Schedule”). The Acquiror Disclosure Schedule will be arranged in paragraphs corresponding to the lettered and numbered paragraphs contained in this Section 4,
and the disclosure in any such numbered and lettered section of the Acquiror Disclosure Schedule shall qualify only the corresponding section in this Section 4 (except to the extent disclosure in any numbered and lettered section of the Acquiror Disclosure Schedule is specifically cross-referenced in another numbered and lettered section of the Acquiror Disclosure Schedule.

4.1 Organization, Standing and Power. Each of Acquiror and Merger Sub is a corporation duly organized, validly existing and in good standing under the laws of the state of Delaware. Each of Acquiror and Merger Sub has the corporate power to own its properties and to carry on its business as now being conducted and as proposed to be conducted and is duly qualified to do business and is in good standing in each jurisdiction in which the failure to be so qualified and in good standing could reasonably be expected to have a Material Adverse Effect on Acquiror. Acquiror has delivered a true and correct copy of the Certificate of Incorporation and Bylaws or other charter documents, as applicable, of Acquiror and Merger Sub, each as amended to date, to Target. Neither Acquiror nor Merger Sub is in violation of any of the provisions of its Certificate of Incorporation or Bylaws.

4.2 Authority. Acquiror and Merger Sub have 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, or will have been by the Closing, duly authorized by all necessary corporate action on the part of Acquiror and Merger Sub. This Agreement has been duly executed and delivered by Acquiror and Merger Sub and constitutes the valid and binding obligations of Acquiror and Merger Sub enforceable against Acquiror and Merger Sub in accordance with its terms, except as may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting or relating to creditors’ rights generally, and subject to general principles of equity. The execution and delivery of this Agreement do not, and the consummation of the transactions contemplated hereby 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 material obligation or loss of a material benefit under (a) any provision of the Certificate of Incorporation or Bylaws of Acquiror or any of its Subsidiaries; or (b) any material mortgage, indenture, lease, contract or other agreement or instrument, permit, concession, franchise, license, judgment, order, decree, statute, law, ordinance, rule or regulation applicable to Acquiror or any of its Subsidiaries or their properties or assets [in the case of clause (b), except for such conflicts, violations, defaults, rights of termination, cancellation or acceleration as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on Acquiror]. No consent, approval, order or authorization of or registration, declaration or filing with any Governmental Entity is required by or with respect to Acquiror or any of its Subsidiaries in connection with the execution and delivery of this Agreement by Acquiror and Merger Sub or the consummation by Acquiror and Merger Sub of the transactions contemplated hereby, except for (a) the filing of the Agreement of Merger, together with the required officers’ certificates, and the filing of the Certificate of Merger, each as provided in Section 2.2; (b) filings required under Regulation D of the Securities Act following the Effective Time; (c) the filing of a Form 8-K with the Securities and Exchange Commission ("SEC") and National Association of Securities Dealers ("NASD") within 15 days after the Closing Date; (d) such filings as may be required under applicable state securities laws and the securities laws of any foreign country; (e) such filings as may be required
under HSR [and foreign antitrust laws]; (f) the filing with the Nasdaq Stock Market of a Notification Form for Listing of Additional Shares with respect to the shares of Acquiror Common Stock issuable upon conversion of the Target Common Stock in the Merger and upon exercise of options under the Target Option Plan assumed by Acquiror; and (g) such other consents, authorizations, filings, approvals and registrations which, if not obtained or made, could not reasonably be expected to have a Material Adverse Effect on Acquiror and could not prevent, materially alter or delay any of the transactions contemplated by this Agreement.

4.3 SEC Documents; Financial Statements. [This representation would only be included if a significant amount of Acquiror’s capital stock is being issued in the Merger.] Acquiror has timely filed each statement, report, registration statement (with the prospectus in the form required to be filed pursuant to Rule 424(b) of the Securities Act), definitive proxy statement, and other filing required to be filed with the SEC by Acquiror between [Date] and the date hereof, [and, prior to the Effective Time, Acquiror will file any additional documents filed with the SEC by Acquiror prior to the Effective Time (collectively, the “Acquiror SEC Documents”). In addition, Acquiror has made available to Target all exhibits to the Acquiror SEC Documents filed prior to the date hereof that are (a) requested by Target; and (b) not available in complete form through EDGAR (“Requested Confidential Exhibits”) and will promptly make available to Target all Requested Confidential Exhibits to any additional Acquiror SEC Documents filed prior to the Effective Time]. All documents required to be filed as exhibits to the Target SEC Documents have been so filed[, and all material contracts so filed as exhibits are in full force and effect except those which have expired in accordance with their terms, and neither Acquiror nor any of its Subsidiaries is in default thereunder]. As of their respective filing dates, the Acquiror SEC Documents complied in all material respects with the requirements of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and the Securities Act and none of the Acquiror SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances in which they were made, not misleading, except to the extent corrected by a subsequently filed Acquiror SEC Document prior to the date hereof. The financial statements of Acquiror, including the notes thereto, included in the Acquiror SEC Documents (the “Acquiror Financial Statements”), complied as to form in all material respects with applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto as of their respective dates, and have been prepared in accordance with generally accepted accounting principles applied on a basis consistent throughout the periods indicated and consistent with each other (except as may be indicated in the notes thereto or, in the case of unaudited statements included in Quarterly Reports on Form 10-Q, as permitted by Form 10-Q of the SEC). The Acquiror Financial Statements fairly present the consolidated financial condition and operating results of Acquiror and its Subsidiaries at the dates and during the periods indicated therein (subject, in the case of unaudited statements, to normal, recurring year-end adjustments). There has been no change in Acquiror accounting policies except as described in the notes to the Acquiror Financial Statements.

4.4 Capital Structure. The authorized capital stock of Acquiror consists of [_______] shares of common stock, $.001 par value, and [_______] shares of preferred stock, $.001 par value, of which there were issued and outstanding as of the close of business on the date hereof, [_______] shares of Common Stock and no shares of Preferred Stock. There
are no other outstanding shares of capital stock or voting securities of Acquiror other than shares of Acquiror Common Stock issued after that same date upon the exercise of options issued under the Acquiror Stock Option Plan (the “Acquiror Option Plan”), or the Acquiror Outside Directors Stock Option Plan (the “Acquiror Directors’ Option Plan”), or shares of Acquiror Common Stock issued under the Acquiror Employee Stock Purchase Plan (the “Acquiror ESPP”). All outstanding shares of Acquiror have been duly authorized, validly issued, fully paid and are nonassessable. As of the close of business on that same date, Acquiror has reserved (a) [_________] shares of Acquiror Common Stock for issuance to employees, directors and independent contractors pursuant to the Acquiror Option Plan, of which [_________] shares are subject to outstanding, unexercised options; (b) [_________] shares of Acquiror Common Stock for issuance to directors pursuant to the Acquiror Directors’ Option Plan, of which [_________] shares are subject to outstanding, unexercised options; and (c) [_________] shares of Acquiror Common Stock for issuance pursuant to the Acquiror ESPP, of which [_________] shares are available for issuance. Other than this Agreement, the Acquiror Option Plan, the Acquiror Directors’ Option Plan and the Acquiror ESPP, there are no other options, warrants, calls, rights, commitments or agreements of any character to which Acquiror is a party or by which either of them is bound obligating Acquiror to issue, deliver, sell, repurchase or redeem, or cause to be issued, delivered, sold, repurchased or redeemed, any shares of the capital stock of Acquiror or obligating Acquiror to grant, extend or enter into any such option, warrant, call, right, commitment or agreement.

4.5 Issuance of Shares. The issuance and delivery of the Acquiror Common Stock as Merger Consideration in accordance with this Agreement shall be, at or prior to the Effective Time, duly authorized by all necessary corporate action on the part of Acquiror, and, when issued at the Effective Time as contemplated hereby, such shares of Acquiror Common Stock will be duly and validly issued, fully paid and nonassessable. Such Acquiror Common Stock, when so issued and delivered in accordance with the provisions of this Agreement, shall be free and clear of all liens and encumbrances and adverse claims, other than restrictions on transfer created by applicable securities laws and will not have been issued in violation of their respective properties or any preemptive rights or rights of first refusal or similar rights.

[Because Target stockholders are receiving Acquiror’s Common Stock, Target counsel may also look for a litigation representation from Acquiror:]

4.6 [Litigation. There is no private or governmental action, suit, proceeding, claim, arbitration or investigation pending before any agency, court or tribunal, foreign or domestic, or, to the knowledge of Acquiror threatened against Acquiror or any of its properties or any of its officers or directors (in their capacities as such) that, individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect on Acquiror. There is no judgment, decree or order against Acquiror or any of its Subsidiaries or, to the knowledge of Acquiror, or any of its directors or officers (in their capacities as such) that could prevent, enjoin or materially alter or delay any of the transactions contemplated by this Agreement, or that could reasonably be expected to have a Material Adverse Effect on Acquiror.]
4.7 Interim Operations of Merger Sub. Merger Sub was formed solely for the purpose of engaging in the transactions contemplated by this Agreement, has engaged in no other business activities and has conducted its operations only as contemplated by this Agreement.

4.8 Representations Complete. None of the representations or warranties made by Acquiror or Merger Sub herein or in any Schedule hereto, including the Acquiror Disclosure Schedule, or certificate furnished by Acquiror or Merger Sub pursuant to this Agreement, or the Acquiror SEC Documents, or any written statement furnished to Target pursuant hereto or in connection with the transactions contemplated hereby, when all such documents are read together in their entirety, contains or will contain at the Effective Time any untrue statement of a material fact or omits or will omit at the Effective Time 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.

[Note: If neither of the parties are obtaining a tax opinion, then the agreement should include additional tax representations of the type normally included in an officer's certificate related to the tax opinion. In addition, Target's counsel may request a covenant that Acquiror will not take any action which could reasonably be expected to jeopardize the treatment of the Merger as a reorganization within the meaning of Section 368 of the Code.]

5. Conduct Prior to the Effective Time.

[Note: This draft provides no covenants regarding the conduct of Acquiror's business; in some circumstances Acquiror might agree to limited covenants such as those in Sections 5.1(a) and (b).]

5.1 Conduct of Business of Target. During the period from the date of this Agreement and continuing until the earlier of the termination of this Agreement or the Effective Time, Target agrees (except to the extent expressly contemplated by this Agreement or as consented to in writing by Acquiror): (a) to carry on its business in the usual regular and ordinary course in substantially the same manner as heretofore conducted; (b) to pay its debts and Taxes when due subject (i) to good faith disputes over such debts or Taxes; and (ii) to Acquiror's consent to the filing of material Tax Returns, if applicable; (c) to pay or perform other [material] obligations when due; and (d) to use all reasonable efforts to preserve intact its present business organizations, keep available the services of its present officers and key employees and preserve its relationships with [material] customers, suppliers, distributors, licensors, licensees, and others having business dealings with it, to the end that its goodwill and ongoing businesses shall be unimpaired at the Effective Time. Target agrees to promptly notify Acquiror of (a) any [material] event or occurrence not in the ordinary course of Target's business, and of any event which could reasonably be expected to have a Material Adverse Effect on Target; and (b) any [material] change in its capitalization as set forth in Section 3.5. Without limiting the foregoing, except as expressly contemplated by this Agreement or the Target Disclosure Schedule, Target shall not do, cause or permit any of the following, without the prior written consent of Acquiror:
(a) **Charter Documents.** Cause or permit any amendments to its Articles of Incorporation or Bylaws;

(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, 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, directors and consultants in accordance with agreements providing for the repurchase of shares in connection with any termination of service to it;

(c) **Stock Option Plans, Etc.** Accelerate, amend or change the period of exercisability or vesting of options or other rights granted under its stock plans or authorize cash payments in exchange for any options or other rights granted under any of such plans;

(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 agreements or commitments of any character obligating it to issue any such shares or other convertible securities other than the issuance of shares of its Common Stock pursuant to the exercise of stock options, warrants or other rights therefore outstanding as of the date of this Agreement; **provided, however, that Target may, in the ordinary course of business consistent with past practice, grant options for the purchase of Target Common Stock under the Target Option Plan not to exceed an aggregate of ________ shares**;

**[Target will probably need some flexibility to grant options in order to recruit and retain key employees prior to Closing. Acquiror may wish to restrict this right.]**

(e) **Intellectual Property.** Transfer to any person or entity any rights to its Intellectual Property **[other than in the ordinary course of business consistent with past practice]**;

(f) **Exclusive Rights.** Enter into or amend any agreements pursuant to which any other party is granted exclusive marketing or other exclusive rights of any type or scope with respect to any of Target Products or Target Intellectual Property;

(g) **Dispositions.** Sell, lease, license or otherwise dispose of or encumber any of its properties or assets that are material, individually or in the aggregate, to its business, taken as a whole **[, other than in the ordinary course of business consistent with past practice]**;

(h) **Indebtedness.** Incur any indebtedness for borrowed money, or guarantee any such indebtedness, or issue or sell any debt securities or guaranty any debt securities of others, in excess of $________ in the aggregate;

(i) **Agreements.** Enter into, terminate or amend, in a manner that will adversely affect the business of Target, (i) any agreement involving the obligation to pay or the right to receive **[S10,000]** or more, (ii) any agreement relating to the license, transfer or other
disposition or acquisition of Intellectual Property rights or rights to market or sell Target Products or (iii) any other agreement material to the business or prospects of Target or that is or would be a Material Contract;

(j) Payment of Obligations. Pay, discharge or satisfy, in an amount in excess of $__________ in the aggregate, any claims, liabilities or obligations (absolute, accrued, asserted or unasserted, contingent or otherwise) arising other than in the ordinary course of business, other than the payment, discharge or satisfaction of liabilities reflected or reserved against in the Target Financial Statements;

(k) Capital Expenditures. Make any capital expenditures, capital additions or capital improvements, in excess of $__________ in the aggregate [, other than in the ordinary course of business consistent with past practice];

(l) Insurance. Materially reduce the amount of any material insurance coverage provided by existing insurance policies;

(m) Termination or Waiver. Terminate or waive any right of substantial value, other than in the ordinary course of business;

(n) Employee Benefit Plans; New Hires; Pay Increases. Amend any Target Employee Plan or adopt any plan that would constitute a Target Employee Plan except in order to comply with applicable laws or regulations, or hire any new officer-level employee, pay any special bonus, special remuneration or special noncash benefit (except payments and benefits made pursuant to written agreements outstanding on the date hereof), or [materially] increase the benefits, salaries or wage rates of its employees [, other than in the ordinary course of business consistent with past practice];

(o) Severance Arrangements. Grant or pay any severance or termination pay or benefits (i) to any director or officer or (ii) except for payments made pursuant to written agreements outstanding on the date hereof and disclosed on the Target Disclosure Schedule, to any other employee;

(p) Lawsuits. Commence a lawsuit other than (i) for the routine collection of bills, (ii) in such cases where Target in good faith determines that failure to commence suit would result in the material impairment of a valuable aspect of Target’s business, provided that it consults with Acquiror prior to the filing of such a suit or (iii) for a breach of this Agreement;

(q) Acquisitions. Acquire or agree to acquire by merging with, or by purchasing a substantial portion of the stock or 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 that are material individually or in the aggregate, to its business, taken as a whole;

(r) Taxes. Other than in the ordinary course of business, make or change any material election in respect of Taxes, adopt or change any accounting method in respect of Taxes, file any material tax Return or any amendment to a material tax Return, enter into any closing agreement, settle any material claim or assessment in respect of Taxes, or consent to any
extension or waiver of the limitation period applicable to any material claim or assessment in respect of Taxes;

(s) **Revaluation.** Revalue any of its assets, including without limitation writing down the value of inventory or writing off notes or accounts receivable other than in the ordinary course of business or as required by changes in generally accepted accounting principles; or

(t) **Other.** Take or agree in writing or otherwise to take, any of the actions described in Sections 5.2(a) through (s) above, or any action that would cause a material breach of its representations or warranties contained in this Agreement or prevent it from materially performing or cause it not to materially perform its covenants hereunder.

### 5.2 No Solicitation.

(a) From and after the date of this Agreement until the Effective Time, Target shall not, directly or indirectly through any officer, director, employee, representative or agent of Target or otherwise: (i) solicit, initiate, or encourage any inquiries or proposals that constitute, or could reasonably be expected to lead to, a proposal or offer for a merger, consolidation, share exchange, business combination, sale of all or substantially all assets, sale of shares of capital stock or similar transactions involving Target other than the transactions contemplated by this Agreement (any of the foregoing inquiries or proposals an “Acquisition Proposal”); (ii) engage or participate in negotiations or discussions concerning, or provide any non-public information to any person or entity relating to, any Acquisition Proposal; or (iii) agree to, enter into, accept, approve or recommend any Acquisition Proposal. Target represents and warrants that it has the legal right to terminate any pending discussions or negotiations relating to an Acquisition Proposal without payment of any fee or other penalty.

(b) Target shall notify Acquiror immediately (and no later than 24 hours) after receipt by Target (or its advisors) of any Acquisition Proposal or any request for nonpublic information in connection with an Acquisition Proposal or for access to the properties, books or records of Target by any person or entity that informs Target that it is considering making, or has made, an Acquisition Proposal. Such notice shall be made orally and in writing and shall indicate in reasonable detail the identity of the offeror and the terms and conditions of such proposal, inquiry or contact.

*Note that this is a “No shop” provision with no “fiduciary out.” Target must evaluate whether some “fiduciary out” provision is necessary.*

### 6. Additional Agreements.

**6.1 Preparation of Solicitation Statement.**

(a) As soon as practicable after the execution of this Agreement, Target shall prepare, with the cooperation of Acquiror, a solicitation statement for the solicitation of approval of the shareholders of Target describing this Agreement, the Agreement of Merger and the transactions contemplated hereby and thereby. Acquiror shall provide such information about Acquiror as Target shall reasonably request. The information supplied by Target for
inclusion in the solicitation statement to be sent to the shareholders of Target shall not, on the
date the solicitation statement is first mailed to Target’s shareholders or at the Effective Time,
contain any statement that, at such time, is false or misleading with respect to any material fact,
or omit to state any material fact necessary in order to make the statements made therein, in light
of the circumstances under which they are made, not false or misleading, or omit to state any
material fact necessary to correct any statement in any earlier communication that has become
false or misleading. Notwithstanding the foregoing, Target makes no representation, warranty or
covenant with respect to any information supplied by Acquiror or Merger Sub that is contained
in any of the foregoing documents. The information supplied by Acquiror or Merger Sub for
inclusion in the solicitation statement shall not, on the date the solicitation statement is first
mailed to Target’s shareholders or at the Effective Time, contain any statement that, at such time,
is false or misleading with respect to any material fact, or omit to state any material fact
necessary in order to make the statements therein, in light of the circumstances under which they
are made, not false or misleading, or omit to state any material fact necessary to correct any
statement in any earlier communication that has become false or misleading. Notwithstanding
the foregoing, Acquiror and Merger Sub make no representation, warranty or covenant with
respect to any information supplied by Target that is contained in any of the foregoing
documents.

(b) The solicitation statement shall constitute a disclosure document for
the offer and issuance of shares of Acquiror Common Stock to be received by the holders of
Target Capital Stock in the Merger. Acquiror and Target shall each use reasonable commercial
efforts to cause the solicitation statement to comply with applicable federal and state securities
laws requirements. Each of Acquiror and Target agrees to provide promptly to the other such
information concerning its business and financial statements and affairs as, in the reasonable
judgment of the providing party or its counsel, may be required or appropriate for inclusion in
the solicitation statement or in any amendments or supplements thereto, and to cause its counsel
and auditors to cooperate with the other’s counsel and auditors in the preparation of the
solicitation statement. Target will promptly advise Acquiror, and Acquiror will promptly advise
Target, in writing if at any time prior to the Effective Time either Target or Acquiror shall obtain
knowledge of any facts that might make it necessary or appropriate to amend or supplement the
solicitation statement in order to make the statements contained or incorporated by reference
therein not misleading or to comply with applicable law. The solicitation statement shall contain
the recommendation of the Board of Directors of Target that the Target shareholders approve the
Merger and this Agreement and the conclusion of the Board of Directors that the terms and
conditions of the Merger are fair and reasonable to the shareholders of Target. Anything to the
contrary contained herein notwithstanding, Target shall not include in the solicitation statement
any information with respect to Acquiror or its affiliates or associates, the form and content of
which information shall not have been approved by Acquiror prior to such inclusion.

This Section contemplates a solicitation of all shareholders of Target by a written
consent to the Merger. If all shareholders are solicited, Target can consummate the Merger
upon receipt of the necessary approvals; if only a few large shareholders are solicited, under
Section 603 of California Law Target must wait ten days after notice before consummating the
merger. A meeting of shareholders, effected through a notice and proxy statement, will take
longer. Both Target and Acquiror will want to move as quickly as possible in most cases to
obtain shareholder approval.]
6.2 Approval of Shareholders. Target shall promptly after the date hereof take all action necessary in accordance with the California Law and its Articles of Incorporation and Bylaws to obtain the written consent of the Target shareholders approving the Merger as soon as practicable. Subject to Section 6.1, Target shall use its efforts to solicit from shareholders of Target written consents in favor of the Merger and shall take all other action necessary or advisable to secure the vote or consent of shareholders required to effect the Merger.

6.3 Sale of Shares Pursuant to Regulation D. The parties hereto acknowledge and agree that the shares of Acquiror Common Stock issuable to the Target shareholders pursuant to Section 2.6 hereof shall constitute “restricted securities” within the Securities Act. The certificates of Acquiror Common Stock shall bear the legends set forth in Section 2.6(i). Target will use its best efforts to cause each Target shareholder to execute and deliver to Acquiror an Investor Representation Statement in the form attached hereto as Exhibit C. It is acknowledged and understood that Acquiror is relying on the written representations made by each shareholder of Target in the Investor Representation Statements.

6.4 Access to Information.

(a) Target shall afford Acquiror and its accountants, counsel and other representatives, [reasonable] access [during normal business hours] during the period prior to the Effective Time to (i) all of Target’s properties, personnel, books, contracts, commitments and records and (ii) all other information concerning the business, properties and personnel of Target as Acquiror may reasonably request. [Acquiror shall afford Target and its accountants, counsel and other representatives, [reasonable] access during [normal business hours] during the period prior to the Effective Time to (i) all of Acquiror’s properties, books, contracts, commitments and records and (ii) all other information concerning the business, properties and personnel of Acquiror as Target may reasonably request.]

[This provision may be reciprocal if a significant amount of Acquiror’s capital stock is being issued in the Merger and if Target has substantial bargaining power, but more typically this provision would be directed only to Target to provide access to Acquiror.]

(b) Subject to compliance with applicable law, from the date hereof until the Effective Time, each of Acquiror and Target shall confer on a regular and frequent basis with one or more representatives of the other party to report operational matters of materiality and the general status of ongoing operations.

(c) No information or knowledge obtained in any investigation pursuant to this Section 6.4 shall affect or be deemed to modify any representation or warranty contained herein or the conditions to the obligations of the parties to consummate the Merger.

[This is the so-called “sand-bagging” provision. Note that Acquiror can learn of a breach, close and deduct the value from the Escrow.]

6.5 Confidentiality. The parties acknowledge that Acquiror and Target have previously executed a confidentiality agreement dated [Date] (the “Confidentiality Agreement”), which Confidentiality Agreement is hereby incorporated herein by reference and shall continue in full force and effect in accordance with its terms.
6.6 Public Disclosure. Unless otherwise permitted by this Agreement, Acquiror and Target shall consult with each other before issuing any press release or otherwise making any public statement or making any other public (or non-confidential) disclosure (whether or not in response to an inquiry) regarding the terms of this Agreement and the transactions contemplated hereby, and neither shall issue any such press release or make any such statement or disclosure without the prior approval of the other (which approval shall not be unreasonably withheld), except as may be required by law or by obligations pursuant to any listing agreement with any national securities exchange or with Nasdaq.

[This provision is critical to Acquiror, whose stock is trading in the public markets. Target should be aware that this provision covers discussions with employees, customers and suppliers.]

6.7 Regulatory Approval; Further Assurances.

(a) Each party shall use all reasonable efforts to file, as promptly as practicable after the date of this Agreement, all notices, reports and other documents required to be filed by such party with any Governmental Entity with respect to the Merger and the other transactions contemplated by this Agreement, and to submit promptly any additional information requested by any such Governmental Entity. Without limiting the generality of the foregoing, Target and Acquiror shall, promptly after the date of this Agreement, prepare and file the notifications required under the HSR Act in connection with the Merger. Target and Acquiror shall respond as promptly as practicable to (i) any inquiries or requests received from the Federal Trade Commission or the Department of Justice for additional information or documentations and (ii) any inquiries or requests received from any state attorney general or other Governmental Entity in connection with antitrust or related matters. Each of Target and Acquiror shall (i) give the other party prompt notice of the commencement of any Legal Proceeding by or before any Governmental Entity with respect to the Merger or any of the other transactions contemplated by this Agreement, (ii) keep the other party informed as to the status of any such Legal Proceeding and (iii) promptly inform the other party of any communication to or from the Federal Trade Commission, the Department of Justice or any other Governmental Entity regarding the Merger. Target and Acquiror will consult and cooperate with one another, and will consider in good faith the views of one another, in connection with any analysis, appearance, presentation, memorandum, brief, argument, opinion or proposal made or submitted in connection with any legal proceeding under or relating to HSR or any other federal or state antitrust or fair trade law. In addition, except as may be prohibited by any Governmental Entity or by any legal requirement, in connection with any legal proceeding under or relating to HSR or any other federal or state antitrust or fair trade law or any other similar legal proceeding, each of Target and Acquiror will permit authorized representatives of the other party to be present at each meeting or conference relating to any such legal proceeding and to have access to and be consulted in connection with any document, opinion or proposal made or submitted to any Governmental Entity in connection with any such legal proceeding.

(b) Subject to Section 6.7(c), Acquiror and Target shall use all reasonable efforts to take, or cause to be taken, all actions necessary to effectuate the Merger and make effective the other transactions contemplated by this Agreement. Without limiting the generality of the foregoing, but subject to Section 6.7(c), each party to this Agreement shall: (i) make any
filings and give any notices required to be made and given by such party in connection with the Merger and the other transactions contemplated by this Agreement; (ii) use all reasonable efforts to obtain any consent required to be obtained (pursuant to any applicable legal requirement or contract, or otherwise) by such party in connection with the Merger or any of the other transactions contemplated by this Agreement; and (iii) use all reasonable efforts to lift any restraint, injunction or other legal bar to the Merger. Each party shall promptly deliver to the other a copy of each such filing made, each such notice given and each such consent obtained by such party during the period prior to the Effective Time. Each party, at the reasonable request of the other party, shall execute and deliver such other instruments and do and perform such other acts and things as may be necessary or desirable for effecting completely the consummation of this Agreement and the transactions contemplated hereby.

(c) Notwithstanding anything to the contrary contained in this Agreement, Acquiror shall not have any obligation under this Agreement to: (i) dispose or transfer or cause any of its Subsidiaries to dispose of or transfer any assets, or to commit to cause Target to dispose of any assets; (ii) discontinue or cause any of its Subsidiaries to discontinue offering any product or service, or commit to cause Target to discontinue offering any product or service; (iii) license or otherwise make available, or cause any of its Subsidiaries to license or otherwise make available, to any person, any technology, software or other Intellectual Property, or commit to cause Target to license or otherwise make available to any person any technology, software or other Intellectual Property; (iv) hold separate or cause any of its Subsidiaries to hold separate any assets or operations (either before or after the Closing Date), or commit to cause Target to hold separate any assets or operations; or (v) make or cause any of its Subsidiaries to make any commitment (to any Governmental Entity or otherwise) regarding its future operations or the future operations of Target.

6.8 Target Options and Warrants.

(a) At the Effective Time, each Target Option, whether vested or unvested, will be assumed by Acquiror. Section 6.8 of the Target Disclosure Schedule hereto sets forth a true and complete list as of the date hereof of all holders of Target Options, including the number of shares of Target Common Stock subject to each such option, the exercise or vesting schedule, the exercise price per share and the term of each such option. On the Closing Date, Target shall deliver to Acquiror an updated Section 6.8 of the Target Disclosure Schedule current as of such date. Each option assumed by Acquiror under this Agreement shall continue to have, and be subject to, the same terms and conditions set forth in the Target Option Plan and/or any other document governing such option immediately prior to the Effective Time, except that: (i) such Target Option will be exercisable for that number of whole shares of Acquiror Common Stock equal to the product of the number of shares of Target Common Stock that were issuable upon exercise of such option immediately prior to the Effective Time multiplied by the Exchange Ratio and rounded down to the nearest whole number of shares of Acquiror Common Stock; (ii) the per share exercise price for the shares of Acquiror Common Stock issuable upon exercise of such Target Option will be equal to the quotient determined by dividing the exercise price per share of Target Common Stock at which such Target Option was exercisable immediately prior to the Effective Time by the [Common] Exchange Ratio, rounded up to the nearest whole tenth of a cent; and (iii) any restriction on the exercisability of such Target Option will continue in full force and effect, and the term, exercisability, vesting schedule
and other provisions of such Target Option will remain unchanged. Consistent with the terms of the Target Option Plan and the documents governing the outstanding options under the Target Option Plan, the Merger will not terminate any of the outstanding Target Options or accelerate the exercisability or vesting of such Target Options or the shares of Acquiror Common Stock underlying Target Options upon the Acquiror’s assumption thereof in the Merger. It is the intention of the parties that Target Options so assumed by Acquiror will remain incentive stock options as defined in Section 422 of the Code to the extent such Target Options qualified as incentive stock options prior to the Effective Time. Within ten (10) business days after the Effective Time, Acquiror will issue to each person who, immediately prior to the Effective Time, was a holder of an outstanding Target Option under the Target Option Plan a document in form and substance satisfactory to Target evidencing the foregoing assumption. [In the event any Target Option is exercised within twelve (12) months following the Effective Time, __________ percent (___ %) of the Acquiror Common Stock otherwise issuable upon such exercise shall be deposited into Escrow and shall be treated in accordance with Section 9.]

(b) [Cancellation of Warrants.] Target agrees to use its best efforts to obtain, prior to the Closing Date, a binding written agreement, acceptable to Acquiror, from each holder of Target Warrants whereby such holder agrees that if the Target Warrants held by such holder have not been exercised prior to the Closing Date, then such Target Warrants shall terminate upon and may not be exercised on or after the Closing Date.

Alternative:

[(b) Assumption of Warrants.] [Acquiror may provide for assumption of warrants in a provision similar to Section 6.8(a).]

6.9 Form S-8. Acquiror agrees to file, no later than [ten (10) days] after the Closing, a registration statement on Form S-8 covering the shares of Acquiror Common Stock issuable pursuant to outstanding options under the Target Option Plan assumed by Acquiror. Target shall cooperate with and assist Acquiror in the preparation of such registration statement.

6.10 Blue Sky Laws. Acquiror shall take such steps as may be necessary to comply with the securities and blue sky laws of all jurisdictions applicable to the issuance of the Acquiror Common Stock in connection with the Merger. Target shall use its commercially reasonable efforts to assist Acquiror to comply with the securities and blue sky laws of all jurisdictions applicable to the issuance of Acquiror Common Stock in connection with the Merger.

6.11 Escrow Agreement On or before the Effective Time, Acquiror, Merger Sub, Escrow Agent and the Shareholders’ Agent will execute the Escrow Agreement contemplated by Section 9 in substantially the form attached as Exhibit D (“Escrow Agreement”).

6.12 Nonaccredited Stockholders. Prior to the Effective Time, Target shall not take any action, including the granting of employee stock options, that would cause the number
of Target shareholders who are not “accredited investors” pursuant to Regulation D promulgated under the Securities Act to increase to more than 35 during the term of this Agreement.

6.13 Listing of Additional Shares. Prior to the Effective Time, Acquiror shall file with the Nasdaq Stock Market a Notification Form for Listing of Additional Shares with respect to the shares of Acquiror Common Stock issuable upon conversion of the Target Common Stock in the Merger or upon exercise of Target Options assumed by Acquiror in connection with the Merger.

6.14 Employees. Target will use commercially reasonable efforts in consultation with Acquiror to retain existing employees of Target through the Effective Time and following the Merger. Target shall use its reasonable efforts to: (a) cause each of such employees set forth in Section 6.14 of the Target Disclosure Schedule to execute an offer letter in substantially the form attached hereto as Exhibit E; (b) cause each person set forth in Section 6.14 of the Target Disclosure Schedule to execute a Non-Competition and Non-Solicitation agreement in substantially the form set forth as Exhibit F; and (c) cause each other Target employee to execute and deliver to Acquiror a Proprietary Rights and Non-Disclosure agreement in the form provided by Acquiror.

[This Section must be tailored to individual facts. In a merger, employees of Target will continue after the Merger. Some key employees may be critical to Acquiror, however, and Acquiror (or Target) may not be willing to close the Merger without such key employees accepting employment with Acquiror (as opposed to Target) and/or signing a non-competition agreement. These terms of employment and noncompete can involve significant negotiation. Acquiror may want Target employees to sign a form of proprietary rights and non-disclosure agreement with Acquiror to protect work performed after the Merger for Acquiror.]

6.15 Reorganization. Acquiror and Target shall each use its best efforts to cause the business combination to be effected by the Merger to be qualified as a “reorganization” described in Section 368 of the Code and to obtain the opinion of its respective counsel contemplated by Sections 7.2(f) and 7.3(d). Each party shall make such representations as counsel to the parties shall reasonably request to enable them to render such opinions.

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

6.17 Registration of Shares Issued in the Merger.

(a) Acquiror shall use its reasonable commercial efforts to cause the Shares of Acquiror Common Stock issued in the Merger, including any and all Escrow Shares (the “Registrable Securities”) to be registered under the Securities Act so as to permit the resale thereof, and in connection therewith shall use its commercially reasonable efforts to prepare and file a registration statement (the “Registration Statement”) with the SEC with respect to the Registrable Securities as soon as practicable after the date hereof, but no later than immediately prior to the Effective Time, and shall use its reasonable commercial efforts to cause the Registration Statement to become effective as soon as possible after the Effective Time;
provided, however, that each holder of Registrable Securities ("Holder") shall provide all such
information and materials to Acquiror and take all such action as may be required in order to
permit Acquiror to comply with all applicable requirements of the SEC and to obtain any desired
acceleration of the effective date of such Registration Statement. Such provision of information
and materials is a condition precedent to the obligations of Acquiror pursuant to this
Section 6.17. Acquiror shall not be required to effect more than one (1) registration under this
Section 6.17. The offering made pursuant to such registration shall not be underwritten.

(b) Acquiror shall: (i) prepare and file with the SEC the Registration
Statement in accordance with Section 6.17(a) with respect to the shares of Registrable Securities
and shall use all commercially reasonable efforts to cause the Registration Statement to remain
effective for a period ending on the first to occur of (A) the date all of the shares registered
thereunder may be sold under Rule 144 in one three-month period (assuming compliance by the
Holders with the provisions thereof) or (B) one (1) year after the Effective Time, subject to
Section 6.17(c); (ii) prepare and file with the SEC such amendments and supplements to the
Registration Statement and the prospectus used in connection therewith as may be necessary, and
comply with the provisions of the Securities Act with respect to the sale or other disposition of
all securities proposed to be registered in the Registration Statement until the termination of
effectiveness of the Registration Statement; and (iii) for so long as Acquiror is required to cause
the Registration Statement to remain effective, furnish to each Holder such number of copies of
any prospectus (including any preliminary prospectus and any amended or supplemented
prospectus) as required by the Securities Act, and such other documents as each Holder may
reasonably request in order to effect the offering and sale of the shares of Registrable Securities
to be offered and sold.

(c) Notwithstanding any other provision of this Section 6.17, Acquiror
shall have the right at any time to require that all Holders suspend open market offers and sales
of Registrable Securities whenever, and for so long as, in the reasonable, good-faith judgment of
Acquiror after consultation with counsel, there is in existence material undisclosed information
or events with respect to Acquiror (the "Suspension Right"). In the event Acquiror exercises the
Suspension Right, such suspension will continue for the period of time reasonably necessary for
disclosure to occur at a time that is not materially detrimental to Acquiror or until such time as
the information or event is no longer material, each as reasonably determined in good faith by
Acquiror after consultation with counsel. Acquiror will promptly give the Shareholders’ Agent
notice, in a writing signed by an executive officer of Acquiror, of any such suspension (the
"Suspension Notice"). Acquiror agrees to notify the Shareholders’ Agent promptly upon
termination of the suspension (the "Resumption Notice"). Upon receipt of either a Suspension
Notice or Resumption Notice, the Purchaser Representative (as defined in Section 7.2(l)) shall
immediately notify each Holder concerning the status of the Registration Statement. The period
during which Acquiror is required to cause the Registration Statement to remain effective shall
be extended by a period equal in length to any and all periods during which open market offers
and sales of Registrable Securities are suspended pursuant to exercise of the Suspension Right.

(d) Acquiror shall pay all of the out-of-pocket expenses, other than
underwriting discounts and commissions, incurred in connection with any registration of
Registrable Securities pursuant to this Section 6.17, including without limitation all registration
and filing fees, printing expenses, transfer agents’ and registrars’ fees, the fees and
disbursements of Acquiror’s outside counsel and independent accountants, and the reasonable fees and disbursements of a single counsel for the Holders.

(e) To the fullest extent permitted by law, Acquiror will indemnify, defend, protect and hold harmless each selling Holder, each underwriter of Registrable Securities being sold pursuant to this Section 6.17, each person, if any, who controls any such Holder or underwriter within the meaning of the Securities Act or the Exchange Act and their respective affiliates, officers, directors, partners, successors and assigns (each a “Holder Indemnitee”), against all actions, claims, losses, damages, liabilities and expenses to which they or any of them become subject under the Securities Act, the Exchange Act or under any other statute or at common law or otherwise and, except as hereinafter provided, will promptly reimburse each Holder Indemnitee for any legal or other expenses reasonably incurred in connection with investigating or defending any actions whether or not resulting in any liability, insofar as such actions, claims, losses, damages, liabilities and expenses arise out of or are based upon any untrue statement or alleged untrue statement of material fact in any registration statement and any prospectus filed pursuant to Section 6.17 or any post-effective amendment thereto or arise out of or are based upon any omission or alleged omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading or any violation by Acquiror of any rule or regulation promulgated under the Securities Act, the Exchange Act or any statute, regulation or law applicable to Acquiror and relating to action or inaction required of Acquiror in connection with such registration; provided, however, that Acquiror shall not be liable to any such Holder Indemnitee in respect of any actions, claims, losses, damages, liabilities and expenses resulting from any untrue statement or alleged untrue statement, or omission or alleged omission made in reliance upon and in conformity with information furnished in writing to Acquiror by such Holder Indemnitee or any of such Holder Affiliate specifically for use in connection with such registration statement and prospectus or post-effective amendment.

(f) To the fullest extent permitted by law, each selling Holder of Registrable Securities will indemnify Acquiror, each person, if any, who controls the Acquiror within the meaning of the Securities Act or the Exchange Act, each underwriter of Registrable Securities and their respective affiliates, officers, directors, partners, successors and assigns (each an “Acquiror Indemnitee”) against any actions, claims, losses, damages, liabilities and expenses to which they or any of them may become subject under the Securities Act, the Exchange Act or under any other statute or at common law or otherwise, and, except as hereinafter provided, will promptly reimburse each Acquiror Indemnitee for any legal or other expenses reasonably incurred in connection with investigating or defending any actions, whether or not resulting in any liability, insofar as such actions, claims, losses, damages, liabilities and expenses arise out of or are based upon any untrue statement or alleged untrue statement of a material fact in any registration statement and any prospectus filed pursuant to Section 6.17 or any post-effective amendment thereto, or any omission or alleged omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, which untrue statement or alleged untrue statement or omission or alleged omission was made in reliance upon and in conformity with information furnished in writing to the Acquiror by such Holder or underwriter specifically for use in connection with such registration statement, prospectus or post-effective amendment; provided, however, that the obligations of each such selling Holder hereunder shall be limited to an amount equal to the proceeds to such Holder from the sale of such Holder’s Registrable Securities hereunder.
(g) Each person entitled to indemnification under this Section 6.17 (an “Indemnified Person”) shall give notice to the party required to provide indemnification (the “Indemnifying Person”) promptly after such Indemnified Person has actual knowledge of any claim as to which indemnity may be sought and shall permit the Indemnifying Person to assume the defense of any such claim and any litigation resulting therefrom; provided, however, that counsel for the Indemnifying Person who conducts the defense of such claim or any litigation resulting therefrom shall be approved by the Indemnified Person (whose approval shall not unreasonably be withheld), and the Indemnified Person may participate in such defense at such party’s expense (unless the Indemnified Person has reasonably concluded that there may be a conflict of interest between the Indemnifying Person and the Indemnified Person in such action, in which case the fees and expenses of counsel for the Indemnified Person shall be at the expense of the Indemnifying Person); and provided, further, that the failure of any Indemnified Person to give notice as provided herein shall not relieve the Indemnifying Person of its obligations under this Section 6.17 except to the extent that the Indemnifying Person is materially prejudiced thereby. No Indemnifying Person, in the defense of any such claim or litigation, shall (except with the consent of each Indemnified Person) consent to entry of any judgment or enter into any settlement that does not include as an unconditional term thereof the giving by the claimant or plaintiff to such Indemnified Person of a release from all liability in respect to such claim or litigation. Each Indemnified Person shall furnish such information regarding itself or the claim in question as an Indemnifying Person may reasonably request in writing and as shall be reasonably required in connection with the defense of such claim and litigation resulting therefrom.

(h) In order to provide for just and equitable contribution to joint liability under the Securities Act in any case in which Acquiror or any Holder makes a claim for indemnification pursuant to this Section 6.17 but it is judicially determined (by the entry of a final judgment or decree by a court of competent jurisdiction and the expiration of time to appeal or the denial of the last right of appeal) that such indemnification may not be enforced in such case notwithstanding that this Section 6.17 provides for indemnification in such case, then Acquiror and such Holder shall contribute to the aggregate losses, claims, damages or liabilities to which they may be subject (after contribution from others) in such proportion as is appropriate to reflect the relative fault of Acquiror on the one hand and the Holder on the other in connection with the statements or omissions that resulted in such losses, claims, damages or liabilities, as well as any other relevant equitable considerations or, if the allocation provided herein is not permitted by applicable law, in such proportion as shall be permitted by applicable law and reflect as nearly as possible the allocation provided herein. The relative fault of the Acquiror on the one hand and of the Holder on the other shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or omission or alleged omission to state a material fact relates to information supplied by Acquiror on the one hand or by the Holder on the other, and each party’s relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission; provided, however, that in any such case (i) no Holder will be required to contribute any amount in excess of the proceeds received by such Holder from the sale of Registrable Securities pursuant to the Registration Statement; and (ii) no person or entity guilty of fraudulent misrepresentation within the meaning of Section 11(f) of the Securities Act will be entitled to contribution from any person or entity who was not guilty of such fraudulent misrepresentation.
7. Conditions to the Merger.

7.1 Conditions to Obligations of Each Party to Effect the Merger. The respective obligations of each party to this Agreement to consummate and effect this Agreement and the transactions contemplated hereby shall be subject to the satisfaction at or prior to the Effective Time of each of the following conditions, any of which may be waived, in writing, by agreement of all the parties hereto:

(a) Shareholder Approval. This Agreement and the Merger shall be approved by the shareholders of Target by the requisite vote under California Law and Target’s Articles of Incorporation.

(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 Merger shall be and remain in effect, nor shall any proceeding brought by an administrative agency or commission or other governmental authority or instrumentality, domestic or foreign, seeking any of the foregoing be pending, which could reasonably be expected to have a Material Adverse Effect on Acquiror, either individually or combined with the Surviving Corporation after the Effective Time, nor shall there be any action taken, or any statute, rule, regulation or order enacted, entered, enforced or deemed applicable to the Merger, which makes the consummation of the Merger illegal.

(c) Governmental Approval. Acquiror, Target and Merger Sub shall have timely obtained from each Governmental Entity all approvals, waivers and consents, necessary for consummation of or in connection with the Merger and the several transactions contemplated hereby, including such approvals, waivers and consents as may be required under the Securities Act, under state blue sky laws and under HSR, other than filings and approvals relating to the Merger or affecting Acquiror’s ownership of Target or any of its properties if failure to obtain such approval, waiver or consent could not reasonably be expected to have a Material Adverse Effect on Acquiror after the Effective Time.

7.2 Additional Conditions to the Obligations of Acquiror and Merger Sub. The obligations of Acquiror and Merger Sub to consummate and effect this Agreement and the transactions contemplated hereby shall be subject to the satisfaction at or prior to the Effective Time of each of the following conditions, any of which may be waived, in writing, by Acquiror:

(a) Representations, Warranties and Covenants. (i) The representations and warranties of Target in this Agreement shall be true and correct in all material respects, without regard to any qualification as to materiality contained in such representation or warranty on and as of the date of this Agreement and on and as of the Closing as though such representations and warranties were made on and as of such time (except for such representations and warranties that speak specifically as of the date hereof or as of another date, which shall be true and correct as of such date).

(a) [Alternate, Target-friendly formulation:] Representations, Warranties and Covenants. The representations and warranties of Target in this
Agreement shall be true and correct in all respects on and as of the date of this Agreement and at and as of the Closing as though such representations and warranties were made on and as of such time (except for such representations and warranties that speak specifically as of the date hereof or as of another date, which shall be true and correct as of such date), disregarding for the purposes of such determination any “Material Adverse Effect” or other materiality qualifiers set forth in such representations and warranties, except for such failures of such representations and warranties to be so true and correct as could not, individually or in the aggregate reasonably be expected to have a Material Adverse Effect on Target.

(b) Performance of Obligations. Target 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 it as of the Closing.

(c) Certificate of Officers. Acquiror and Merger Sub shall have received a certificate executed on behalf of Target by the chief executive officer and chief financial officer of Target certifying that the conditions set forth in Sections 7.2(a) and 7.2(b) have been satisfied.

(d) Third Party Consents. All consents or approvals required to be obtained in connection with the Merger and the other transactions contemplated by this Agreement shall have been obtained and shall be in full force and effect, except where the failure to obtain such consents or approvals, could not individually or in the aggregate be reasonably expected to have a Material Adverse Effect on Target.

(e) No Governmental Litigation. There shall not be pending or threatened any legal proceeding in which a Governmental Entity is or is threatened to become a party or is otherwise involved, and neither Acquiror nor Target shall have received any communication from any Governmental Entity in which such Governmental Entity indicates the probability of commencing any legal proceeding or taking any other action: (i) challenging or seeking to restrain or prohibit the consummation of the Merger; (ii) relating to the Merger and seeking to obtain from Acquiror or any of its Subsidiaries, or Target, any damages or other relief that would be material to Acquiror; (iii) seeking to prohibit or limit in any material respect Acquiror’s ability to vote, receive dividends with respect to or otherwise exercise ownership rights with respect to the stock of Target; or (iv) that would materially and adversely affect the right of Acquiror or Target to own the assets or operate the business of Target.

(f) Tax Opinion. Acquiror shall have received a written opinion from Acquiror’s legal counsel to the effect that the Merger will be treated for Federal income tax purposes as a reorganization within the meaning of Section 368 of the Internal Revenue Code. **If a tax opinion is material, it is typical for each party to receive an opinion from its counsel.**

(g) No Other Litigation. There shall not be pending any legal proceeding: (i) challenging or seeking to restrain or prohibit the consummation of the Merger or any of the other transactions contemplated by this Agreement; (ii) relating to the Merger and seeking to obtain from Acquiror or any of its Subsidiaries, or Target, any damages or other relief that would be material to Acquiror; (iii) seeking to prohibit or limit in any material respect Acquiror’s ability to vote, receive dividends with respect to or otherwise exercise ownership rights with
respect to any of Target Capital Stock; or (iv) which would affect adversely the right of Acquiror or Target to own the assets or operate the business of Target.

(h) Employees. As of the Closing, there shall be sufficient Target employees, in Acquiror’s reasonable good faith determination, to permit Acquiror to continue to operate the business of Target in the ordinary course of business following the Closing. [This is a controversial provision; typically, it would be limited to key employees.]

(i) Escrow Agreement. Acquiror, Merger Sub, Target, Escrow Agent and the Shareholders’ Agent shall have entered into an Escrow Agreement substantially in the form attached hereto as Exhibit D.

(j) No Material Adverse Change. There shall not have occurred any change in the financial condition, properties, assets (including intangible assets), liabilities, business, operations, results of operations [or prospects] of Target, taken as a whole, that, individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect on Target. [Consider carve-outs.]

(k) Investor Representation Statement; Number of Shareholders. Each of the Target’s shareholders shall have delivered to Acquiror a signed Investor Representation Statement in substantially the form attached hereto as Exhibit B and each such Statement shall be in full force and effect, and there shall be no more than thirty-five (35) Target shareholders who are both (i) U.S. persons as defined under Regulation S under the Securities Act (a “U.S. Person”); and (ii) not “accredited investors” as defined in Rule 501 under the Securities Act.

(l) Purchaser Representative. There shall be a Purchaser Representative, as defined in Regulation D under the Securities Act, reasonably satisfactory to Acquiror, representing each holder of Target Capital Stock who is a U.S. Person and not an “accredited investor” as defined in Rule 501 under the Securities Act, and such Purchaser Representative shall have executed and delivered documentation reasonably satisfactory to Acquiror.

(m) Offer Letters and Non-Competition and Non-Solicitation Agreements. The employees of Target set forth in Section 3.18 of the Target Disclosure Schedule shall have accepted employment with Merger Sub pursuant to the terms of an offer letter in substantially the form attached hereto as Exhibit E, as applicable, and shall have entered into Non-Competition and Non-Solicitation Agreements in substantially the form attached as Exhibit F.

(n) Dissenters’ Rights. Not more than five percent (5%) of the Target Capital Stock outstanding immediately prior to the Effective Time shall be eligible as Dissenting Shares. [This provision may be necessary to preserve either cash or tax-free treatment.]

(o) Conversion of Preferred Stock. All shares of Target Preferred Stock shall have converted into Target Common Stock in accordance with Target’s Articles of Incorporation prior to the Effective Time. [This provision will change depending on the structure of the transaction.]
(p) **Warrants.** All Target Warrants outstanding on the Closing Date shall be cancelled as provided in Section 6.8(b). [This provision will change depending on the structure of the transaction.]

(q) **Opinion.** Counsel for Target shall have delivered to Acquiror an opinion in a form and substance reasonably satisfactory to Acquiror and its counsel. [Typically a form of opinion is attached.]

7.3 **Additional Conditions to Obligations of Target.** The obligations of Target to consummate and effect this Agreement and the transactions contemplated hereby shall be subject to the satisfaction at or prior to the Effective Time of each of the following conditions, any of which may be waived, in writing, by Target:

(a) **Representations, Warranties and Covenants.** (i) The representations and warranties of Acquiror and Merger Sub in this Agreement shall be true and correct in all material respects without regard to any qualification as to materiality contained in such representation or warranty on and as of the date of this Agreement and on and as of the Closing Date as though such representations and warranties were made on and as of such time (except for such representations and warranties that speak specifically as of the date hereof or as of another date, which shall be true and correct as of such date). [Use the alternative version of this condition here if target friendly version used above.]

(b) **Performance of Obligations.** Acquiror and Merger Sub 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 them as of the Closing.

(c) **Certificate of Officers.** Target shall have received a certificate executed on behalf of Acquiror and Merger Sub by the chief executive officer and chief financial officer of Acquiror and Merger Sub, respectively, certifying that the conditions set forth in Sections 7.3(a) and 7.3(b) have been satisfied.

(d) **Tax Opinion.** Target shall have received a written opinion from Target’s legal counsel to the effect that the Merger will be treated for Federal income tax purposes as a reorganization within the meaning of Section 368 of the Internal Revenue Code. [Note: This condition will sometimes also include a provision that if no opinion is received by Target’s legal counsel, the condition will still be satisfied if Acquiror’s legal counsel delivers the opinion to Target.]

(e) **No Material Adverse Change.** [This condition is often omitted by Acquiror in first draft, especially if Target is receiving only a very small percent of Acquiror’s Common Stock.] There shall not have occurred any change in the financial condition, properties, assets (including intangible assets), liabilities, business, operations or results of operations of Acquiror that, individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect on Acquiror.
(f) **Nasdaq Listing.** The Acquiror Common Stock to be issued in the Merger shall have been authorized for listing on the Nasdaq National Market upon official notice of issuance.

(g) **Registration Statement.** Acquiror shall have filed with the SEC the Registration Statement.

*This condition is typically omitted in Acquiror's first draft; note that the Registration Statement cannot be declared effective until closing since no shares are issued, and SEC review may delay effectiveness.*

8. **Termination, Amendment and Waiver.**

8.1 **Termination.** This Agreement may be terminated at any time prior to the Effective Time (with respect to Section 8.1(b) through Section 8.1(d), by written notice by the terminating party to the other party):

(a) by the mutual written consent of Acquiror and Target;

(b) by either Acquiror or Target if the Merger shall not have been consummated by [Date]; provided, however, that the right to terminate this Agreement under this Section 8.1(b) shall not be available to any party whose failure to fulfill any obligation under this Agreement has been the cause of or resulted in the failure of the Merger to occur on or before such date;

(c) by either Acquiror or Target if a court of competent jurisdiction or other Governmental Entity shall have issued a nonappealable final order, decree or ruling or taken any other action, in each case having the effect of permanently restraining, enjoining or otherwise prohibiting the Merger, unless the party relying on such order, decree or ruling or other action has not complied [in all material respects] with its obligations under this Agreement; or

(d) by Acquiror or Target, if there has been a breach of any representation, warranty, covenant or agreement on the part of the other party set forth in this Agreement, which breach (i) causes the conditions set forth in Section 7.1 or 7.2 (in the case of termination by Acquiror) or Section 7.1 or 7.3 (in the case of termination by Target) not to be satisfied and (ii) shall not have been cured within ten (10) business days following receipt by the breaching party of written notice of such breach from the other party.

8.2 **Effect of Termination.** In the event of termination of this Agreement as provided in Section 8.1, there shall be no liability or obligation on the part of Acquiror, Target, Merger Sub or their respective officers, directors, or stockholders, except to the extent that such termination results from the willful breach by a party of any of its representations, warranties or covenants set forth in this Agreement; provided, however, that the provisions of Sections 6.5, 6.6, 6.16, and 10 shall remain in full force and effect and survive any termination of this Agreement.
8.3 Amendment. This Agreement may be amended by the parties hereto, by action taken or authorized by their respective Boards of Directors. This Agreement may not be amended except by an instrument in writing signed on behalf of each of the parties hereto.

8.4 Extension; Waiver. At any time prior to the Effective Time, the parties hereto, by action taken or authorized by their respective Boards of Directors, may, to the extent legally allowed: (i) extend the time for the performance of any of the obligations or other acts of the other parties hereto; (ii) waive any inaccuracies in the representations and warranties contained herein or in any document delivered pursuant hereto; and (iii) waive compliance with any of the agreements or conditions contained herein. Any agreement on the part of a party hereto to any such extension or waiver shall be valid only if set forth in a written instrument signed on behalf of such party.

9. Escrow and Indemnification

9.1 Escrow Fund.

(a) At the Closing, the Escrow Shares shall be registered in the name of, and be deposited with, Bank XXX (or other institution selected by Acquiror with the reasonable consent of Target) as escrow agent (the “Escrow Agent”), such deposit and any Additional Escrow Shares (as defined in Section 9.1(b) below) to constitute the Escrow Fund and to be governed by the terms set forth herein and in the Escrow Agreement attached hereto as Exhibit D. The Escrow Fund shall be available to compensate Acquiror pursuant to the indemnification obligations of the shareholders of Target. In the event Acquiror issues any Additional Escrow Shares, such shares will be issued in the name of the Escrow Agent and delivered to the Escrow Agent in the same manner as the Escrow Shares delivered at the Closing.

(b) Except for dividends paid in stock declared with respect to the Escrow Shares (“Additional Escrow Shares”), which shall be treated as Escrow Shares pursuant to Section 9.1(a) hereof, any cash dividends, dividends payable in securities or other distributions of any kind made in respect of the Escrow Shares will be delivered to the shareholders of Target on a pro rata basis. Each shareholder of Target will have voting rights with respect to the Escrow Shares deposited in the Escrow Fund with respect to such shareholder so long as such Escrow Shares are held in escrow, and Acquiror will take all reasonable steps necessary to allow the exercise of such rights. While the Escrow Shares remain in the Escrow Agent’s possession pursuant to this Agreement, the shareholders of Target will retain and will be able to exercise all other incidents of ownership of said Escrow Shares which are not inconsistent with the terms and conditions of this Agreement.

9.2 Indemnification.

(a) Survival of Warranties. All representations and warranties made by Target, [Acquiror or Merger Sub] herein, or in any certificate, schedule or exhibit delivered pursuant hereto, shall survive the Closing and continue in full force and effect until the [first] anniversary of the Closing Date (the “Termination Date”). [Consider whether Acquiror should indemnify Target.]
(b) (i) Subject to the limitations set forth in this Section 9, the shareholders of Target will jointly [and severally] [Target may require indemnification to be pro rata] indemnify and hold harmless Acquiror and the Surviving Corporation and their respective officers, directors, agents, attorneys and employees, and each person, if any, who controls or may control Acquiror or the Surviving Corporation within the meaning of the Securities Act (individually an “Acquiror Indemnified Person” and collectively the “Acquiror Indemnified Persons”) from and against any and all losses, costs, damages, liabilities and expenses arising from claims, demands, actions, causes of action, including, without limitation, legal fees, (collectively, “Damages”) arising out of any misrepresentation or breach of or default in connection with any of the representations, warranties, covenants and agreements given or made by Target in this Agreement, the Target Disclosure Schedule or any exhibit or schedule to this Agreement. [Acquiror Indemnified Persons shall act in good faith and in a commercially reasonable manner to mitigate any Damages they may suffer.] [The sole recourse of the Indemnified Persons shall be against the Escrow Fund and claims against the Escrow Fund shall be the sole and exclusive remedy of Acquiror Indemnified Persons for any Damages hereunder.] [Consider whether the Escrow Fund should be the sole and exclusive remedy. If the Escrow Fund is not the sole and exclusive remedy, Target counsel should consider a cap on liability.]

(ii) Nothing in this Agreement shall limit the liability in amount or otherwise of (A) Target for any breach of any representation, warranty or covenant if the Merger does not close; or (B) any Target shareholder in connection with any breach by such shareholder of any representation or covenant in the Investor Representation Statement, Shareholder Agreement, Irrevocable Proxy or continuity of interest certificate delivered in connection with tax opinions to be rendered, or delivered pursuant hereto; or (C) Target with respect to fraud, criminal activity or intentional breach of any covenant contained in this Agreement.

(c) [Indemnification by Acquiror and Merger Sub. Subject to the limitations set forth in this Section 9, Acquiror hereby agrees to indemnify, defend and hold harmless Target, the shareholders of Target and their respective officers, directors, agents, attorneys and employees, and each person who controls or may control Target or such Target shareholder (individually a “Target Indemnified Person” and collectively, the “Target Indemnified Persons”) from and against any and all Damages which arising out of any misrepresentation or breach of or default in connection with any of the representations, warranties, covenants and agreements given or made by Acquiror or Merger Sub in this Agreement, the Acquiror Disclosure Schedule or any exhibit or schedule to this Agreement. The sole recourse of the Target Indemnified Persons from any Damages shall be indemnification under this Section 9, and Target Indemnified Persons shall act in good faith and in a commercially reasonable manner to mitigate any Damages they may suffer. The aggregate indemnification obligations of Acquiror and Merger Sub hereunder shall not exceed $_________; provided, however, that there shall be no limitation on liability of Acquiror or Merger Sub for (i) any breach of any representation, warranty or covenant if the Merger does not close, or (ii) fraud, criminal activity or intentional breach of any covenant contained in this Agreement.] [Often omitted in a first draft.]
(d) **Threshold for Claims.** No claim for Damages shall be made under Section 9 unless the aggregate of Damages exceeds $[________] [this amount is heavily negotiated; one standard is the lesser of $250,000 or 1%) for which claims are made hereunder by the Target Indemnified Persons or Acquiror Indemnified Persons, as the case may be, in which case the Target Indemnified Person or Acquiror Indemnified Person, as the case may be, shall be entitled to seek compensation [for all Damages without regard to the limitation set forth in this Section 9.2(d) (the "**Limitation**")]. The prior clause creates a threshold; a deductible would instead state "for Damages exceeding the limitation set forth in this Section 9.2(d) (the "**Limitation**")].

9.3 **Escrow Period; Release From Escrow.**

(a) The Escrow Period shall terminate upon the expiration of [**twelve months**] after the Effective Time; provided, however, that a portion of the Escrow Fund that, in the reasonable judgment of Acquiror subject to the objection of the Shareholders’ Agent and the subsequent arbitration of the matter in the manner provided in Section 9.6 hereto, is necessary to satisfy any unsatisfied claims specified in any Officer’s Certificate (as defined in Section 9.4 below) delivered to the Escrow Agent prior to termination of the Escrow Period with respect to facts and circumstances existing prior to expiration of the Escrow Period, shall remain in the Escrow Fund until such claims have been resolved.

(b) Within three (3) business days after the Termination Date (the "**Release Date**"), the Escrow Agent shall release from escrow to the shareholders of Target their pro rata portion of the Escrow Shares and Additional Escrow Shares, less with respect to each such shareholder the number of Escrow Shares and Additional Shares with a value (as determined pursuant to Section 9.4) equal to the sum of (i) such shareholder’s pro rata portion of any liability described in an Officer’s Certificate delivered to Acquiror in accordance with Section 9.4 and (ii) such shareholder’s pro rata portion of any liability described in an Officer’s Certificate delivered to Indemnitee in accordance with Section 9.3(a) with respect to any pending but unresolved indemnification claims of Indemnitee. Any Escrow Shares and Additional Escrow Shares held as a result of clause (ii) shall be released to the shareholders of Target or released to Acquiror (as appropriate) promptly upon resolution of each specific indemnification claim involved. Escrow Shares and Additional Escrow Shares shall be released to the respective shareholders of Target in proportion to their respective shares of the Merger Consideration. Acquiror will take such action as may be necessary to cause such certificates to be issued in the names of the appropriate persons. Certificates representing Escrow Shares and Additional Escrow Shares so issued that are subject to resale restrictions under applicable securities laws will bear legends to that effect. No fractional shares shall be released and delivered from Escrow to the shareholders of Target. In lieu of any fraction of an Escrow Share to which a Target shareholder would otherwise be entitled, such holder will receive from Acquiror an amount of cash (rounded to the nearest whole cent) equal to the product of such fraction multiplied by the Average Closing Price.

(c) No Escrow Shares or Additional Escrow Shares or any beneficial interest therein may be pledged, sold, assigned or transferred, including by operation of law, by any shareholder of Target or be taken or reached by any legal or equitable process in satisfaction
of any debt or other liability of any such shareholder, prior to the delivery to such shareholder of such shareholder’s pro rata portion of the Escrow Fund by the Escrow Agent as provided herein.

(d) The Escrow Agent is hereby granted the power to effect any transfer of Escrow Shares contemplated by this Agreement. Acquiror will cooperate with the Escrow Agent in promptly issuing stock certificates to effect such transfers.

9.4 Claims Upon Escrow Fund. Upon receipt by the Escrow Agent on or before the Release Date of a certificate signed by any officer of Acquiror (an “Officer’s Certificate”) stating that Damages exist with respect to the indemnification obligations of the shareholders of Target set forth in Section 9.2, and specifying in reasonable detail the individual items of such Damages included in the amount so stated, the date each such item was paid, or properly accrued or arose, and the nature of the misrepresentation, breach of warranty, covenant or claim to which such item is related, the Escrow Agent shall, subject to the provisions of this Section 9, deliver to Acquiror out of the Escrow Fund, as promptly as practicable, Acquiror Common Stock or other assets held in the Escrow Fund having a value equal to such Damages. For the purpose of compensating Acquiror for its Damages pursuant to this Agreement, the Acquiror Common Stock in the Escrow Fund shall be valued at the Average Closing Price. [Consider what date(s) should be used to determine value of the Escrow Fund.]

9.5 Objections to Claims.

(a) At the time of delivery of any Officer’s Certificate to the Escrow Agent, a duplicate copy of such Officer’s Certificate shall be delivered to the Shareholders’ Agent. For a period of thirty (30) days after such delivery, the Escrow Agent shall make no delivery of Acquiror Common Stock or other property pursuant to Section 9.4 hereof unless the Escrow Agent shall have received written authorization from the Shareholders’ Agent to make such delivery. After the expiration of such thirty (30) day period, the Escrow Agent shall make delivery of the Acquiror Common Stock or other property in the Escrow Fund in accordance with Section 9.4 hereof, provided that no such payment or delivery may be made if the Shareholders’ Agent shall object in a written statement to the claim made in the Officer’s Certificate, and such statement shall have been delivered to the Escrow Agent and to Acquiror prior to the expiration of such thirty (30) day period.

(b) In case the Shareholders’ Agent shall so object in writing to any claim or claims by Acquiror made in any Officer’s Certificate, Acquiror shall have thirty (30) days to respond in a written statement to the objection of the Shareholders’ Agent. If after such thirty (30) day period there remains a dispute as to any claims, the Shareholders’ Agent and Acquiror shall attempt in good faith for sixty (60) days to agree upon the rights of the respective parties with respect to each of such claims. If the Shareholders’ Agent and Acquiror should so agree, a memorandum setting forth such agreement shall be prepared and signed by both parties and shall be furnished to the Escrow Agent. The Escrow Agent shall be entitled to rely on any such memorandum and shall distribute the Acquiror Common Stock or other property from the Escrow Fund in accordance with the terms thereof.
9.6 Claims by Target Indemnities.

(a) Subject to the provisions of this Section 9, upon receipt by Acquiror of a certificate signed by the Shareholders’ Agent (an “Agent Certificate”) stating that Damages exist with respect to the indemnification obligations of Acquiror and Merger Sub set forth in Section 9.2 and specifying in reasonable detail the individual items of such Damages included in the amount so stated, the date each item was paid, or properly accrued or arose, and the nature of the misrepresentation, breach of warranty, covenant or other claim to which such item is related, Acquiror shall, subject to the provisions of this Section 9, deliver a sum of cash equal to such Damages to the Shareholders’ Agent as promptly as practicable.

(b) Acquiror shall have thirty (30) days after delivery of an Agent Certificate to object to any claim or claims made by such Agent Certificate in a written statement delivered to Shareholders’ Agent. In case Acquiror shall so object in writing to any claim or claims made by the Shareholders’ Agent in the Agent Certificate, the Shareholders Agent shall have thirty (30) days to respond in a written statement to the objection of Acquiror. If after such thirty (30) day period there remains a dispute as to any claims, the Shareholders’ Agent and Acquiror shall attempt in good faith for sixty (60) days to agree upon the rights of the respective parties with respect to each of such claims. If the Shareholders’ Agent and Acquiror should so agree, a memorandum setting forth such agreement shall be prepared and signed by both parties. Acquiror shall, if agreed in such memorandum, make payment for claims or other disposition as agreed in such memorandum and such performance shall satisfy all of Acquiror’s obligations as to such claim.

9.7 Resolution of Conflicts and Arbitration.

(a) If no agreement can be reached after good faith negotiation between the parties pursuant to Sections 9.5 [or 9.6], either Acquiror or the Shareholders’ Agent may, by written notice to the other, demand arbitration of the matter unless the amount of the Damages is at issue in pending litigation with a third party, in which event arbitration shall not be commenced until such amount is ascertained or both parties agree to arbitration; and in either such event the matter shall be settled by arbitration conducted by [one] arbitrator. Acquiror and the Shareholders’ Agent shall agree on the arbitrator, provided that if Acquiror and the Shareholders’ Agent cannot agree on such arbitrator, either Acquiror or Shareholders’ Agent can request that Judicial Arbitration and Mediation Services (“JAMS”) select the arbitrator. The arbitrator shall set a limited time period and establish procedures designed to reduce the cost and time for discovery while allowing the parties an opportunity, adequate in the sole judgment of the arbitrator, to discover relevant information from the opposing parties about the subject matter of the dispute. The arbitrator shall rule upon motions to compel or limit discovery and shall have the authority to impose sanctions, including attorneys’ fees and costs, to the same extent as a court of competent law or equity, should the arbitrator determine that discovery was sought without substantial justification or that discovery was refused or objected to without substantial justification. The decision of the arbitrator shall be written, shall be in accordance with applicable law and with this Agreement, and shall be supported by written findings of fact and conclusion of law which shall set forth the basis for the decision of the arbitrator. The decision
of the arbitrator as to the validity and amount of any claim in such Officer’s Certificate [or Agent Certificate] shall be binding and conclusive upon the parties to this Agreement, and notwithstanding anything in Section 9 hereof, the Escrow Agent and the parties shall be entitled to act in accordance with such decision and the Escrow Agent shall be entitled to make or withhold payments out of the Escrow Fund in accordance therewith.

(b) Judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction. Any such arbitration shall be held in Santa Clara or San Mateo County, California under the commercial rules then in effect of the American Arbitration Association. The non-prevailing Party to an arbitration shall pay its own expenses, the fees of the arbitrator, any administrative fee of JAMS, and the expenses, including attorneys’ fees and costs, reasonably incurred by the other party to the arbitration. For purposes of this Section 9.7(b), in any arbitration hereunder in which any claim or the amount thereof stated in the Officer’s Certificate [or Agent Certificate, as the case may be,] is at issue, the party seeking indemnification shall be deemed to be the Non-Prevailing Party unless the arbitrators award the party seeking indemnification more than [one-half (1/2)] of the amount in dispute, plus any amounts not in dispute; otherwise, the person against whom indemnification is sought shall be deemed to be the Non-Prevailing Party.

9.8 Shareholders’ Agent.

(a) The Shareholders’ Agent shall be constituted and appointed as agent for and on behalf of the Target shareholders to give and receive notices and communications, to authorize delivery to Acquiror of the Acquiror Common Stock or other property from the Escrow Fund in satisfaction of claims by Acquiror, to object to such deliveries, [to make claims on behalf of the Target Shareholders pursuant to Section 9.6,] to agree to, negotiate, enter into settlements and compromises of, and demand arbitration and comply with orders of courts and awards of arbitrators with respect to such claims, and to take all actions necessary or appropriate in the judgment of the Shareholders’ Agent for the accomplishment of the foregoing. Such agency may be changed by the holders of a majority in interest of the Escrow Fund from time to time upon not less than 10 days’ prior written notice to Acquiror. No bond shall be required of the Shareholders’ Agent, and the Shareholders’ Agent shall receive no compensation for his services. Notices or communications to or from the Shareholders’ Agent shall constitute notice to or from each of the Target shareholders.

(b) The Shareholders’ Agent shall not be liable for any act done or omitted hereunder as Shareholder’ Agent while acting in good faith and in the exercise of reasonable judgment and any act done or omitted pursuant to the advice of counsel shall be conclusive evidence of such good faith. The Target shareholders shall severally indemnify and hold the Shareholders’ Agent harmless against any loss, liability or expense incurred without gross negligence 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.

(c) The Shareholders’ Agent shall have reasonable access to information about Target and the reasonable assistance of Target’s officers and employees for purposes of performing his duties and exercising his rights hereunder, provided that the Shareholders’ Agent shall treat confidentially and not disclose any nonpublic information from or about Target to
anyone (except on a need to know basis to individuals who agree to treat such information confidentially).

(d) Acquiror acknowledges that the Shareholders’ Agent may have a conflict of interest with respect to his duties as Shareholders’ Agent, and in such regard the Shareholders’ Agent has informed Acquiror that he will act in the best interests of the Target shareholders.

9.9 Actions of the Shareholders’ Agent. A decision, act, consent or instruction of the Shareholders’ Agent shall constitute a decision of all Target shareholders for whom shares of Acquiror Common Stock otherwise issuable to them are deposited in the Escrow Fund and shall be final, binding and conclusive upon each such Target shareholder, and the Escrow Agent and Acquiror may rely upon any decision, act, consent or instruction of the Shareholders’ Agent as being the decision, act, consent or instruction of each and every such Target shareholder. The Escrow Agent and Acquiror are hereby relieved from any liability to any person for any acts done by them in accordance with such decision, act, consent or instruction of the Shareholders’ Agent.

9.10 Third-Party Claims. In the event Acquiror becomes aware of a third-party claim which Acquiror believes may result in a demand against the Escrow Fund, Acquiror shall notify the Shareholders’ Agent of such claim, and the Shareholders’ Agent and the Target shareholders for whom shares of Acquiror Common Stock otherwise issuable to them are deposited in the Escrow Fund shall be entitled, at their expense, to participate in any defense of such claim with the consent of Acquiror which shall not be unreasonably withheld. Acquiror shall have the right in its sole discretion to settle any such claim. In the event that the Shareholders’ Agent has consented to any such settlement, the Shareholders’ Agent shall have no power or authority to object under Section 9.5 or any other provision of this Section 9 to the amount of any claim by Acquiror against the Escrow Fund for indemnity with respect to such settlement.


10.1 Notices. All notices and other communications hereunder shall be in writing and shall be deemed duly delivered: (i) upon receipt if delivered personally; (ii) three (3) business days after being mailed by registered or certified mail, postage prepaid, return receipt requested; (iii) one (1) business day after it is sent by commercial overnight courier service; or (iv) upon transmission if sent via facsimile with confirmation of receipt to the parties at the following address (or at such other address for a party as shall be specified upon like notice):

(a) if to Acquiror or Merger Sub, to:

[Acquiror]
[Address]
Attention:
Fax:
Tel:
with a copy to:

Acquiror’s Counsel
[Address]
Attention:
Fax:
Tel:

(b) if to Target, to:

Target
[Address]
Attention:
Fax:
Tel:

with a copy to:

Target’s Counsel
[Address]
Attention:
Fax:
Tel:

(c) if to Shareholders’ Agent, to:

[Address]
Attention:
Fax:
Tel:

with a copy to:

Shareholders’ Agent’s Counsel
[Address]
Attention:
Fax:
Tel:

10.2 Definitions. In this Agreement any reference to any event, change, condition or effect being “material” with respect to any entity or group of entities means any material event, change, condition or effect related to the financial condition, properties, assets (including intangible assets), liabilities, business, operations or results of operations of such entity or group of entities. In this Agreement any reference to a “Material Adverse Effect” with respect to any entity or group of entities means any event, change or effect that is materially adverse to the financial condition, properties, assets, liabilities, business, operations, results of operations or prospects [Note: the word “prospects” is often subject to negotiation] of such entity and its subsidiaries, taken as a whole. In this Agreement any reference to a party’s
“knowledge” means such party’s actual knowledge after reasonable inquiry of officers, directors and other employees of such party reasonably believed to have knowledge of such matters. [Consider whether to limit knowledge to identified persons] In this Agreement, an entity shall be deemed to be a “Subsidiary” of a party if such party directly or indirectly owns, beneficially or of record, at least 50% of the outstanding equity or financial interests of such entity.

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

10.4 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 the exhibits and schedules hereto, including the Target Disclosure Schedule and the Acquiror Disclosure Schedule: (a) together constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof except for the Confidentiality Agreement, which shall continue in full force and effect, and shall survive any termination of this Agreement or the Closing, in accordance with its terms; and (b) are not intended to confer upon any other person any rights or remedies hereunder and shall not be assigned by operation of law or otherwise without the written consent of the other party.

10.5 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 will continue in full force and effect and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto. The parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision.

10.6 Remedies Cumulative. Except as otherwise provided herein, any and all remedies herein expressly conferred upon a party will 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 of any one remedy will not preclude the exercise of any other remedy.

10.7 Governing Law. This Agreement shall be governed by and construed in accordance with the internal laws of California applicable to parties residing in California, without regard applicable principles of conflicts of law. Each of the parties hereto irrevocably consents to the exclusive jurisdiction of any court located within _________, in connection with any matter based upon or arising out of this Agreement or the matters contemplated hereby and it agrees that process may be served upon it in any manner authorized by the laws of the State of California for such persons and waives and covenants not to assert or plead any objection which it might otherwise have to such jurisdiction and such process.

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

10.9 **[Enforcement.** Each of the parties hereto agrees that irreparable damage would occur and that the parties would not have any adequate remedy at law 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 an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions of this Agreement in any Federal court located in the State of Delaware or in Delaware state court, this being in addition to any other remedy to which they are entitled at law or in equity. In addition, each of the parties hereto (a) consents to submit itself to the personal jurisdiction of any Federal court located in the State of Delaware or any Delaware state court in the event that any dispute arises out of this Agreement or any of the transactions contemplated by this Agreement, (b) agrees that it will not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from any such court, (c) agrees that it will not bring any action relating to this Agreement or any of the transactions contemplated by this Agreement in any court other than a Federal court sitting in the State of Delaware or a Delaware state court and (d) waives any right to trial by jury with respect to any claim or proceeding related to or arising out of this Agreement or any transaction contemplated by this Agreement.]

10.10 **Amendment; Waiver.** Any amendment or waiver of any of the terms or conditions of this Agreement must be in writing and must be duly executed by or on behalf of the party to be charged with such waiver. The failure of a party to exercise any of its rights hereunder or to insist upon strict adherence to any term or condition hereof on any one occasion shall not be construed as a waiver or deprive that party of the right thereafter to insist upon strict adherence to the terms and conditions of this Agreement at a later date. Further, no waiver of any of the terms and conditions of this Agreement shall be deemed to or shall constitute a waiver of any other term of condition hereof (whether or not similar).
IN WITNESS WHEREOF, Target, Acquiror, Merger Sub and Shareholders' Agent have caused this Agreement to be executed and delivered by each of them or their respective officers thereunto duly authorized, all as of the date first written above.

TARGET, INC.

By: ______________________________
    [Name]
    [President and Chief Executive Officer]

ACQUIROR, INC.

By: ______________________________
    [Name]
    [President and Chief Executive Officer]

TARGET ACQUISITION CORPORATION

By: ______________________________
    [Name]
    [Title]

SHAREHOLDERS' AGENT

__________________________________
    [Name]