

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

FORM 8-K

**CURRENT REPORT
PURSUANT TO SECTION 13 OR 15(D) OF THE
SECURITIES EXCHANGE ACT OF 1934**

Date of Report (Date of earliest event reported): September 26, 2004

PROGRESS SOFTWARE CORPORATION

(Exact Name of Registrant as Specified in Charter)

Massachusetts

*(State or other jurisdiction
of incorporation)*

033-41752

*(Commission
File Number)*

04-2746201

*(IRS Employer
Identification Number)*

14 Oak Park, Bedford, Massachusetts 01730

(Address of principal executive offices) (Zip Code)

(781) 280-4000

(Registrant's telephone number, including area code)

(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below).

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
 - Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
 - Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
 - Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
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Item 8.01 Other Events

On September 26, 2004 Progress Software Corporation (“**Progress**”), together with its wholly-owned subsidiary, PSI Acquisition Sub, Inc., a Delaware corporation (“**Merger Sub**”), entered into an Agreement and Plan of Merger (the “**Merger Agreement**”) with Persistence Software, Inc., a Delaware corporation (“**Persistence**”). Progress will acquire Persistence in an all-cash transaction for approximately \$16 million in the aggregate. Pursuant to the terms of the Merger Agreement, Merger Sub will merge with and into Persistence, the effect of which is to make Persistence a wholly-owned subsidiary of Progress. Current stockholders of Persistence will receive \$5.70 in cash (subject to certain adjustments as provided in the Merger Agreement) in exchange for each share of common stock of Persistence. The closing of the merger remains subject to approval by the stockholders of Persistence and satisfaction of customary closing conditions. Neither Progress nor any of its affiliates has a material relationship with Persistence or any of its affiliates.

The foregoing description of the Merger Agreement does not purport to be complete and is qualified in its entirety by the terms and conditions of the Merger Agreement, a copy of which is filed as Exhibit 99.1 and is incorporated by reference. A copy of the joint press release issued by Progress and Persistence on September 27, 2004 announcing the Merger Agreement is filed as Exhibit 99.2 and is incorporated by reference.

Concurrently with the execution of the Merger Agreement, all of the directors, certain officers and the largest stockholder of Persistence, holding approximately 28% of Persistence’s outstanding common stock in the aggregate, have entered into voting agreements with Persistence agreeing to vote in favor of the merger.

Item 9.01 Financial Statements and Exhibits

(c) Exhibits

- 99.1 Agreement and Plan of Merger by and among Progress Software Corporation, PSI Acquisition Sub., Inc. and Persistence Software, Inc. dated September 26, 2004
- 99.2 Press Release, dated September 27, 2004, entitled “Progress Software Corporation to Acquire Persistence Software to Accelerate Growth of ObjectStore Operating Company”

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

PROGRESS SOFTWARE CORPORATION

By: /s/ Norman R. Robertson

Norman R. Robertson

Senior Vice President, Finance and Administration and Chief Financial Officer

Date: September 27, 2004

Exhibit Index

<u>Exhibit No.</u>	<u>Description</u>
99.1	Agreement and Plan of Merger by and among Progress Software Corporation, PSI Acquisition Sub., Inc. and Persistence Software, Inc. dated September 26, 2004
99.2	Press Release, dated September 27, 2004, entitled "Progress Software Corporation to Acquire Persistence Software to Accelerate Growth of ObjectStore Operating Company"

AGREEMENT AND PLAN OF MERGER
BY AND AMONG
PROGRESS SOFTWARE CORPORATION,
PSI ACQUISITION SUB, INC.
AND
PERSISTENCE SOFTWARE, INC.

AGREEMENT AND PLAN OF MERGER

This AGREEMENT AND PLAN OF MERGER (this "**Agreement**") is made and entered into as of September 26, 2004, by and among Progress Software Corporation, a Massachusetts corporation ("**Parent**"), PSI Acquisition Sub, Inc., a Delaware corporation and a wholly owned first-tier subsidiary of Parent ("**Merger Sub**"), and Persistence Software, Inc., a Delaware corporation (the "**Company**").

RECITALS

A. The respective Boards of Directors of Parent, Merger Sub and the Company have approved this Agreement, and declared advisable the merger of Merger Sub with and into the Company (the "**Merger**") upon the terms and subject to the conditions of this Agreement and in accordance with the General Corporation Law of the State of Delaware ("**Delaware Law**").

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

In consideration of the foregoing and the representations, warranties, covenants and agreements set forth in this Agreement, the parties agree as follows:

ARTICLE 1 THE MERGER

1.1 **Certain Definitions.** For purposes of this Agreement, the following terms shall have the following meanings:

(a) "**Company Option**" shall mean each outstanding unexercised option to purchase Company Common Stock, whether or not then vested or fully exercisable, granted on or prior to the date hereof to any current or former employee or director of the Company or any subsidiary of the Company or any other person under any Company Option Plan or other similar plan of the Company or in connection with any employment, consulting or other agreement or other arrangement approved by the Company's Board of Directors with the Company or any subsidiary of the Company on or prior to the date hereof.

(b) "**Company Option Plan**" shall mean the Company's 1994 Stock Purchase Plan, 1997 Stock Plan, 1999 Employee Stock Purchase Plan and 1999 Directors' Stock Option Plan.

(c) "**Company Warrant**" shall mean each outstanding warrant or other right to purchase Company Common Stock other than Company Options.

(d) "**In-the-Money Options**" shall mean all vested Company Options which are exercisable (or will become exercisable as a result of the transactions contemplated hereby), as of immediately prior to the Effective Time, at an exercise price per share less than the Merger Consideration (as defined in Section 1.7(a)).

(e) ***In-the-Money Warrants*** shall mean all Company Warrants which are exercisable (or will become exercisable as a result of the transactions contemplated hereby), as of immediately prior to the Effective Time, at an exercise price per share less than the Merger Consideration.

1.2 **The Merger.** Upon the terms and subject to the conditions of this Agreement and the applicable provisions of Delaware Law, at the Effective Time (as defined below), Merger Sub shall be merged with and into the Company, the separate corporate existence of Merger Sub shall cease, and the Company shall continue as the surviving corporation of the Merger (the ***Surviving Corporation***).

1.3 **Effective Time; Closing.** Subject to the provisions of this Agreement, the parties hereto shall cause the Merger to be consummated by filing a certificate of merger (the ***Certificate of Merger***) consistent with this Agreement with the Secretary of State of the State of Delaware in accordance with the relevant provisions of Delaware Law and the General Corporation Law of the State of California (***California Law***), the time of such filing (or such later time as may be agreed in writing by the Company and Parent and specified in the Certificate of Merger) being the ***Effective Time***, as soon as practicable on or after the Closing Date (as defined below). The closing of the Merger (the ***Closing***) shall take place at the offices of Foley Hoag LLP, Seaport World Trade Center West, 155 Seaport Boulevard, Boston, Massachusetts, at a time and date to be specified by the parties, which shall be no later than the second business day after the satisfaction or waiver of the conditions set forth in 0, or at such other time, date and location as the parties hereto agree in writing (the ***Closing Date***).

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

1.5 **Certificate of Incorporation; Bylaws.**

(a) The Certificate of Merger shall provide that, at the Effective Time, the Certificate of Incorporation of the Surviving Corporation shall be in the form of the Certificate of Incorporation of the Merger Sub as in effect immediately prior to the Effective Time; *provided, however*, that as of the Effective Time, Article I of the Certificate of Incorporation of the Surviving Corporation shall read: "The name of the corporation is Persistence Software, Inc."

(b) At the Effective Time, 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.

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

Corporation shall be the officers of Merger Sub immediately prior to the Effective Time, until their respective successors are duly appointed.

1.7 Effect on Capital Stock. Subject to the terms and conditions of this Agreement, at the Effective Time, by virtue of the Merger and without any action on the part of Merger Sub, the Company or the holders of any of the following securities:

(a) Each share of common stock, par value \$0.001 per share, of the Company ("**Company Common Stock**") issued and outstanding immediately prior to the Effective Time, other than any shares of Company Common Stock to be canceled pursuant to Section 1.7(b) and any "Dissenting Shares" (as defined, and to the extent provided in Section 1.13(a)), will be canceled and extinguished and automatically converted into the right to receive \$5.70 in cash, without interest, subject to adjustment as set forth in Section 1.10 (the "**Merger Consideration**").

(b) Each share of Company Common Stock held by the Company or owned by Merger Sub, Parent or any subsidiary of the Company or of Parent immediately prior to the Effective Time shall be canceled and extinguished without any conversion thereof.

(c) Each share of common stock, par value \$0.001 per share, of Merger Sub ("**Merger Sub Common Stock**"), issued and outstanding immediately prior to the Effective Time shall be converted into one validly issued, fully paid and nonassessable share of common stock, \$.001 par value per share, of the Surviving Corporation. Following the Effective Time, each certificate evidencing ownership of shares of Merger Sub Common Stock shall evidence ownership of such shares of capital stock of the Surviving Corporation.

1.8 Options.

(a) Promptly following the execution of this Agreement, the Company shall use commercially reasonable efforts to ensure that at the Effective Time, all Company Options shall be canceled, in each case, in accordance with and pursuant to the terms of the Company Option Plans under which such Company Options were granted. In consideration of such cancellation, each holder of an In-the-Money Option canceled in accordance with this Section 1.8 will be entitled to receive in settlement of such In-the-Money Option, as promptly as practicable following the Effective Time, a cash payment from the Payment Fund (as defined in Section 1.11), subject to any required withholding of taxes, equal to the product of (i) the total number of shares of Company Common Stock otherwise issuable upon exercise of such In-the-Money Option and (ii) the excess of the Merger Consideration over the applicable exercise price per share of Company Common Stock otherwise issuable upon exercise of such In-the-Money Option (the "**In-the-Money Option Consideration**"); *provided, however*, that with respect to any person subject to Section 16(a) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), any such amount shall be paid as soon as practicable after the first date payment can be made without liability to such person under Section 16(b) of the Exchange Act. For the avoidance of doubt, all Company Options that are not In-the-Money Options (including without limitation the unvested portion of any Company Options regardless of their exercise price) shall be canceled without payment of any consideration and without any further liability to the Company or the Surviving Corporation and shall not be accelerated, and the holders of

Company Options shall be entitled to the In-the-Money Option Consideration pursuant to this Section 1.8 only to the extent such Company Options are In-the-Money Options.

(b) The Company shall use commercially reasonable efforts to cause each holder of a Company Option to execute a written acknowledgment of such holder that (i) the payment of the In-the-Money Option Consideration, if any, will satisfy in full the Company's obligation to such person pursuant to such Company Option and (ii) subject to the payment of the In-the-Money Option Consideration, if any, such Company Option held by such holder shall, without any action on the part of the Company or the holder, be deemed terminated, canceled, void and of no further force and effect as between the Company and the holder and neither party shall have any further rights or obligations with respect thereto and (iii) that the portion of any Company Option held by such holder that is not an In-the-Money Option shall be canceled without payment of any consideration and without any further liability to the Company or the Surviving Corporation.

1.9 Warrants.

(a) Promptly following the execution of this Agreement, the Company shall use commercially reasonable efforts to ensure that at the Effective Time, all Company Warrants shall be terminated. In consideration of such termination, each holder of an In-the-Money Warrant terminated in accordance with this Section 1.9 will be entitled to receive in settlement of such In-the-Money Warrant, as promptly as practicable following the Effective Time, a cash payment from the Payment Fund (as defined in Section 1.11), subject to any required withholding of taxes, equal to the product of (i) the total number of shares of Company Common Stock otherwise issuable upon exercise of such In-the-Money Warrant and (ii) the excess of the Merger Consideration over the applicable exercise price per share of Company Common Stock otherwise issuable upon exercise of such In-the-Money Warrant (the "**In-the-Money Warrant Consideration**"); *provided, however*, that with respect to any person subject to Section 16(a) of the Exchange Act, any such amount shall be paid as soon as practicable after the first date payment can be made without liability to such person under Section 16(b) of the Exchange Act. For the avoidance of doubt, all Company Warrants that are not In-the-Money Warrants shall be terminated without payment of any consideration and without any further liability to the Company or the Surviving Corporation and shall not be accelerated, and the holders of Company Warrants shall be entitled to the In-the-Money Warrant Consideration pursuant to this Section 1.9 only to the extent such Company Warrants are In-the-Money Warrants.

(b) The Company shall use commercially reasonable efforts to cause each holder of a Company Warrant to execute a written acknowledgment of such holder that (i) the payment of the In-the-Money Warrant Consideration, if any, will satisfy in full the Company's obligation to such person pursuant to such Company Warrant and (ii) subject to the payment of the In-the-Money Warrant Consideration, if any, such Company Warrant held by such holder shall, without any action on the part of the Company or the holder, be deemed terminated, canceled, void and of no further force and effect as between the Company and the holder and neither party shall have any further rights or obligations with respect thereto and (iii) that any Company Warrant held by such holder that is not an In-the-Money Warrant shall be canceled without payment of any consideration and without any further liability to the Company or the Surviving Corporation.

1.10 Adjustments to Merger Consideration. Without limiting any other provision of this Agreement, the Merger Consideration shall be adjusted, at any time and from time to time, to reflect fully the effect of any stock split, reverse split, stock dividend (including any dividend or distribution of securities convertible into Company Common Stock), reorganization, recapitalization or other like change, if permitted by the terms of Section 4.1, with respect to Company Common Stock occurring after the date of this Agreement and prior to the Effective Time.

1.11 Payment for Company Common Stock, In-the-Money Options and In-the-Money Warrants.

(a) Prior to the Effective Time, Parent shall appoint a commercial bank or trust company reasonably acceptable to the Company to act as exchange and paying agent, registrar and transfer agent (the “**Agent**”) for the purpose of (i) exchanging certificates representing, immediately prior to the Effective Time, Company Common Stock for the applicable portion of the Merger Consideration, (ii) making payment of the aggregate In-the-Money Option Consideration in exchange for the cancellation of all In-the-Money Options and (iii) making payment of the aggregate In-the-Money Warrant Consideration in exchange for termination of all In-the-Money Warrants. Within two business days after the Effective Time, Parent shall deposit, or cause to be deposited, in trust with the Agent for the benefit of the holders of shares of Company Common Stock, In-the-Money Options and In-the-Money Warrants, cash in an aggregate amount equal to the Merger Consideration multiplied by the number of shares of Company Common Stock outstanding, plus the aggregate amount of In-the-Money Option Consideration, plus the aggregate amount of In-the-Money Warrant Consideration (such amount being hereinafter referred to as the “**Payment Fund**”). For purposes of determining the aggregate amount of cash to be deposited by Parent pursuant to this Section 00, Parent shall assume that no holder of shares of Company Common Stock will perfect their right to appraisal or demand purchase of their shares of Company Common Stock under Delaware Law or California Law, respectively. The Agent shall, pursuant to instructions provided by Parent, make the payments provided for in Section 1.7, 1.8 and 1.9 of this Agreement out of the Payment Fund (it being understood that any and all interest earned on funds made available to the Agent pursuant to this Agreement shall be turned over to the party depositing such funds with the Agent). The Payment Fund shall not be used for any other purpose except as provided in this Agreement.

(b) Promptly after the Effective Time, Parent or the Surviving Corporation shall cause the Agent to mail to each holder of record of a certificate or certificates (“**Certificates**”) that immediately prior to the Effective Time represented outstanding shares of Company Common Stock that were converted into the right to receive a portion of the Merger Consideration under Section 1.7 and to each holder of Dissenting Shares (i) a notice of the effectiveness of the Merger, (ii) a letter of transmittal in customary form (that shall specify that delivery shall be effected, and risk of loss and title to the Certificates shall pass, only upon proper delivery of the Certificates to the Agent and shall contain such other provisions as Parent or the Surviving Corporation may reasonably specify), (iii) instructions for use in surrendering such Certificates and receiving the applicable portion of the Merger Consideration in respect thereof and (iv) such notification as may be required under Delaware Law and California Law to be given to the holders of Dissenting Shares. Upon surrender to the Agent of a Certificate,

together with such letter of transmittal duly executed and completed in accordance with the instructions thereto, the holder of such Certificate shall be entitled to receive, in exchange therefor, cash in an amount equal to the product of (i) the number of shares of Company Common Stock formerly represented by such Certificate and (ii) the Merger Consideration, which amounts shall be paid by Agent by check or wire transfer in accordance with the instructions provided by such holder. No interest or dividends will be paid or accrued on the consideration payable upon the surrender of any Certificate. If the consideration provided for herein is to be delivered in the name of a person other than the person in whose name the Certificate surrendered is registered, it shall be a condition of such delivery that the Certificate so surrendered shall be properly endorsed or otherwise in proper form for transfer and that the person requesting such delivery shall pay any transfer or other taxes required by reason of such delivery to a person other than the registered holder of the Certificate, or that such person shall establish to the satisfaction of the Surviving Corporation that such tax has been paid or is not applicable. Until surrendered in accordance with the provisions of this Section 1.11(b), each Certificate (other than Certificates representing Dissenting Shares or shares of Company Common Stock to be canceled pursuant to Section 1.7(b)) shall represent, for all purposes, only the right to receive an amount in cash equal to the Merger Consideration multiplied by the number of shares of Company Common Stock formerly evidenced by such Certificate without any interest or dividends thereon.

(c) The consideration issued upon the surrender of Certificates in accordance with this Agreement shall be deemed to have been issued in full satisfaction of all rights pertaining to such shares of Company Common Stock formerly represented thereby. After the Effective Time, there shall be no transfers on the stock transfer books of the Surviving Corporation of any shares of Company Common Stock that were outstanding immediately prior to the Effective Time. If, after the Effective Time, Certificates are presented to the Surviving Corporation, they shall be canceled and exchanged as provided in this Article 1.

(d) Any portion of the Payment Fund (including any amounts that may be payable to the former stockholders of the Company in accordance with the terms of this Agreement) which remains unclaimed by the former stockholders of the Company upon the 180th day immediately following the Closing Date shall be returned to the Surviving Corporation, upon demand, and any former stockholders of the Company who have not theretofore complied with this Article 1 shall, subject to the remainder of this Section 1.11(d), thereafter look to the Surviving Corporation only as general unsecured creditors thereof for payment of any Merger Consideration, without any interest or dividends thereon, that may be payable in respect of each share of Company Common Stock held by such stockholder. Following the Closing, the Agent shall retain the right to invest and reinvest the Payment Fund on behalf of the Surviving Corporation in securities listed or guaranteed by the United States government or certificates of deposit of commercial banks that have, or are members of a group of commercial banks that has, consolidated total assets of not less than \$500,000,000 and the Surviving Corporation shall receive the interest earned thereon. None of Merger Sub, the Company or Agent shall be liable to a holder of Certificates or any other person in respect of any cash delivered to a public official pursuant to any applicable abandoned property, escheat or similar law. If any Certificates shall not have been surrendered upon the seventh anniversary of the Closing Date (or immediately prior to such earlier date on which any Merger Consideration, dividends (whether in cash, stock or property) or other distributions with respect to shares of Company Common Stock in respect

of such Certificate would otherwise escheat to or become the property of any Governmental Entity (as defined in Section 2.2(c)) any such shares, cash, dividends or distributions in respect of such Certificate shall, to the extent permitted by applicable law, become the property of the Surviving Corporation, free and clear of all claims or interests of any person previously entitled thereto.

(e) In the event any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit (in form and substance acceptable to the Surviving Corporation) of that fact by the person (who shall be the record owner of such Certificate) claiming such Certificate to be lost, stolen or destroyed and, if required by the Surviving Corporation, the posting by such person of a bond in such amount as the Surviving Corporation may direct as indemnity against any claim that may be made against it with respect to such Certificate, the Agent will issue in exchange for such lost, stolen or destroyed Certificate the Merger Consideration deliverable in respect thereof pursuant to this Agreement.

(f) Each of the Agent, the Surviving Corporation and Parent shall be entitled to deduct and withhold from any consideration otherwise payable to any former holder of shares of Company Common Stock, In-the-Money Options or In-the-Money Warrants pursuant to this Agreement such amounts as may be required to be deducted or withheld with respect to the making of such payment under the Internal Revenue Code of 1986, as amended (the "**Code**"), or any applicable provision of state, local or foreign tax law. To the extent that amounts are so deducted or withheld and paid over to the appropriate taxing authority by Agent, the Surviving Corporation or Parent, such amounts shall be treated for all purposes of this Agreement as having been paid to the person to whom such amounts would otherwise have been paid.

1.12 Taking of Necessary Action; Further Action. 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 the Company and Merger Sub, the officers and directors of the Company and Merger Sub will take all such lawful and necessary action. Parent shall cause Merger Sub to perform all of its obligations relating to this Agreement and the transactions contemplated hereby.

1.13 Dissenters' Rights.

(a) Notwithstanding any provision of this Agreement to the contrary other than Section 1.13(b), any shares of Company Common Stock held by a holder who duly demands appraisal or purchase of such shares in accordance with Delaware Law or California Law, respectively, and is in compliance with all the provisions of Delaware Law or California Law, as applicable, concerning the right of such holder to demand appraisal or purchase of such shares in connection with the Merger ("**Dissenting Shares**"), shall not be converted into or represent a right to receive Merger Consideration pursuant to Section 0, but instead shall be converted into the right to receive only such consideration as may be determined to be due with respect to such Dissenting Shares under Delaware Law or California Law, respectively. From and after the Effective Time, a holder of Dissenting Shares shall not be entitled to exercise any of the voting rights or other rights of a stockholder of the Surviving Corporation.

(b) Notwithstanding the provisions of Section 1.7(a), if any holder of shares of Company Common Stock who demands appraisal or purchase of such shares under Delaware Law or California Law, respectively, shall effectively withdraw or lose (through failure to perfect or otherwise) the right to appraisal or purchase, then, as of the later of the Effective Time and the occurrence of such event, such holder's shares shall no longer be Dissenting Shares and shall automatically be converted into and represent only the right to receive the Merger Consideration as provided in Section 1.7(a), without interest thereon, upon surrender of the certificate representing such shares pursuant to Section 1.11.

(c) The Company shall give Parent (i) prompt notice of any written demands for appraisal or purchase of any shares of Company Common Stock, withdrawals of such demands, and any other instruments served pursuant to Delaware Law or California Law, respectively, and received by the Company which relate to any such demand for appraisal or purchase and (ii) the opportunity to participate in all negotiations and proceedings which take place prior to the Effective Time with respect to demands for appraisal or purchase under Delaware Law or California Law, respectively. The Company shall not, except with the prior written consent of Parent, voluntarily make any payment with respect to any demands for appraisal or purchase of Company Common Stock or offer to settle or settle any such demands.

ARTICLE 2 REPRESENTATIONS AND WARRANTIES OF THE COMPANY

As of the date of this Agreement and as of the Closing Date, the Company represents and warrants to Parent and Merger Sub, subject to any exceptions expressly stated in the disclosure schedule delivered by the Company to Parent dated as of the date hereof and certified by a duly authorized officer of the Company (the "**Company Disclosure Schedule**"), which exception shall specifically identify the representation to which it relates, as follows:

2.1 Organization; Subsidiaries.

(a) The Company and each of its subsidiaries (which subsidiaries are identified on Part 2.1 of the Company Disclosure Schedule) (i) is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction in which it is organized; (ii) has the corporate or other power and authority to own, lease and operate its assets and property and to carry on its business as now being conducted; and (iii) except as would not be material to the Company, is duly qualified or licensed to do business in each jurisdiction where the character of the properties owned, leased or operated by it or the nature of its activities makes such qualification or licensing necessary.

(b) Other than the corporations identified in Part 2.1 of the Company Disclosure Schedule, neither the Company nor any of the other corporations identified in Part 2.1 of the Company Disclosure Schedule owns any capital stock of, or any equity interest of any nature in, any corporation, partnership, joint venture arrangement or other business entity, other than the entities identified in Part 2.1 of the Company Disclosure Schedule. Neither the Company nor any of its subsidiaries has agreed or is obligated to make, or is bound by any written or oral agreement, contract, lease, instrument, note, option, warranty, purchase order, license, insurance policy, benefit plan or legally binding commitment or undertaking of any

nature, as in effect as of the date hereof or as may hereinafter be in effect under which it may become obligated to make any future investment in or capital contribution to any other entity. Neither the Company, nor any of its subsidiaries, has, at any time, been a general partner of any general partnership, limited partnership or other entity. Part 2.1 of the Company Disclosure Schedule indicates the jurisdiction of organization of each entity listed therein and the Company's direct or indirect equity interest therein.

(c) The Company has delivered or made available to Parent a true and correct copy of the Certificate of Incorporation and Bylaws of the Company and similar governing instruments of each of its subsidiaries, each as amended to date (collectively, the "**Company Charter Documents**"), and each such instrument is in full force and effect. Neither the Company nor any of its subsidiaries is in violation of any of the provisions of the Company Charter Documents. The Company has delivered or made available to Parent all proposed or considered amendments to the Company Charter Documents.

2.2 Company Capitalization.

(a) The authorized capital stock of the Company consists solely of 7,500,000 shares of Company Common Stock, of which there were 2,718,664 shares issued and outstanding as of the close of business on September 23, 2004, and 500,000 shares of preferred stock, par value \$0.001 per share, of which no shares are issued or outstanding. All outstanding shares of Company Common Stock are duly authorized, validly issued, fully paid and nonassessable and are not subject to preemptive rights created by statute, the Certificate of Incorporation or Bylaws of the Company or any agreement or document to which the Company is a party or by which it is bound. As of the date of this Agreement, there are no shares of Company Common Stock held in treasury by the Company.

(b) As of the close of business on September 23, 2004, (i) 366,134 shares of Company Common Stock are subject to issuance pursuant to outstanding Company Options for an aggregate exercise price of \$2,600,357.81, (ii) 223,513 shares of Company Common Stock are subject to issuance pursuant to outstanding Company Warrants; and (iii) 122,997 shares of Company Common Stock are reserved for future issuance under the Company's 1999 Employee Stock Purchase Plan (the "**Company ESPP**"). Part 2.2(b) of the Company Disclosure Schedule sets forth the following information with respect to each Company Option and each Company Warrant outstanding as of the date of this Agreement: (i) the name of the optionee or warrant holder; (ii) the number of shares of Company Common Stock subject to such Company Option or Company Warrant; (iii) the exercise price of such Company Option or Company Warrant; (iv) the date on which such Company Option or Company Warrant was granted or assumed; (v) the date on which such Company Option or Company Warrant expires, (vi) the Company Option Plan pursuant to which such Company Option was granted, and (vii) whether the exercisability of such Company Option or Company Warrant will be accelerated in any way by the transactions contemplated by this Agreement, and indicates the extent of any such acceleration. The Company has delivered to Parent accurate and complete copies of the Company Option Plans and each form of stock option agreement evidencing any Company Options and an accurate and complete copy of each Company Warrant. All shares of Company Common Stock subject to issuance as aforesaid, upon issuance on the terms and conditions specified in the instruments pursuant to which they are issuable, will be duly authorized, validly issued, fully paid and

nonassessable. Except as set forth in Part 2.2(b) of the Company Disclosure Schedule, there are no commitments or agreements of any character to which the Company is bound obligating the Company to accelerate the vesting of any Company Option or Company Warrant as a result of the Merger.

(c) All outstanding shares of Company Common Stock, all outstanding Company Options, all outstanding Company Warrants and all outstanding shares of capital stock of each subsidiary of Company have been issued and granted in compliance with (i) all applicable securities laws and other applicable material Legal Requirements and (ii) all material requirements set forth in applicable agreements or instruments. For the purposes of this Agreement, “**Legal Requirements**” means any federal, state, local, municipal, foreign or other law, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any court, administrative agency or commission or other governmental authority or instrumentality, foreign or domestic (each, a “**Governmental Entity**”).

(d) As of the Closing Date, all Company options shall have been irrevocably cancelled and all Company Warrants shall have been irrevocably terminated.

2.3 Obligations With Respect to Capital Stock. Except as set forth in Part 2.3 of the Company Disclosure Schedule, there are no equity securities, partnership interests or similar ownership interests of any class of Company equity security, or any securities exchangeable or convertible into or exercisable for such equity securities, partnership interests or similar ownership interests, issued, reserved for issuance or outstanding. Except for securities the Company owns free and clear of all claims and Encumbrances (as defined below), directly or indirectly through one or more subsidiaries, and except for shares of capital stock or other similar ownership interests of certain subsidiaries of the Company that are owned by certain nominee equity holders as required by the applicable law of the jurisdiction of organization of such subsidiaries, as of the date of this Agreement, there are no equity securities, partnership interests or similar ownership interests of any class of equity security of any subsidiary of the Company, or any security exchangeable or convertible into or exercisable for such equity securities, partnership interests or similar ownership interests, issued, reserved for issuance or outstanding. Except as set forth in Part 2.2 or Part 2.3 of the Company Disclosure Schedule, there are no subscriptions, options, warrants, equity securities, convertible debt, partnership interests or similar ownership interests, calls, rights (including preemptive rights), commitments or agreements of any character to which the Company or any of its subsidiaries is a party or by which it is bound obligating the Company or any of its subsidiaries to issue, deliver or sell, or cause to be issued, delivered or sold, or repurchase, redeem or otherwise acquire, or cause the repurchase, redemption or acquisition of, any shares of capital stock, partnership interests or similar ownership interests of the Company or any of its subsidiaries or obligating the Company or any of its subsidiaries to grant, extend, accelerate the vesting of or enter into any such subscription, option, warrant, equity security, call, right, commitment or agreement. Except as contemplated by this Agreement there are no registration rights, and there is no voting trust, proxy, rights agreement, “poison pill” anti-takeover plan or other agreement or understanding to which the Company is a party or by which it is bound with respect to any equity security of any

class of the Company or with respect to any equity security, partnership interest or similar ownership interest of any class of any of its subsidiaries.

For purposes of this Agreement, “**Encumbrances**” means any lien, pledge, hypothecation, charge, mortgage, security interest, encumbrance, claim, infringement, interference, option, right of first refusal, preemptive right, community property interest or restriction of any nature (including any restriction on the voting of any security, any restriction on the transfer of any security or other asset, any restriction on the receipt of any income derived from any asset, any restriction on the use of any asset and any restriction on the possession, exercise or transfer of any other attribute of ownership of any asset).

2.4 Authority; Non-Contravention.

(a) The Company 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 the Company, subject only to the Company Stockholder Approval (as defined below) and the filing of the Certificate of Merger pursuant to Delaware Law. The affirmative vote of the holders of a majority of the outstanding shares of Company Common Stock entitled to vote at the Stockholders Meeting (as defined in Section 5.1) (the “**Company Stockholder Approval**”) is sufficient for the Company’s stockholders to approve and adopt this Agreement and approve the Merger, and no other approval of any holder of any securities of the Company is required in connection with the consummation of the transactions contemplated hereby. This Agreement has been duly executed and delivered by the Company and, assuming the due execution and delivery by Parent and Merger Sub, constitutes the valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except as enforceability may be limited by bankruptcy and other similar laws affecting the rights of creditors generally and general principles of equity.

(b) The execution and delivery of this Agreement by the Company does not, and the performance of this Agreement by the Company will not, (i) conflict with or violate the Company Charter Documents, (ii) subject to obtaining the Company Stockholder Approval and compliance with the requirements set forth in Section 2.4(c), conflict with or violate any law, rule, regulation, order, judgment or decree applicable to the Company or any of its subsidiaries or by which the Company or any of its subsidiaries or any of their respective material properties is bound or affected, or (iii) result in any material breach of or constitute a material default (or an event that with notice or lapse of time or both would become a material default) under, or impair the Company’s (or a subsidiary’s) rights or alter the rights or obligations of any third party under, or give to others any rights of termination, amendment, acceleration or cancellation of, or result in the creation of an Encumbrance on any of the properties or assets of the Company or any of its subsidiaries pursuant to, any material note, bond, mortgage, indenture, contract, agreement, lease, license, permit, franchise, concession, or other instrument or obligation to which the Company or any of its subsidiaries is a party or by which the Company or any of its subsidiaries or its or any of their respective material properties are bound or affected. Part 2.4(b) of the Company Disclosure Schedule lists all consents, waivers and approvals under any of the Company’s or any of its subsidiaries’ agreements, contracts, licenses or leases required to be obtained in connection with the consummation of the transactions contemplated hereby, which, if

individually or in the aggregate not obtained, would result in a material loss of benefits to the Company, Parent or the Surviving Corporation as a result of the Merger.

(c) Except as disclosed in Part 2.4 of the Company Disclosure Schedule, no consent, approval, order or authorization of, or registration, declaration or filing with any Governmental Entity or other person, is required to be obtained or made by the Company in connection with the execution and delivery of this Agreement or the consummation of the Merger, except for (i) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware and appropriate documents with the relevant authorities of other states in which the Company is qualified to do business, (ii) the filing of the Proxy Statement (as defined in Section 2.17) with the Securities and Exchange Commission (“**SEC**”) in accordance with the Exchange Act, (iii) such consents, approvals, orders, authorizations, registrations, declarations and filings as may be required under applicable federal, foreign and state securities (or related) laws and the securities or antitrust laws of any foreign country, and (iv) such other consents, authorizations, filings, approvals and registrations which if not obtained or made would not be material to the Company, Parent or the Surviving Corporation or have a material adverse effect on the ability of the parties hereto to consummate the Merger.

2.5 SEC Filings; Company Financial Statements.

(a) The Company has filed all forms, reports and documents required to be filed by the Company with the SEC and has made available to Parent such forms, reports and documents in the form filed with the SEC (if and to the extent such forms, reports and documents are not available on EDGAR). All such required forms, reports and documents (including those that the Company may file subsequent to the date hereof) are referred to herein as the “**Company SEC Reports**.” As of their respective dates, the Company SEC Reports (i) were prepared in accordance with the requirements of the Securities Act of 1933, as amended (the “**Securities Act**”), or the Exchange Act, as the case may be, and the rules and regulations of the SEC thereunder applicable to such Company SEC Reports and (ii) did not at the time they were filed (or if subsequently amended or superseded by a filing prior to the date of this Agreement, then on the date of such subsequent filing) contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. None of Company’s subsidiaries is required to file any forms, reports or other documents with the SEC. Except as set forth in the Company SEC Reports, since the date of the Company’s last proxy statement filed with the SEC, no event has occurred as of the date of this Agreement that would be required to be reported by the Company pursuant to Item 404 of Regulation S-K promulgated by the SEC.

(b) Each of the consolidated financial statements (including, in each case, any related notes thereto) contained in the Company SEC Reports (the “**Company Financials**”), including each Company SEC Report filed after the date hereof until the Closing, (i) complied as to form in all material respects with the published rules and regulations of the SEC with respect thereto, (ii) was prepared in accordance with generally accepted accounting principles (“**GAAP**”) applied on a consistent basis throughout the periods involved (except as may be indicated in the notes thereto or, in the case of unaudited interim financial statements, as may be permitted by the SEC on Form 10-Q, 8-K or any successor form under the Exchange Act) and (iii) fairly

presented the consolidated financial position of the Company and its subsidiaries as at the respective dates thereof and the consolidated results of the Company's operations and cash flows for the periods indicated, except that the unaudited interim financial statements may not contain all the footnotes required by GAAP for audited statements, and were or are subject to normal and recurring year-end adjustments that the Company does not expect to be material, individually or in the aggregate. The balance sheet of the Company contained in the Company SEC Reports as of June 30, 2004 is hereinafter referred to as the "**Company Balance Sheet**." Neither the Company nor any of its subsidiaries has any liabilities (absolute, accrued, contingent or otherwise) that are, individually or in the aggregate, material to the business, results of operations or financial condition of the Company and its subsidiaries taken as a whole, except for liabilities reflected on the Company Balance Sheet or incurred since the date of the Company Balance Sheet in the ordinary course of business consistent with past practices.

(c) The Company has not been notified by its independent auditors or by the staff of the SEC that such auditors or the staff of the SEC, as the case may be, are of the view that any financial statement included in any registration statement filed by the Company under the Securities Act or any periodic or current report filed by the Company under the Exchange Act should be restated, or that the Company should modify its accounting in future periods in a manner that would be materially adverse to the Company. The Company has heretofore furnished to Parent a complete and correct copy of any amendments or modifications, which have not yet been filed with the SEC but which are required to be filed, to agreements, documents or other instruments which previously had been filed by the Company with the SEC pursuant to the Securities Act or the Exchange Act.

(d) The Company is in compliance in all material respects with all effective provisions of the Sarbanes-Oxley Act of 2002 (the "**Sarbanes-Oxley Act**") that are applicable to the Company, and any related rules and regulations promulgated by the SEC, and is diligently making preparations to comply on a timely basis with all other provisions of the Sarbanes-Oxley Act, including the requirements of Section 404 thereof, as they become effective and applicable to the Company.

2.6 Absence of Certain Changes or Events. Since the date of the Company Balance Sheet there has not been: (i) any Company Material Adverse Effect (as defined in Section 8.3)) with respect to the Company, (ii) any declaration, setting aside or payment of any dividend on, or other distribution (whether in cash, stock or property) in respect of, any of the Company's or any of its subsidiaries' capital stock, or any purchase, redemption or other acquisition by the Company of any of the Company's capital stock or any other securities of the Company or its subsidiaries or any grant or issuance of any options, warrants, calls or rights to acquire any such shares or other securities except for repurchases from employees following their termination pursuant to the terms of their pre-existing stock option or purchase agreements, (iii) any split, combination or reclassification of any of the Company's or any of its subsidiaries' capital stock, (iv) any granting by the Company or any of its subsidiaries of any increase in compensation or fringe benefits to any of their officers or employees, or any payment by the Company or any of its subsidiaries of any bonus to any of their officers or employees, or any granting by the Company or any of its subsidiaries of any increase in severance or termination pay or any entry by the Company or any of its subsidiaries into, or material modification or amendment of, any currently effective employment, severance, termination or indemnification agreement or any

agreement the benefits of which are contingent or the terms of which are materially altered upon the occurrence of a transaction involving the Company of the nature contemplated hereby or any acceleration or release of any vesting condition to the right to exercise any option, warrant or other right to purchase or otherwise acquire any shares of the Company's capital stock or any acceleration or release of any right to repurchase shares of the Company's capital stock upon the termination of employment or services with the Company, (v) any material change or alteration in the policy of the Company relating to the granting of stock options or other equity compensation to its employees and consultants, (vi) entry by the Company or any of its subsidiaries into, or material modification, amendment or cancellation of, any development services, licensing, distribution, sales, sales services or other similar agreement with respect to any material Intellectual Property Rights (as defined in Section 2.9) other than in the ordinary course of business consistent with past practices, (vii) any acquisition, sale or transfer of any material asset by the Company or any of its subsidiaries other than in the ordinary course of business, (viii) any material change by the Company in its accounting methods, principles or practices, except as required by concurrent changes in GAAP, or (ix) any material revaluation by the Company of any of its assets, including writing off notes or accounts receivable other than in the ordinary course of business.

2.7 Taxes.

(a) The Company and each of its subsidiaries have timely filed all Tax Returns required to be filed by or on behalf of the Company and each of its subsidiaries; such Tax Returns were true, correct and complete in all material respects; and the Company and each of its subsidiaries have paid all Taxes due and owing (whether or not shown on such Tax Returns).

(b) The Company and each of its subsidiaries have withheld and paid all Taxes required to be withheld and paid in connection with any amounts paid or owing to any employee, independent contractor, creditor, stockholder or other third party.

(c) Neither the Company nor any of its subsidiaries is currently the beneficiary of any extension of time within which to file any Tax Return.

(d) Neither the Company nor any of its subsidiaries has waived any statute of limitations in respect of Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency.

(e) There are no liens for Taxes (other than Taxes not yet due and payable) upon any of the assets of the Company or any of its subsidiaries.

(f) Neither the Company nor any of its subsidiaries thereof has received from any taxing authority any (i) notice indicating an intent to open an audit or other review or (ii) notice of deficiency or proposed adjustment for any amount of Tax proposed, asserted, or assessed by any taxing authority against the Company or any of its subsidiaries.

(g) No tax audit or administrative or judicial Tax proceeding is pending or presently in progress with respect to the Company or any of its subsidiaries.

(h) The unpaid Taxes of the Company and its subsidiaries did not, as of the date of the most recent Company Balance Sheet, exceed the reserve for Tax liability (rather than any reserve for deferred Taxes established to reflect timing differences between book and Tax income) set forth on the face of such Company Balance Sheet (rather than in any notes thereto) and do not exceed that reserve as adjusted for the passage of time through the Closing Date in accordance with the past custom and practice of the Company and its subsidiaries in filing their Tax Returns.

(i) Neither the Company nor any of its subsidiaries is a party to any agreement, contract, arrangement or plan that has resulted or would result, separately or in the aggregate, in the payment of any (i) "excess parachute payment" within the meaning of Code section 280G (or any corresponding provision of state, local or foreign Tax law) or (ii) any amount that will not be fully deductible as a result of Code section 162(m) or 404 (or any corresponding provision of state, local or foreign Tax law).

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

(k) Neither the Company nor any of its subsidiaries is party to or has any obligation under any tax-sharing, tax indemnity or tax allocation agreement or arrangement.

(l) Neither the Company nor any of its Subsidiaries (A) has been a member of an Affiliated Group (as defined below) filing a consolidated federal income Tax Return (other than a group the common parent of which was the Company) or (B) has any liability for the Taxes of any Person (other than the Company or any of its Subsidiaries) under Treasury Regulation section 1.1502-6 (or any similar provision of state, local, or foreign law), as a transferee or successor, by contract or otherwise.

(m) Neither the Company nor any of its subsidiaries will be required to include any item of income in, or exclude any item of deduction from, taxable income for any taxable period (or portion thereof) ending after the Closing Date as a result of any change in method of accounting for a taxable period ending on or prior to the Closing Date.

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

(o) Neither the Company nor any of its subsidiaries has distributed stock of a corporation, or has had its stock distributed, in a transaction purported or intended to be governed in whole or in part by section 355 or 361 of the Code.

(p) The Company has delivered to Parent correct and complete copies of all foreign, federal and state income tax and all state sales and use Tax Returns filed for the Company and each of its subsidiaries and each of the Company's and its subsidiaries' predecessor entities, if any, filed since December 31, 2001.

For the purposes of this Agreement, “**Tax**” or “**Taxes**” means any federal, state, local or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including taxes under Code section 59A), customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated, or other tax of any kind whatsoever, including any interest, penalty, or addition thereto, whether disputed or not and including any obligations to indemnify or otherwise assume or succeed to the Tax liability of any other Person.

“**Tax Return**” means any return, declaration, report, claim for refund, or information return or statement relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

For purposes of this Agreement, “**Affiliated Group**” means any affiliated group within the meaning of Code section 1504(a) or any similar group defined under a similar provision of state, local, or foreign law.

2.8 Title to Properties.

(a) Neither the Company nor any of its subsidiaries owns any interest in real property, other than the leaseholds described in Part 2.8 of the Company Disclosure Schedule. Part 2.8 of the Company Disclosure Schedule lists all real property leases to which the Company is a party and each amendment thereto that is in effect as of the date of this Agreement. All such current leases are in full force and effect, are valid and effective in accordance with their respective terms, and there is not, under any of such leases, any existing default or event of default (or event which with notice or lapse of time, or both, would constitute a default) that would give rise to a claim against the Company in excess of \$50,000.

(b) The Company has good and valid title to, or, in the case of leased properties and assets, valid leasehold interests in, all of its tangible properties and assets, real, personal and mixed, used or held for use in its business, free and clear of any Encumbrances, except as reflected in the Company Financials and except for liens for Taxes not yet due and payable and such Encumbrances, if any, which are not material in character, amount or extent. Each of the Company’s subsidiaries has good and valid title to, or, in the case of leased properties and assets, valid leasehold interests in, all of its tangible properties and assets, real, personal and mixed, used or held for use in its business, free and clear of any Encumbrances, except as reflected in the Company Financials and except for liens for Taxes not yet due and payable and such Encumbrances, if any, which are not material in character, amount or extent.

2.9 Intellectual Property. For purposes of this Agreement, the following terms shall have the definitions set forth below:

“**Intellectual Property Rights**” means all intellectual property rights used by the Company and its subsidiaries in the conduct of their business, including, without limitation: (i) all trademarks, service marks, trade names, Internet domain names, trade dress, and the goodwill associated therewith, and all registrations or applications for registration thereof (collectively, the “**Company Marks**”); (ii) all patents, patent applications and continuations

(collectively, the “**Company Patents**”); (iii) all copyrights, database rights and moral rights in both published works and unpublished works, including all such rights in software, user and training manuals, marketing and promotional materials, internal reports, business plans and any other expressions, mask works, firmware and videos, whether registered or unregistered, and all registrations or applications for registration thereof (collectively, the “**Company Copyrights**”); and (iv) trade secret and confidential information, including such rights in inventions (whether or not reduced to practice), know-how, customer lists, technical information, proprietary information, technologies, processes and formulae, software, data, plans, drawings and blue prints, whether tangible or intangible and whether stored, compiled, or memorialized physically, electronically, photographically, or otherwise (collectively, the “**Company Secret Information**”). For purposes of this Section 2.9, “**software**” means any and all: (w) computer programs and applications, including any and all software implementations of algorithms, models and methodologies, whether in source code or object code, (x) databases and compilations, including any and all data and collections of data, whether machine readable or otherwise, (y) descriptions, flow-charts, library functions, algorithms, architecture, structure, display screens and development tools, and other information, work product or tools used to design, plan, organize or develop any of the foregoing and (z) all documentation, including user manuals and training materials, relating to any of the foregoing.

(a) Part 2.9 of the Company Disclosure Schedule sets forth a complete and correct list of each of the following which is owned by the Company or its subsidiaries: (i) each registered Company Mark, (ii) each material unregistered Company Mark, if any; (iii) each Company Patent and (iv) each registered Company Copyright. Except as set forth in Part 2.9 of the Company Disclosure Schedule, the Company or one of its subsidiaries: (i) owns all right, title and interest in and to the Intellectual Property Rights, free and clear of all Encumbrances, or (ii) is licensed to use, or otherwise possesses legally valid and enforceable rights to use, the Intellectual Property Rights that it does not so own. The Company and its Subsidiaries have made all necessary filings, recordations and payments to protect and maintain their interests in the Intellectual Property Rights owned by or licensed to the Company except where the failure to make such filings, recordations or payments would not have a Company Material Adverse Effect. No person has notified the Company or any subsidiary of any claim that any of the products, services or technology used, sold, offered for sale or licensed or proposed for use, sale, offer for sale or license by the Company or any of its subsidiaries infringes any intellectual property rights of any person.

(b) Except as set forth in Part 2.9 of the Company Disclosure Schedule: (i) all the Company Patents are valid and subsisting; (ii) to the best of the Company’s knowledge, none of the Company Patents is being infringed; and (iii) to the best of the Company’s knowledge, neither the validity nor the enforceability of any of the Company Patents has been challenged by any person.

(c) Except as set forth in Part 2.9 of the Company Disclosure Schedule: (i) all the Company Marks are valid and subsisting; (ii) to the best of the Company’s knowledge, none of the Company Marks is being infringed or diluted; and (iii) to the best of the Company’s knowledge, none of the Company Marks has been opposed or challenged and no proceeding has been commenced or threatened that would seek to prevent the use by the Company or any of its subsidiaries of any Company Mark.

(d) Except as set forth in Part 2.9 of the Company Disclosure Schedule: (i) all the Company Copyrights, whether or not registered, are valid and enforceable; (ii) to the best of the Company's knowledge, none of the Company Copyrights is being infringed, or its validity challenged or threatened in any way; and (iii) no proceeding has been commenced or threatened that would seek to prevent the use by the Company or any of its subsidiaries of the Company Copyrights.

(e) The Company and its subsidiaries have taken reasonable measures to protect the secrecy, confidentiality and value of the Company Secret Information. To the best of the Company's knowledge, no Company Secret Information has been used, divulged or appropriated for the benefit of any person (other than the Company or any of its subsidiaries) or otherwise misappropriated in a manner which would have a Company Material Adverse Effect.

(f) No Intellectual Property Right is subject to any outstanding order, proceeding (other than pending proceedings pertaining to applications for patent or trademark or copyright registration) or stipulation that restricts in any manner the licensing thereof by the Company or any of its subsidiaries.

(g) To the best of the Company's knowledge, none of its employees engaged in the development of software or in performing sales and marketing functions on behalf of the Company is obligated under any contract with any third party which would materially conflict with such employee's rights to develop software or engage in such sales and marketing functions on behalf of the Company.

(h) All employees, contractors, agents and consultants of the Company or any of its subsidiaries who are or were involved in the creation of material Intellectual Property Rights owned by the Company have executed an assignment of inventions agreement to vest in the Company or its subsidiary, as appropriate, exclusive ownership of such Intellectual Property Rights, except where the failure to have executed such an agreement will not have a Company Material Adverse Effect. All employees, contractors, agents and consultants of the Company or any of its subsidiaries who have or have had access to Company Secret Information owned by the Company have executed nondisclosure agreements to protect the confidentiality of such Company Secret Information, except where the failure to have executed such an agreement will not have a Company Material Adverse Effect.

(i) Without limiting the generality of the foregoing, except as set forth in Part 2.9 of the Company Disclosure Schedule, all the software that the Company or any of its subsidiaries licenses or otherwise makes available to customers, and all Intellectual Property Rights therein, were: (i) developed by employees of the Company or of a subsidiary of the Company within the scope of their employment and subject to their obligation to assign inventions and patents therein; or (ii) developed by independent contractors or consultants who assigned all of their right, title and interest in and to that software to the Company; or (iii) otherwise acquired or licensed by the Company from a third party by an agreement or contract that is disclosed in Part 2.9 of the Company Disclosure Schedule.

(j) All material contracts, licenses and agreements relating to the Intellectual Property Rights are in full force and effect. The consummation of the transactions contemplated

by this Agreement will neither violate nor result in the breach, modification, cancellation, termination, or suspension of such contracts, licenses and agreements. The Company and each of its subsidiaries are in material compliance with, and have not materially breached any term of any of such contracts, licenses and agreements and, to the knowledge of the Company and its subsidiaries, all other parties to such contracts, licenses and agreements are in compliance in all material respects with, and have not materially breached any term of, such contracts, licenses and agreements. Following the Closing Date, the Surviving Corporation will be permitted to exercise all of the Company's rights under such contracts, licenses and agreements to the same extent the Company would have been able to had the transactions contemplated by this Agreement not occurred and without the payment of any additional amounts or consideration other than ongoing fees, royalties or payments which the Company would otherwise be required to pay.

2.10 Compliance with Laws.

(a) Neither the Company nor any of its subsidiaries is in conflict with, or in default or violation of (i) any law, rule, regulation, order, judgment or decree applicable to the Company or any of its subsidiaries or by which the Company or any of its subsidiaries or any of their respective properties is bound or affected, or (ii) any note, bond, mortgage, indenture, contract, agreement, lease, license, permit, franchise or other instrument or obligation to which the Company or any of its subsidiaries is a party or by which the Company or any of its subsidiaries or its or any of their respective properties is bound or affected, except for conflicts, violations and defaults that, individually or in the aggregate, would not cause the Company to lose any material benefit or incur any material liability. No investigation or review by any Governmental Entity is pending or, to the Company's knowledge, has been threatened in a writing delivered to the Company against the Company or any of its subsidiaries, nor, to the Company's knowledge, has any Governmental Entity indicated an intention to conduct an investigation of the Company or any of its subsidiaries. There is no agreement, judgment, injunction, order or decree binding upon the Company or any of its subsidiaries which has or could reasonably be expected to have the effect of prohibiting or materially impairing any business practice of the Company or any of its subsidiaries, any acquisition of material property by the Company or any of its subsidiaries or the conduct of business by the Company and its subsidiaries as currently conducted.

(b) The Company and its subsidiaries hold all permits, licenses, variances, exemptions, orders and approvals from Governmental Entities that are material to or required for the operation of the business of the Company and of its subsidiaries as currently conducted (collectively, the "**Company Permits**"). The Company and its subsidiaries are in compliance, in all material respects, with the terms of the Company Permits.

2.11 **Litigation.** There are no claims, suits, actions or proceedings pending or, to the knowledge of the Company, threatened against, relating to or affecting the Company or any of its subsidiaries, before any Governmental Entity or any arbitrator that seeks to restrain or enjoin the consummation of the transactions contemplated by this Agreement or which could reasonably be expected, either singularly or in the aggregate with all such claims, actions or proceedings, to be material to the Company, any of its subsidiaries or the Surviving Corporation following the Merger or have a material adverse effect on the ability of the parties hereto to consummate the

Merger. No Governmental Entity has at any time challenged or questioned in a writing delivered to the Company the legal right of the Company or any of its subsidiaries to design, offer or sell any of its products or services in the present manner or style thereof or otherwise to conduct its business as currently conducted. As of the date hereof, to the knowledge of the Company, no event has occurred, and no claim, dispute or other condition or circumstance exists, that will, or that would reasonably be expected to, cause or provide a bona fide basis for a director or executive officer of the Company or of any of its subsidiaries to seek indemnification from the Company.

2.12 Employee Benefit Plans.

(a) **Definitions.** With the exception of the definition of “Affiliate” set forth in Section 2.12(a)(i) below (which definition shall apply only to this Section 2.12), for purposes of this Agreement, the following terms shall have the meanings set forth below:

(i) “**Affiliate**” shall mean any other person or entity under common control with the Company within the meaning of Sections 414(b), (c), (m) or (o) of the Code and the regulations issued thereunder;

(ii) “**Company Employee Plan**” shall mean any plan, program, policy, practice, contract, agreement or other arrangement providing for compensation, severance, termination pay, performance awards, stock or stock-related awards, fringe benefits or other employee benefits or remuneration of any kind, whether written or unwritten or otherwise, funded or unfunded, including without limitation, each “employee benefit plan” within the meaning of Section 3(3) of ERISA which is or has been maintained, contributed to, or required to be contributed to, by the Company or any Affiliate for the benefit of any Employee;

(iii) “**COBRA**” shall mean the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended;

(iv) “**DOL**” shall mean the Department of Labor;

(v) “**Employee**” shall mean any current, former or retired employee, officer or director of the Company or any Affiliate;

(vi) “**Employee Agreement**” shall mean each management, employment, severance, consulting, relocation, repatriation, expatriation, visa, work permit or similar agreement or contract between the Company or any Affiliate and any Employee or consultant;

(vii) “**ERISA**” shall mean the Employee Retirement Income Security Act of 1974, as amended;

(viii) “**FMLA**” shall mean the Family Medical Leave Act of 1993, as amended;

(ix) “**International Employee Plan**” shall mean each Company Employee Plan that has been adopted or maintained by the Company, whether informally or formally, for the benefit of Employees outside the United States;

(x) “**IRS**” shall mean the Internal Revenue Service;

(xi) “**Multiemployer Plan**” shall mean any “Pension Plan” (as defined below) which is a “multiemployer plan,” as defined in Section 3(37) of ERISA;

(xii) “**PBGC**” shall mean the Pension Benefit Guaranty Corporation; and

(xiii) “**Pension Plan**” shall mean each Company Employee Plan which is an “employee pension benefit plan,” within the meaning of Section 3(2) of ERISA.

(b) **Disclosure of Plans.** Part 2.12(b) of the Company Disclosure Schedule contains an accurate and complete list of each Company Employee Plan and each Employee Agreement. The Company does not have any plan or commitment to establish any new Company Employee Plan, to modify any Company Employee Plan or Employee Agreement (except to the extent required by law or to conform any such Company Employee Plan or Employee Agreement to the requirements of any applicable law, in each case as previously disclosed to Parent in writing, or as required by this Agreement), or to enter into any Company Employee Plan or Employee Agreement, nor does it have any intention or commitment to do any of the foregoing.

(c) **Documents.** The Company has provided to Parent: (i) accurate and complete copies of all documents embodying each Company Employee Plan and each Employee Agreement including all amendments thereto and written interpretations thereof; (ii) the most recent annual actuarial valuations, if any, prepared for each Company Employee Plan; (iii) the three most recent annual reports (Form Series 5500 and all schedules and financial statements attached thereto), if any, required under ERISA or the Code in connection with each Company Employee Plan or related trust; (iv) if the Company Employee Plan is funded, the most recent annual and periodic accounting of Company Employee Plan assets; (v) the most recent summary plan description together with the summary of material modifications thereto, if any, required under ERISA with respect to each Company Employee Plan; (vi) all IRS determination, opinion, notification and advisory letters, and rulings relating to Company Employee Plans and copies of all applications and correspondence to or from the IRS or the DOL with respect to any Company Employee Plan; (vii) all material written agreements and contracts relating to each Company Employee Plan, including, but not limited to, administrative service agreements, group annuity contracts and group insurance contracts; (viii) all communications material to any Employee or Employees relating to any Company Employee Plan and any proposed Company Employee Plans, in each case, relating to any amendments, terminations, establishments, increases or decreases in benefits, acceleration of payments or vesting schedules or other events which would result in any material liability to the Company; (ix) all COBRA forms and related notices; (x) all registration statements and prospectuses prepared in connection with each Company Employee Plan; and (xi) a list of all employees, officers and consultants of the Company reflecting each such person’s current title and/or job description and compensation.

(d) **Employee Plan Compliance.** (i) The Company has performed in all material respects all obligations required to be performed by it under, is not in default or violation of, and has no knowledge of any default or violation by any other party to, each Company Employee Plan and/or Employee Agreement, and each Company Employee Plan has been established and maintained in all material respects in accordance with its terms and in compliance with all applicable laws, statutes, orders, rules and regulations, including but not limited to ERISA or the Code; (ii) each Company Employee Plan intended to qualify under Section 401(a) of the Code and each trust intended to qualify under Section 501(a) of the Code has either received a favorable determination letter from the IRS with respect to each such Plan as to its qualified status under the Code or has remaining a period of time under applicable Treasury regulations or IRS pronouncements in which to apply for such a determination letter and make any amendments necessary to obtain a favorable determination and no event has occurred which would adversely affect the status of such determination letter or the qualified status of such Plan; (iii) no “prohibited transaction,” within the meaning of Section 4975 of the Code or Sections 406 and 407 of ERISA, and not otherwise exempt under Section 408 of ERISA, has occurred with respect to any Company Employee Plan; (iv) there are no actions, suits or claims pending, or, to the knowledge of the Company, threatened or reasonably anticipated (other than routine claims for benefits) against any Company Employee Plan or against the assets of any Company Employee Plan; (v) each Company Employee Plan can be amended, terminated or otherwise discontinued either before or after the Effective Time in accordance with its terms, without liability to Parent, the Company or any of its Affiliates (other than ordinary administration expenses typically incurred in a termination event); (vi) there are no audits, inquiries or proceedings pending or, to the knowledge of the Company, threatened by the IRS or DOL with respect to any Company Employee Plan; (vii) neither the Company nor any Affiliate is subject to any penalty or tax with respect to any Company Employee Plan under Section 402(i) of ERISA or Sections 4975 through 4980 of the Code; and (viii) all contributions due from the Company or any Affiliate with respect to any of the Company Employee Plans have been made as required under ERISA or have been accrued on the Company Balance Sheet and no further contributions will be due or will have accrued thereunder as of the Closing Date; (ix) to the Company’s knowledge, all individuals who, pursuant to the terms of any Company Employee Plan or Employee Agreement, are entitled to participate in any such Company Employee Plan or Employee Agreement are currently participating in such Company Employee Plan or Employee Agreement, or have been given the opportunity to do so and have declined; (x) there has been no amendment to, written interpretation or authorized announcement (whether or not written) by the Company relating to, or change in employee participation or coverage under, any Company Employee Plan or Employee Agreement that would increase materially the expense of maintaining such Company Employee Plan or Employee Agreement above the level of the expense incurred in respect thereof during the calendar year 2003.

(e) **Pension Plans.** The Company does not now, nor has it ever, maintained, established, sponsored, participated in, or contributed to, any Pension Plan which is subject to Title IV of ERISA or Section 412 of the Code.

(f) **Multiemployer Plans.** At no time has the Company contributed to or been requested to contribute to any Multiemployer Plan.

(g) **No Post-Employment Obligations.** No Company Employee Plan provides, or has any liability to provide, retiree life insurance, retiree health or other retiree employee welfare benefits to any person for any reason, except as may be required by COBRA or other applicable statute, and the Company has never represented, promised or contracted (whether in oral or written form) to any Employee (either individually or to Employees as a group) or any other person that such Employee(s) or other person would be provided with retiree life insurance, retiree health or other retiree employee welfare benefit, except to the extent required by statute.

(h) **COBRA; FMLA.** Neither the Company nor any Affiliate has, prior to the Effective Time, and in any material respect, violated any of the health care continuation requirements of COBRA, the requirements of FMLA or any similar provisions of state law applicable to its Employees. The group health plans (as defined in Section 4980B(g) of the Code) that benefit employees of the Company are in compliance, in all material respects, with the continuation coverage requirements of Section 4980B of the Code and Sections 601 through 608 of ERISA, the Americans with Disabilities Act of 1990, as amended and the FMLA, and the regulations thereunder, as such requirements affect the Company and its employees. As of the Closing Date, there will be no material outstanding, uncorrected violations under COBRA, with respect to any of the Company Employee Plans or Employee Agreements, covered employees or qualified beneficiaries.

(i) **Effect of Transaction.** The execution of this Agreement and the consummation of the transactions contemplated hereby will not (either alone or upon the occurrence of any additional or subsequent events) constitute an event under any Company Employee Plan, Employee Agreement, trust or loan that will or may result in any payment (whether of severance pay or otherwise), acceleration, forgiveness of indebtedness, vesting, distribution, increase in benefits or obligation to fund benefits with respect to any Employee. No payment or benefit which will or may be made by the Company or its Affiliates with respect to any Employee as a result of the transactions contemplated by this Agreement will be characterized as an "excess parachute payment," within the meaning of Section 280G(b)(1) of the Code or will be treated as a nondeductible expense within the meaning of Section 162 of the Code.

(j) **Employment Matters.** The Company and each of its subsidiaries: (i) is in compliance in all material respects with all applicable foreign, federal, state and local laws, rules and regulations respecting employment, employment practices, immigration, terms and conditions of employment and wages and hours, in each case, with respect to Employees; (ii) has withheld all amounts required by law or by agreement to be withheld from the wages, salaries and other payments to Employees; (iii) has properly classified independent contractors for purposes of federal and applicable state tax laws, laws applicable to employee benefits and other applicable laws; (iv) is not liable for any arrears of wages or any taxes or any penalty for failure to comply with any of the foregoing; and (v) is not liable for any material payment to any trust or other fund or to any governmental or administrative authority, with respect to unemployment compensation benefits, social security or other benefits or obligations for Employees (other than routine payments to be made in the normal course of business and consistent with past practice). There are no pending, or, to the Company's knowledge, threatened or reasonably anticipated claims or actions against the Company under any workers compensation policy or long-term

disability policy. To the Company's knowledge, no Employee of the Company has violated any employment contract, nondisclosure agreement or noncompetition agreement by which such Employee is bound due to such Employee being employed by the Company and disclosing to the Company or using trade secrets or proprietary information of any other person or entity. All employees of the Company are legally permitted to be employed by the Company in the United States of America in their current jobs. There are no controversies pending or, to the Company's knowledge threatened, between the Company and any subsidiary and any of their employees that would be reasonably likely to result in the Company's incurring material liability. The Company does not have any employment contracts, Employee Agreements, or consulting agreements currently in effect that are not terminable at will (other than agreements for the sole purpose of providing for the confidentiality of proprietary information or assignment of invention). The Company will have no liability to any employee or to any organization or any other entity as a result of the termination of any employee leasing arrangement.

(k) **Labor.** No work stoppage or labor strike against the Company is pending, threatened or reasonably anticipated. The Company does not know of any activities or proceedings of any labor union to organize any Employees. There are no actions, suits, claims, labor disputes or grievances pending, or, to the knowledge of the Company, threatened or reasonably anticipated relating to any labor, safety or discrimination matters involving any Employee, including charges of unfair labor practices or discrimination complaints, which, if adversely determined, would, individually or in the aggregate, result in any material liability to the Company. Neither the Company nor any of its subsidiaries has engaged in any unfair labor practices within the meaning of the National Labor Relations Act. The Company is not presently, nor has it been in the past, a party to, or bound by, any collective bargaining agreement or union contract with respect to Employees and no collective bargaining agreement is being negotiated by the Company.

(l) **International Employee Plans.** Each International Employee Plan has been established, maintained and administered in material compliance with its terms and conditions and with the requirements prescribed by any and all statutory or regulatory laws that are applicable to such International Employee Plan. Furthermore, no International Employee Plan has unfunded liabilities that are not fully accrued on the Company Balance Sheet. Except as required by law, no condition exists that would prevent the Company or Parent from terminating or amending any International Employee Plan at any time for any reason.

2.13 Environmental Matters.

(a) **Hazardous Material.** Except as would not result in material liability to the Company, no underground storage tanks and no amount of any substance that has been designated by any Governmental Entity or by applicable federal, state or local law to be radioactive, toxic, hazardous or otherwise a danger to health or the environment, including, without limitation, PCBs, asbestos, petroleum, urea-formaldehyde and all substances listed as hazardous substances pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or defined as a hazardous waste pursuant to the United States Resource Conservation and Recovery Act of 1976, as amended, and the regulations promulgated pursuant to said laws, but excluding office and janitorial supplies (a "**Hazardous Material**") are present, as a result of the actions of the Company or any of its subsidiaries or any

affiliate of the Company, or, to the Company's knowledge, as a result of any actions of any third party or otherwise, in, on or under any property, including the land and the improvements, ground water and surface water thereof that the Company or any of its subsidiaries has at any time owned, operated, occupied or leased.

(b) **Hazardous Materials Activities.** Except as would not result in a material liability to the Company (in any individual case or in the aggregate) (i) neither the Company nor any of its subsidiaries has transported, stored, used, manufactured, disposed of, released or exposed its employees or others to Hazardous Materials in violation of any law in effect on or before the Closing Date, and (ii) neither the Company nor any of its subsidiaries has disposed of, transported, sold, used, released, exposed its employees or others to or manufactured any product containing a Hazardous Material (collectively "**Hazardous Materials Activities**") in violation of any rule, regulation, treaty or statute promulgated by any Governmental Entity in effect prior to or as of the date hereof to prohibit, regulate or control Hazardous Materials or any Hazardous Material Activity.

(c) **Permits.** The Company and its subsidiaries currently hold all environmental approvals, permits, licenses, clearances and consents ("**Environmental Permits**") material to and necessary for the conduct of the Company's and its subsidiaries' Hazardous Material Activities and other businesses of the Company and its subsidiaries as such activities and businesses are currently being conducted.

(d) **Environmental Liabilities.** No action, proceeding, revocation proceeding, amendment procedure, writ or injunction is pending, and to the Company's knowledge, no action, proceeding, revocation proceeding, amendment procedure, writ or injunction has been threatened by any Governmental Entity against the Company or any of its subsidiaries in a writing delivered to the Company concerning any Environmental Permit of the Company, Hazardous Material or any Hazardous Materials Activity of the Company or any of its subsidiaries. The Company is not aware of any fact or circumstance which could involve the Company or any of its subsidiaries in any environmental litigation or impose upon the Company any material environmental liability.

2.14 **Certain Agreements.** Except as otherwise set forth in the applicable lettered subsection of the Company Disclosure Schedule, neither the Company nor any of its subsidiaries is a party to or is bound by:

(a) any employment or consulting agreement or commitment with any employee or member of the Company's Board of Directors, providing any term of employment or compensation guarantee or any consulting agreement or any employment agreement that provides severance benefits or other benefits after the termination of employment of such employee regardless of the reason for such termination of employment, except as required by applicable law;

(b) any agreement or plan, including any stock option plan, stock appreciation right plan or stock purchase plan, any of the benefits of which will be increased, or the vesting of benefits of which will be accelerated, by the occurrence of any of the transactions contemplated

by this Agreement or the value of any of the benefits of which will be calculated on the basis of any of the transactions contemplated by this Agreement;

(c) any agreement of indemnification, any guaranty or any instrument evidencing indebtedness for borrowed money by way of direct loan, sale of debt securities, purchase money obligation, conditional sale, or otherwise;

(d) any agreement, obligation or commitment containing covenants purporting to limit or which effectively limit the Company's or any of its subsidiaries' freedom to compete in any line of business or in any geographic area or which would so limit Parent, the Company or the Surviving Corporation or any of its subsidiaries after the Effective Time or granting any exclusive distribution or other exclusive rights;

(e) any agreement or commitment currently in force relating to the disposition or acquisition by the Company or any of its subsidiaries after the date of this Agreement of assets not in the ordinary course of business, or pursuant to which the Company has any material ownership or participation interest in any corporation, partnership, joint venture, strategic alliance or other business enterprise other than the Company's subsidiaries;

(f) any licensing, distribution, resale or other agreement, contract or commitment with regard to the acquisition, distribution, resale or licensing of any Intellectual Property Rights other than licenses, distribution, resale agreements, advertising agreements, or other similar agreement entered into in the ordinary course of business consistent with past practice;

(g) agreement to forgive any indebtedness in excess of \$5,000 of any person to the Company or any subsidiary;

(h) agreement regarding the lease of real property involving rental obligations in excess of \$50,000 per annum, or agreement regarding the purchase of real property;

(i) loan agreement, promissory note or other evidence of indebtedness for borrowed money;

(j) agreement pursuant to which the Company or any subsidiary (A) uses any intellectual property of any third party that is material to the operation of its business (other than off-the-shelf commercial software programs with respect to which no future license or royalty payment will become due), (B) incorporates any third party intellectual property in any of its products; or (C) has granted to any third party an exclusive license of any Intellectual Property Rights owned by the Company or any license of its source code (including customary source code escrow arrangements entered into in the ordinary course of business);

(k) agreement obligating the Company or any subsidiary to make aggregate payments in excess of \$50,000 to any third party during the two-year period ending June 30, 2006;

(l) agreement pursuant to which the Company or any subsidiary (A) reasonably expects to receive aggregate payments in excess of \$100,000 during the two year

period ending June 30, 2006 or (B) reasonably expects to recognize revenue in such aggregate amount during such two year period;

(m) agreement or commitment with any affiliate of the Company;

(n) any agreement or commitment currently in force providing for capital expenditures by the Company or its subsidiaries in excess of \$50,000; or

(o) any other agreement or commitment currently in effect that is material to the Company's or its subsidiaries' business as presently conducted and proposed to be conducted.

Each agreement that is required to be disclosed in the Company Disclosure Schedule pursuant to clauses (a) through (o) above or pursuant to Section 2.9 and each agreement that is required to be filed with any Company SEC Report shall be referred to herein as a "**Company Contract**." Each Company Contract is valid and in full force and effect. Neither the Company nor any of its subsidiaries, nor to the Company's knowledge, any other party thereto, is in breach, violation or default under, and neither the Company nor any of its subsidiaries has received written notice alleging that it has breached, violated or defaulted under, any of the terms or conditions of any Company Contract in such a manner as would permit any other party thereto to cancel or terminate any such Company Contract, or would permit any other party to seek material damages or other remedies for any or all such alleged breaches, violations, or defaults.

2.15 Brokers' and Finders' Fees. Except for fees payable to Seven Hills Partners LLC ("**Seven Hills**") pursuant to an engagement letter dated August 31, 2004, a copy of which has been provided to Parent, the Company has not incurred, nor will it incur, directly or indirectly, any liability for brokerage or finders' fees or agents' commissions or any similar charges in connection with this Agreement or any transaction contemplated hereby.

2.16 Insurance. The Company and each of its subsidiaries have policies of insurance and bonds of the type and in amounts customarily carried by persons conducting business or owing assets similar to those of the Company and its subsidiaries. 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 have been paid, and the Company and its subsidiaries are otherwise in compliance in all material respects with the terms of such policies and bonds. To the knowledge of the Company, there has been no threatened termination of, or material premium increase with respect to, any of such policies. Part 2.16 of the Company Disclosure Schedule sets forth a description of each such policy or bond which provides coverage for the Company or any of its subsidiaries.

2.17 Information in Proxy Statement.

(a) Each document required to be filed by the Company with the SEC in connection with the transactions contemplated by this Agreement (the "**Company Disclosure Documents**"), including, without limitation, the proxy or information statement of the Company containing information required by Regulation 14A under the Exchange Act (together with all amendments and supplements thereto, the "**Proxy Statement**"), to be filed with the SEC in

connection with the Merger, will, when filed, comply as to form in all material respects with the applicable requirements of the Exchange Act. The representations and warranties contained in this Section 2.17(a) will not apply to statements or omissions included in the Company Disclosure Documents based upon information furnished to the Company in writing by Parent or Merger Sub or any of their representatives specifically for use therein.

(b) At the time the Proxy Statement or any amendment or supplement thereto is first mailed to stockholders of the Company and at the time such stockholders vote on approval and adoption of this Agreement and approval of the Merger, the Proxy Statement, as supplemented or amended, if applicable, will not contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading. At the time of the filing of any Company Disclosure Document other than the Proxy Statement and at the time of any distribution thereof, such Company Disclosure Document will not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading. The representations and warranties contained in this Section 2.17(b) will not apply to statements or omissions included in the Company Disclosure Documents based upon information furnished to the Company in writing by Parent or Merger Sub or any of their representatives specifically for use therein.

2.18 Customers; Accounts Receivable.

(a) The Company has no reason to believe, based on indications it has received from its customers, that the Company's software license revenue for the year ended September 30, 2005 is reasonably likely to be less than 80% of the Company's software license revenue for the year ended September 30, 2004.

(b) The receivables shown on the Company Balance Sheet arose in the ordinary course of business, consistent with past practice, and have been collected or are collectible in the book amounts thereof, less an amount not materially in excess of the allowance for doubtful accounts provided for on the Company Balance Sheet. Allowances for doubtful accounts and warranty returns are adequate and have been prepared in accordance with GAAP consistently applied and in accordance with the Company's past practices. The Company's receivables arising after the date of the Company Balance Sheet and prior to the Closing Date arose or will arise in the ordinary course of business, consistent with past practice, and have been collected or are collectible in the book amounts thereof, less reasonable allowances for doubtful accounts determined in accordance with the Company's past practices. To the Company's knowledge, none of its receivables is subject to any material claim of setoff, recoupment or counter claim and it has no knowledge of any specific facts or circumstances (whether asserted or unasserted) that could give rise to any such claim. No material amount of receivables are contingent upon the performance by the Company of any obligation or contract other than normal warranty repair and replacement. No person has any Encumbrance on any of such receivables and no agreement for deduction or discount has been made with respect to any of such receivables.

2.19 Board Approval. The Board of Directors of the Company has approved this Agreement and declared the advisability of this Agreement and the Merger and recommended that the stockholders of the Company approve and adopt this Agreement and approve the Merger. The Board of Directors of the Company has taken all actions so that the restrictions contained in Section 203 of Delaware Law applicable to a “business combination” (as defined therein) will not apply to the execution, delivery or performance of this Agreement or the consummation of the Merger or the other transactions contemplated by this Agreement.

2.20 Fairness Opinion. The Company’s Board of Directors has received an opinion from Seven Hills, dated as of the date hereof, to the effect that, as of the date hereof, the Merger Consideration is fair to the Company’s stockholders from a financial point of view, and has, or will as promptly as practicable after receipt thereof, deliver to Parent a copy of the written confirmation of such opinion.

2.21 Accounting System. The Company and its subsidiaries have internal control over financial reporting, as defined in Rule 13a-15(f) under the Exchange Act and such internal control over financial reporting is reasonably effective. Since January 1, 2002, there has been no change in the internal control over financial reporting of the Company and its subsidiaries that has materially affected, or is reasonably likely to materially affect, the internal control over financial reporting of the Company and its subsidiaries. Without limiting the generality of the foregoing, the Company and its subsidiaries maintain a system of internal accounting controls sufficient to provide reasonable assurance that (a) transactions are executed in accordance with management’s general or specific authorizations; (b) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP and to maintain asset accountability; (c) access to assets is permitted only in accordance with management’s general or specific authorization; and (d) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. The Company has not been notified by its independent auditor that there is any significant deficiency or material weakness in the Company’s internal control over financial reporting. The Company has not received any management letter or similar correspondence from any independent auditor of the Company or any of its subsidiaries.

2.22 Disclosure. None of the information furnished or made available by the Company to Parent in this Agreement, the Company Disclosure Schedule, or in any certificate to be executed or delivered pursuant hereto by the Company at or prior to the Closing Date, is false or misleading or contains any misstatement of a material fact, or omits to state any material fact required to be stated in order to make the statements herein or therein not misleading in light of the circumstances under which they were made. There is no fact known to the Company and not disclosed to Parent in writing that is reasonably likely to give rise to a Company Material Adverse Effect or to have the effect of preventing, materially delaying, making illegal or otherwise interfering with the Merger and the other transactions contemplated by this Agreement.

Article 3
REPRESENTATIONS AND WARRANTIES OF PARENT AND MERGER SUB

As of the date of this Agreement and as of the Closing Date, Parent and Merger Sub represent and warrant to the Company, subject to any exception expressly stated in the disclosure schedule, delivered by Parent to the Company dated as of the date hereof and certified by a duly authorized officer of Parent (the "**Parent Disclosure Schedule**"), which exception shall specifically identify the representation to which it relates, as follows:

3.1 Organization of Parent and Merger Sub.

(a) Each of Parent and Merger Sub (i) is a corporation duly organized, validly existing and in good standing under the laws of the jurisdiction in which it is organized; (ii) has the corporate or other power and authority to own, lease and operate its assets and property and to carry on its business as now being conducted; and (iii) except as would not be material to Parent, is duly qualified or licensed to do business in each jurisdiction where the character of the properties owned, leased or operated by it or the nature of its activities makes such qualification or licensing necessary.

(b) Parent has delivered or made available to Company a true and correct copy of the Certificate of Incorporation and Bylaws of Parent and Merger Sub, each as amended to date (collectively, the "**Parent Charter Documents**"), and each such instrument is in full force and effect. Neither Parent nor Merger Sub is in violation of any of the provisions of the Parent Charter Documents. Parent has delivered or made available to Company all proposed or considered amendments to the Parent Charter Documents.

3.2 Authority; Non-Contravention.

(a) Parent 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 duly authorized by all necessary corporate action on the part of Parent and Merger Sub, subject only to the filing of the Certificate of Merger pursuant to Delaware Law. No other approval of any holder of any securities of Parent is required in connection with the consummation of the transactions contemplated hereby. This Agreement has been duly executed and delivered by Parent and Merger Sub and, assuming the due authorization, execution and delivery by the Company, constitutes the valid and binding obligations of Parent and Merger Sub, enforceable against Parent and Merger Sub in accordance with its terms, except as enforceability may be limited by bankruptcy and other similar laws affecting the rights of creditors generally and general principles of equity.

(b) The execution and delivery of this Agreement by Parent and Merger Sub does not, and the performance of this Agreement by Parent and Merger Sub will not, (i) conflict with or violate the Parent Charter Documents, (ii) subject to compliance with the requirements set forth in Section 3.2(c) below, conflict with or violate any material law, rule, regulation, order, judgment or decree applicable to Parent or Merger Sub or by which any of their respective material properties is bound or affected, or (iii) result in any material breach of or constitute a

material default (or an event that with notice or lapse of time or both would become a material default) under, or impair Parent's rights or alter the rights or obligations of any third party under, or give to others any rights of termination, amendment, acceleration or cancellation of; or result in the creation of an Encumbrance on any of the properties or assets of Parent or Merger Sub pursuant to, any material note, bond, mortgage, indenture, contract, agreement, lease, license, permit, franchise or other instrument or obligation to which Parent or Merger Sub is a party or by which Parent or Merger Sub or any of their respective material properties are bound or affected.

(c) No consent, approval, order or authorization of, or registration, declaration or filing with any Governmental Entity or other person is required to be obtained or made by Parent or Merger Sub in connection with the execution and delivery of this Agreement or the consummation of the Merger, except for (i) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware, (ii) the filing of a Schedule 13D with regard to the Voting Agreements in accordance with the Securities Act and the Exchange Act, (iii) such consents, approvals, orders, authorizations, registrations, declarations and filings as may be required under applicable federal, foreign and state securities (or related) laws and the securities or antitrust laws of any foreign country, and (iv) such other consents, authorizations, filings, approvals and registrations which if not obtained or made would not be material to Parent or the Surviving Corporation or have a material adverse effect on the ability of the parties hereto to consummate the Merger.

3.3 Litigation. There are no claims, suits, actions or proceedings pending or, to the knowledge of Parent, threatened against, relating to or affecting Parent or any of its subsidiaries, before any Governmental Entity or any arbitrator that seeks to restrain or enjoin the consummation of the transactions contemplated by this Agreement or which could reasonably be expected, either singularly or in the aggregate with all such claims, actions or proceedings, to have a material adverse effect on the ability of the parties hereto to consummate the Merger.

3.4 Information to be Supplied. Parent and Merger Sub will deliver to the Company all information reasonably requested by the Company for inclusion in the Proxy Statement. None of the information to be supplied by Parent or Merger Sub to the Company for inclusion in the Proxy Statement will, at the time it is sent to the stockholders of the Company or at the time of the Stockholders Meeting, contain any untrue statement of a 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 misleading.

3.5 Brokers' and Finders' Fees. Parent has not incurred, nor will it incur, directly or indirectly, any liability for brokerage or finders' fees or agents' commissions or any similar charges in connection with this Agreement or any transaction contemplated hereby.

Article 4 **CONDUCT PRIOR TO THE EFFECTIVE TIME**

4.1 Conduct of Business by the Company. During the period from the date of this Agreement and continuing until the earlier of the termination of this Agreement pursuant to its terms or the Effective Time, the Company and each of its subsidiaries shall, except to the extent that Parent shall otherwise consent in writing, carry on its business in the usual, regular and

ordinary course, in substantially the same manner as heretofore conducted and in compliance in all material respects with all applicable laws and regulations, pay its debts and Taxes when due subject to good faith disputes over such debts or Taxes, pay or perform other material obligations when due, and use commercially reasonable efforts consistent with past practices and policies to (i) preserve intact its present business organization, (ii) keep available the services of its present officers and employees, (iii) collect its accounts receivable and any other amounts payable to it when due and otherwise enforce any obligations owed to it by others substantially in accordance with their terms, and (iv) preserve its relationships with customers, suppliers, licensors, licensees, and others with which it has business dealings. In addition, the Company will promptly notify Parent of any material event involving its business or operations.

In addition, except as permitted by the terms of this Agreement, without the prior written consent of Parent, during the period from the date of this Agreement and continuing until the earlier of the termination of this Agreement pursuant to its terms or the Effective Time, the Company shall not do any of the following and shall not permit its subsidiaries to do any of the following:

- (a) Take any action out of the ordinary course of business or otherwise inconsistent with past practices with respect to accounts payable or accounts receivable of the Company, including without limitation negotiating any discounts with respect to accounts receivable or delaying payment of any accounts payable past its due date;
- (b) Waive any stock repurchase rights, accelerate, amend or change the period of exercisability of options or repurchase of restricted stock, or reprice options granted to any employee, consultant, director or authorize cash payments in exchange for any options or take any such action with regard to any warrant or other right to acquire the Company's capital stock;
- (c) Grant any severance or termination pay to any officer or employee except pursuant to written agreements in effect, or policies existing, on the date hereof and as previously disclosed in writing to Parent, or adopt any new severance plan;
- (d) Transfer or license to any person or entity or otherwise extend, amend or modify in any material respect any rights to Intellectual Property Rights, other than non-exclusive licenses in the ordinary course of business and consistent with past practice;
- (e) Declare, set aside or pay any dividends on or make any other distributions (whether in cash, stock, equity securities or property) in respect of any capital stock or split, combine or reclassify any capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for any capital stock;
- (f) Purchase, redeem or otherwise acquire, directly or indirectly, any shares of capital stock of the Company or its subsidiaries, except repurchases of unvested shares at cost in connection with the termination of the employment relationship with any employee pursuant to option agreements or purchase agreements in effect on the date hereof;
- (g) Enter into any agreement, obligation or commitment containing covenants purporting to limit or which effectively limit the Company's or any of its subsidiaries' freedom to compete in any line of business or in any geographic area or which would so limit Parent, the

Company or the Surviving Corporation or any of its subsidiaries after the Effective Time or granting any exclusive distribution or other exclusive rights;

(h) Issue, deliver, sell, authorize, pledge or otherwise encumber any shares of capital stock or any securities convertible into shares of capital stock, or subscriptions, rights, warrants or options to acquire any shares of capital stock or any securities convertible into shares of capital stock, or enter into other agreements or commitments of any character obligating it to issue any such shares or convertible securities, other than the issuance, delivery and/or sale of (i) shares of Company Common Stock pursuant to the exercise of Company Options and Company Warrants, (ii) shares of Company Common Stock issuable to participants in the Company ESPP consistent with the terms thereof and (iii) options granted to newly hired employees, consistent in amounts with the Company's prior practices;

(i) Cause, permit or propose any amendments to the Company Charter Documents or to the charter documents of any subsidiary;

(j) Acquire or agree to acquire by merging or consolidating with, or by purchasing any equity interest in or a portion of the assets of, or by any other manner, any business or any corporation, partnership, association or other business organization or division thereof; or otherwise acquire or agree to acquire any assets which are material, individually or in the aggregate, to the business of the Company or enter into any material joint ventures, strategic relationships, alliances, marketing or co-sale agreements or make any material loan or advance to, or investment in, any person, except for loans or capital contributions to a subsidiary or advances of routine business or travel expenses to employees, officers or directors in the ordinary course of business, consistent with past practice;

(k) Sell, lease, license, encumber or otherwise dispose of any properties or assets which are material, individually or in the aggregate, to the business of the Company;

(l) Incur any indebtedness for borrowed money or guarantee any such indebtedness of another person, issue or sell any debt securities or options, warrants, calls or other rights to acquire any debt securities of the Company, enter into any "keep well" or other agreement to maintain any financial statement condition or enter into any arrangement having the economic effect of any of the foregoing other than (i) in connection with the financing of ordinary course trade payables consistent with past practice or (ii) pursuant to existing credit facilities in the ordinary course of business;

(m) Adopt or amend any employee benefit plan or employee stock purchase or employee stock option plan, or enter into any employment contract or collective bargaining agreement (other than offer letters and letter agreements entered into in the ordinary course of business consistent with past practice with employees who are terminable "at will"), pay any special bonus or special remuneration to any director or employee, or increase the salaries or wage rates or fringe benefits (including rights to severance or indemnification) of its directors, officers, employees or consultants other than in the ordinary course of business, consistent with past practice and other than indemnification agreements with directors and officers in the form previously provided to Parent, or change in any material respect any management policies or procedures;

(n) Make any capital expenditures outside of the ordinary course of business in excess of \$50,000 in the aggregate;

(o) Modify, amend or terminate any Company Contract or other material contract or agreement to which the Company or any subsidiary thereof is a party or waive, release or assign any material rights or claims thereunder;

(p) Enter into, modify, amend or cancel any development services, licensing, distribution, sales, sales representation or other similar agreement or obligation with respect to any Intellectual Property Rights other than such agreements entered into in the ordinary course of business consistent with past practices or enter into any contract of a character required to be disclosed by Section 2.14;

(q) Materially revalue any of its assets or, except as required by GAAP, make any change in accounting methods, principles or practices;

(r) Discharge, settle or satisfy any disputed claim, litigation, arbitration, disputed liability or other controversy (absolute, accrued, asserted or unasserted, contingent or otherwise), including any liability for Taxes, other than the discharge or satisfaction in the ordinary course of business consistent with past practice, or in accordance with their terms, of liabilities reflected or reserved against in the Company Balance Sheet or incurred since June 30, 2004 in the ordinary course of business consistent with past practice, or waive any material benefits of, or agree to modify in any material respect, any confidentiality, standstill or similar agreements to which the Company or any of its subsidiaries is a party; *provided, however*, that the discharge or settlement of any disputed claim, liability or other controversy in the amount of less than \$50,000 shall not be deemed to be prohibited by the foregoing;

(s) Engage in any action with the intent to directly or indirectly adversely affect any of the transactions contemplated by this Agreement, including with respect to any "poison pill" or similar plan, agreement or arrangement, or any anti-takeover, control share acquisition, fair price, moratorium or other similar statute (each, a "**Takeover Statute**"); or

(t) Agree in writing or otherwise to take any of the actions described in Section 4.1(a) through 4.1(s) above.

Article 5

ADDITIONAL AGREEMENTS

5.1 Stockholders Meeting.

(a) The Company, acting through its Board of Directors, shall, in accordance with applicable law and its certificate of incorporation and bylaws, duly call, give notice of, convene and hold a special meeting of its stockholders (the "**Stockholders Meeting**") as soon as reasonably practicable following the clearance by the SEC of the Proxy Statement for the purpose of considering and voting upon the approval and adoption of this Agreement and the approval of the Merger and such other matters as may be necessary to effectuate the transactions contemplated hereby. The Company's Board of Directors shall (i) recommend to the stockholders of the Company the approval and adoption of this Agreement and the approval of

the Merger, (ii) include in the Proxy Statement its recommendation that the stockholders of the Company vote in favor of the approval and adoption of this Agreement and the approval of the Merger, (iii) use commercially reasonable efforts to solicit such approval from the stockholders of the Company and (iv) not withdraw or modify such favorable recommendation, except as permitted in paragraph (c) below.

(b) As soon as reasonably practicable following the execution of this Agreement and in connection with the Stockholders Meeting, the Company shall (i) promptly prepare and file with the SEC, use commercially reasonable efforts to have cleared by the SEC and thereafter mail to its stockholders as promptly as practicable the Proxy Statement and all other proxy materials required in connection with such meeting, (ii) notify Parent of the receipt of any comments of the SEC with respect to the Proxy Statement and of any requests by the SEC for any amendment or supplement thereto or for additional information and shall promptly provide to Parent copies of all correspondence between the Company or any representative of the Company and the SEC and (iii) shall give Parent and its counsel the opportunity to review the Proxy Statement prior to its being filed with the SEC and shall give Parent and its counsel the opportunity to review all amendments and supplements to the Proxy Statement and all responses to requests for additional information and replies to comments prior to their being filed with, or sent to, the SEC.

(c) Nothing in this Agreement shall prevent the Board of Directors of the Company from withholding, withdrawing, amending or modifying its recommendation in favor of the Merger if (i) a Superior Offer (as defined below) is made to the Company and is not withdrawn, (ii) the Company shall have provided written notice to Parent (a "**Notice of Superior Offer**") advising Parent that the Company has received a Superior Offer, specifying all of the material terms and conditions of such Superior Offer and identifying the person or entity making such Superior Offer, (iii) the Board of Directors of the Company reasonably concludes, after consultation with its outside counsel, that, in light of such Superior Offer, the withholding, withdrawal, amendment or modification of such recommendation is required in order for the Board of Directors of the Company to comply with its fiduciary obligations to the Company's stockholders under applicable law, and (iv) the Company shall not have violated any of the restrictions set forth in Section 5.4 or this Section 5.1. The Company shall provide Parent with at least three business days prior notice (or such lesser prior notice as is provided to the members of the Company's Board of Directors but in no event less than twenty-four hours) of any meeting of the Company's Board of Directors at which the Company's Board of Directors is reasonably expected to consider any Acquisition Proposal (as defined in Section 5.4) to determine whether such Acquisition Proposal is a Superior Offer. Nothing contained in this Section 5.1 shall limit the Company's obligation to hold and convene the Stockholders Meeting (regardless of whether the recommendation of the Board of Directors of the Company shall have been withdrawn, amended or modified).

For purposes of this Agreement, "**Superior Offer**" shall mean an unsolicited, bona fide written offer made by a third party to consummate any of the following transactions: (i) a merger or consolidation involving the Company pursuant to which the stockholders of the Company immediately preceding such transaction hold less than 50% of the equity interest in the surviving or resulting entity of such transaction or (ii) the acquisition by any person or "group" (as defined under Section 13(d) of the Exchange Act and the rules and regulations thereunder) (including by

way of a tender offer or an exchange offer or a two step transaction involving a tender offer followed with reasonable promptness by a cash-out merger involving the Company), directly or indirectly, of ownership of 100% of the then outstanding shares of capital stock of the Company, on terms that the Board of Directors of the Company determines, in its reasonable judgment (based on consultation with Seven Hills or another financial advisor of national standing) to be more favorable to the Company stockholders than the terms of the Merger; *provided, however*, that any such offer shall not be deemed to be a “**Superior Offer**” unless any financing that is required to consummate the transaction contemplated by such offer is committed, or unless the Company’s Board of Directors shall reasonably conclude (based on consultation with its financial advisor) that such financing is likely to be obtained by such third party on a timely basis.

(d) Nothing contained in this Agreement shall prohibit the Company or its Board of Directors from disclosing to its stockholders a position contemplated by Rules 14d-9 and 14e-2(a) promulgated under the Exchange Act, if, in the good faith judgment of the Company’s Board of Directors, after consultation with and advice from its outside counsel, is required in order for the Board of Directors to comply with its fiduciary obligations, or is otherwise required, under applicable law.

5.2 Antitrust and Other Filings.

(a) As promptly as practicable after the execution of this Agreement, each of the Company and Parent will prepare and file any pre-merger notification forms required by the merger notification or control laws and regulations of any applicable jurisdiction, as agreed to by the parties (the “**Antitrust Filings**”) and (ii) any other filings required to be filed by it under the Exchange Act, the Securities Act or any other federal, state or foreign laws relating to the Merger and the transactions contemplated by this Agreement (the “**Other Filings**”). The Company and Parent each shall promptly supply the other with any information which may be required in order to effectuate any filings pursuant to this Section 5.2.

(b) Each of the Company and Parent will notify the other promptly upon the receipt of any comments from any government officials in connection with any filing made pursuant hereto and of any request for amendments or supplements to any Antitrust Filings or Other Filings or for additional information and will supply the other with copies of all correspondence between such party or any of its representatives, on the one hand, and any government officials, on the other hand, with respect to the Merger or any Antitrust Filing or Other Filing. Each of the Company and Parent will cause all documents that it is responsible for filing with any regulatory authorities to comply in all material respects with all applicable requirements of law and the rules and regulations promulgated thereunder. Whenever any event occurs which is required to be set forth in an amendment or supplement to any Antitrust Filing or Other Filing, the Company or Parent, as the case may be, will promptly inform the other of such occurrence and cooperate in filing with the appropriate government officials such amendment or supplement.

5.3 Confidentiality; Access to Information.

(a) The parties acknowledge that the Company and Parent have previously executed that certain Confidentiality Agreement dated as of June 3, 2004 (the "**Confidentiality Agreement**"), which Confidentiality Agreement will continue in full force and effect in accordance with its terms.

(b) The Company will afford Parent and its accountants, counsel and other representatives reasonable access to its properties, books, records and personnel during the period prior to the Effective Time to obtain all information concerning the business, including the status of product development efforts, properties, results of operations and personnel, as Parent may reasonably request. No information or knowledge obtained by a party in any investigation pursuant to this Section 5.3 will 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.

5.4 No Solicitation.

(a) From and after the date of this Agreement until the Effective Time or termination of this Agreement pursuant to its terms, the Company and its subsidiaries will not, nor will they authorize or permit any of their respective officers, directors, affiliates or employees or any investment banker, attorney or other advisor or representative retained by any of them to, directly or indirectly, (i) solicit, initiate, encourage or induce the making, submission or announcement of any Acquisition Proposal, (ii) participate in any discussions or negotiations regarding, or furnish to any person any nonpublic information with respect to, or take any other action to facilitate any inquiries or the making of any proposal that constitutes, or may reasonably be expected to lead to, any Acquisition Proposal, (iii) engage in discussions with any person with respect to any Acquisition Proposal, except to refer them to the provisions of this Section 5.4(a), (iv) approve, endorse or recommend any Acquisition Proposal or (v) enter into any letter of intent or similar document or any contract, agreement or commitment contemplating or otherwise relating to any Acquisition Proposal; *provided, however*, that prior to the approval and adoption of this Agreement and approval of the Merger at the Stockholders Meeting, this Section 5.4(a) shall not prohibit the Company from furnishing nonpublic information regarding the Company and its subsidiaries to, or entering into discussions with, any person or group who has submitted (and not withdrawn) to the Company an unsolicited, written, bona fide Acquisition Proposal that the Board of Directors of the Company reasonably concludes (based on consultation with Seven Hills or another financial advisor of national standing) constitutes, or is likely to lead to, a Superior Offer; provided that (1) neither the Company nor any representative of the Company and its subsidiaries shall have violated any of the restrictions set forth in this Section 5.4, (2) the Board of Directors of the Company concludes in good faith, after consultation with its outside legal counsel, that such action is required in order for the Board of Directors of the Company to comply with its fiduciary obligations to the Company's stockholders under applicable law, (3) prior to furnishing any such nonpublic information to, or entering into any such discussions with, such person or group, the Company gives Parent written notice of the identity of such person or group and all of the material terms and conditions of such Acquisition Proposal and of the Company's intention to furnish nonpublic information to, or enter into discussions with, such person or group, and the Company receives from such person or group an executed confidentiality agreement containing terms at least as restrictive with regard to the Company's confidential information as the Confidentiality Agreement, (4) the Company

gives Parent at least three business days advance notice of its intent to furnish such nonpublic information or enter into such discussions, and (5) contemporaneously with furnishing any such nonpublic information to such person or group, the Company furnishes such nonpublic information to Parent (to the extent such nonpublic information has not been previously furnished by the Company to Parent). The Company and its subsidiaries will immediately cease any and all existing activities, discussions or negotiations with any parties conducted heretofore with respect to any Acquisition Proposal. Without limiting the foregoing, it is understood that any violation of the restrictions set forth in the preceding two sentences by any officer, director or employee of the Company or any of its subsidiaries or any investment banker, attorney or other advisor or representative of the Company or any of its subsidiaries shall be deemed to be a breach of this Section 5.4 by the Company.

For purposes of this Agreement, “**Acquisition Proposal**” shall mean any offer or proposal (other than an offer or proposal by Parent) relating to, or involving: (A) any acquisition or purchase by any person or “group” (as defined under Section 13(d) of the Exchange Act and the rules and regulations thereunder) of more than a 15% beneficial ownership interest in the total outstanding voting securities of Company or any of its subsidiaries; (B) any tender offer or exchange offer that if consummated would result in any person or “group” (as defined under Section 13(d) of the Exchange Act and the rules and regulations thereunder) beneficially owning 15% or more of the total outstanding voting securities of the Company or any of its subsidiaries; (C) any merger, consolidation, business combination or similar transaction involving the Company pursuant to which the stockholders of the Company immediately preceding such transaction hold less than 85% of the equity interests in the surviving or resulting entity of such transaction; (D) any sale, lease, exchange, transfer, license (other than in the ordinary course of business), acquisition, or disposition of any material assets of the Company; or (E) any liquidation or dissolution of the Company.

(b) In addition to the obligations of the Company set forth in paragraph (a) of this Section 5.4, the Company as promptly as practicable, and in any event within 24 hours of its receipt, shall advise Parent orally and in writing of an Acquisition Proposal or any request for nonpublic information or other inquiry which the Company reasonably believes could lead to an Acquisition Proposal, the material terms and conditions of such Acquisition Proposal, request or inquiry, and the identity of the person or group making any such Acquisition Proposal, request or inquiry. The Company will keep Parent informed as promptly as practicable in all material respects of the status and details (including material amendments or proposed amendments) of any such Acquisition Proposal, request or inquiry.

5.5 Public Disclosure. Parent and the Company will consult with each other, and to the extent practicable, agree, before issuing any press release or otherwise making any public statement with respect to the Merger, this Agreement or an Acquisition Proposal and will not issue any such press release or make any such public statement prior to such consultation, except as may be required by law or any listing agreement with a national securities exchange.

5.6 Reasonable Efforts; Notification.

(a) Upon the terms and subject to the conditions set forth in this Agreement, each of the parties agrees to use all commercially reasonable efforts to take, or cause to be taken,

all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable, the Merger and the other transactions contemplated by this Agreement, including using all commercially reasonable efforts to accomplish the following: (i) causing the conditions precedent set forth in Article 6 to be satisfied, (ii) obtaining all necessary actions or nonactions, waivers, consents, approvals, orders and authorizations from Governmental Entities and making of all necessary registrations, declarations and filings (including registrations, declarations and filings with Governmental Entities) and taking all steps that may be necessary to avoid any suit, claim, action, investigation or proceeding by any Governmental Entity, (iii) obtaining all necessary consents, approvals or waivers from third parties, (iv) defending any suits, claims, actions, investigations or proceedings, whether judicial or administrative, challenging this Agreement or the consummation of the transactions contemplated hereby, including seeking to have any stay or temporary restraining order entered by any court or other Governmental Entity vacated or reversed and (v) executing and delivering any additional instruments necessary to consummate the transactions contemplated by, and to fully carry out the purposes of, this Agreement. Notwithstanding anything in this Agreement to the contrary, neither Parent nor any of its affiliates shall be under any obligation to make proposals, execute or carry out agreements or submit to orders providing for the sale or other disposition or holding separate (through the establishment of a trust or otherwise) of any assets or categories of assets of Parent or any of its affiliates or the Company or any of its subsidiaries or the holding separate of the shares of Company Common Stock (or shares of stock of the Surviving Corporation) or imposing or seeking to impose any limitation on the ability of Parent or any of its subsidiaries or affiliates to conduct their business or own such assets or to acquire, hold or exercise full rights of ownership of the shares of Company Common Stock (or shares of stock of the Surviving Corporation).

(b) Each of the Company and Parent will give prompt notice to the other of (i) any notice or other communication from any person alleging that the consent of such person is or may be required in connection with the Merger, (ii) any notice or other communication from any Governmental Entity in connection with the Merger or (iii) any litigation relating to, involving or otherwise affecting the Company, Parent or their respective subsidiaries that relates to the consummation of the Merger. The Company shall give prompt notice to Parent of any representation or warranty made by it contained in this Agreement becoming untrue or inaccurate, or any failure of the Company to comply with or satisfy in any material respect any covenant, condition or agreement to be complied with or satisfied by it under this Agreement; *provided, however*, that no such notification shall affect the representations, warranties, covenants or agreements of the parties or the conditions to the obligations of the parties under this Agreement. Parent shall give prompt notice to the Company of any representation or warranty made by it or Merger Sub contained in this Agreement becoming untrue or inaccurate, or any failure of Parent or Merger Sub to comply with or satisfy in any material respect any covenant, condition or agreement to be complied with or satisfied by it under this Agreement; *provided, however*, that no such notification shall affect the representations, warranties, covenants or agreements of the parties or the conditions to the obligations of the parties under this Agreement.

(c) The Company shall give prompt notice to Parent of receipt by the Company of any demand for appraisal or purchase rights pursuant to Delaware Law or California Law, respectively.

5.7 **Third Party Consents.** As soon as practicable following the date hereof, the Company will use all commercially reasonable efforts to obtain any consents, waivers and approvals under any of its or its subsidiaries' respective agreements, contracts, licenses or leases required to be obtained in connection with the consummation of the transactions contemplated hereby.

5.8 **Employee Stock Purchase Plan.** The Company shall take all actions necessary pursuant to the terms of the Company ESPP in order to shorten the participation period(s) under such plan which includes the Effective Time (the "**Current Offerings**") such that a new purchase date for each such participation period shall occur prior to the Effective Time and shares shall be purchased by the Company ESPP participants prior to the Effective Time. The Current Offerings shall expire immediately following such new purchase date, and the Company ESPP shall terminate immediately prior to the Effective Time. Subsequent to such new purchase date, the Company shall take no action, pursuant to the terms of the Company ESPP, to commence any new offering period.

5.9 **Indemnification.**

(a) From and after the Effective Time, Parent will cause the Surviving Corporation to fulfill and honor in all respects the obligations of the Company pursuant to any indemnification agreements between the Company and its directors and officers as of the Effective Time (the "**Indemnified Parties**") and any indemnification provisions under the Company's Certificate of Incorporation or Bylaws as in effect on the date hereof. The Certificate of Incorporation and Bylaws of the Surviving Corporation will contain provisions with respect to exculpation and indemnification that are at least as favorable to the Indemnified Parties as those contained in the Certificate of Incorporation and Bylaws of the Company as in effect on the date hereof, which provisions will not be amended, repealed or otherwise modified for a period of six years from the Effective Time in any manner that would adversely affect the rights thereunder of individuals who, immediately prior to the Effective Time, were directors, officers, employees or agents of the Company, unless such modification is required by law.

(b) Parent shall, or the Company may with the prior written consent of Parent, purchase prior to the Effective Time a six year extended reporting endorsement ("**D&O Tail Coverage**") under the Company's existing directors' and officers' liability insurance policy, or with the Company's prior written consent, which shall not be unreasonably withheld or conditioned, a substantially similar policy, with respect to claims arising from facts or events that occurred on or prior to the Effective Time. Notwithstanding the foregoing, in no event shall the aggregate premiums for such D&O Tail Coverage exceed \$225,000 (the "**D&O Premium Cap**"). If Parent is unable to obtain the D&O Tail Coverage for an aggregate amount less than or equal to the D&O Premium Cap, Parent, after consultation with the Company, shall obtain as much insurance as can be obtained for the D&O Premium Cap.

(c) This Section 5.9 shall survive the consummation of the Merger, is intended to benefit the Surviving Corporation and each Indemnified Party, shall be binding on all successors and assigns of the Surviving Corporation and Parent, and shall be enforceable by the Indemnified Parties.

5.10 **Takeover Statutes.** If any Takeover Statute is or may become applicable to the Merger or the other transactions contemplated by this Agreement, each of Parent and Company and their respective Boards of Directors shall grant such approvals and take such lawful actions as are necessary to ensure that such transactions may be consummated as promptly as practicable on the terms contemplated by this Agreement and otherwise act to eliminate or minimize the effects of such statute and any regulations promulgated thereunder on such transactions.

5.11 **Prior Service Credit.** Parent shall, to the extent permitted by any employee benefit plan or program sponsored or maintained by Parent or any affiliate thereof (including, with limitation, the Surviving Corporation after the Effective Time), give former employees of the Company that are retained as employees of the Surviving Corporation credit for their service with the Company both prior to and after the Effective Time for purposes of determining eligibility to participate in and vesting or accrual in such plan or program.

5.12 **401(k) Plan.** The Company shall take all action necessary in advance of the Effective Time to terminate its and its subsidiaries 401(k) plans effective immediately prior to the Effective Time (all such plans are referred to herein collectively as the “**Company 401(k) Plan**”). Parent will cause its 401(k) plan to accept rollovers or direct rollovers of “eligible rollover distributions” within the meaning of Section 402(c) of the Code made with respect to the Company’s and its subsidiaries’ employees pursuant to the Company 401(k) Plan by reason of the transactions contemplated by this Agreement.

5.13 **2004 Employee Bonus Policy.** Part 5.13 of the Company Disclosure Schedule describes the terms and conditions of the Company’s 2004 employee bonus policy (the “**Employee Bonus Policy**”). The Employee Bonus Policy shall survive the consummation of the Merger, is intended to benefit each of the Company’s employees eligible to participate in such Policy, shall be binding on all successors and assigns of the Surviving Corporation and Parent, and shall be enforceable by such eligible employees.

Article 6 CONDITIONS TO THE MERGER

6.1 **Conditions to Obligations of Each Party to Effect the Merger.** The respective obligations of each party to this Agreement to effect the Merger shall be subject to the satisfaction at or prior to the Closing Date of the following conditions:

(a) **Stockholder Approvals.** The Company Stockholder Approval shall have been obtained.

(b) **No Order.** No Governmental Entity shall have enacted, issued, promulgated, enforced or entered any statute, rule, regulation, executive order, decree, injunction or other order (whether temporary, preliminary or permanent) which is in effect and which has the effect of making the Merger illegal or otherwise prohibiting consummation of the Merger.

(c) **Material Consents.** All material consents, approvals, permits of, authorizations from, notifications to and filings with any Governmental Entities required to be made or obtained prior to the consummation of the Merger shall have been made or obtained.

6.2 Additional Conditions to Obligations of the Company. The obligation of the Company to consummate and effect the Merger shall be subject to the satisfaction at or prior to the Closing Date of each of the following conditions, any of which may be waived, in writing, exclusively by the Company:

(a) **Representations and Warranties.** Each representation and warranty of Parent and Merger Sub contained in this Agreement (i) shall have been true and correct as of the date of this Agreement and (ii) shall be true and correct on and as of the Closing Date with the same force and effect as if made on the Closing Date except, (A) in each case, or in the aggregate, as does not constitute a material adverse effect on Parent or Merger Sub as of the Closing Date; *provided, however*, such material adverse effect qualification shall be inapplicable with respect to the representations and warranties contained in Section 3.2 (which representations shall be true and correct at the applicable times in all material respects), and (B) for those representations and warranties which address matters only as of a particular date (which representations shall have been true and correct (subject to the qualifications set forth in the preceding clause (A)) as of such particular date) (it being understood that, for purposes of determining the accuracy of such representations and warranties, any update of or modification to the Parent Disclosure Schedule made or purported to have been made after the execution of this Agreement shall be disregarded). The Company shall have received a certificate with respect to the foregoing signed on behalf of Parent by an authorized officer of Parent. In the event that Parent shall have given any notice required by Section 5.6 that any representation or warranty by Parent in this Agreement is or has become untrue or inaccurate, such certification shall make specific reference to such notice and shall state concisely the basis of Parent's judgment that the matter or matters identified in any such notice do not individually, or in the aggregate, constitute a material adverse effect on Parent or Merger Sub as of the Closing Date.

(b) **Agreements and Covenants.** Parent and Merger Sub shall have performed or complied in all material respects with all agreements and covenants required by this Agreement to be performed or complied with by them on or prior to the Closing Date, and the Company shall have received a certificate to such effect signed on behalf of Parent by an authorized officer of Parent.

6.3 Additional Conditions to the Obligations of Parent and Merger Sub. The obligations of Parent and Merger Sub to consummate and effect the Merger shall be subject to the satisfaction at or prior to the Closing Date of each of the following conditions, any of which may be waived, in writing, exclusively by Parent:

(a) **Representations and Warranties.** Each representation and warranty of the Company contained in this Agreement (i) shall have been true and correct as of the date of this Agreement and (ii) shall be true and correct on and as of the Closing Date with the same force and effect as if made on and as of the Closing Date except (A) in each case, or in the aggregate, as does not constitute a Company Material Adverse Effect as of the Closing Date; *provided, however*, such Company Material Adverse Effect qualification shall be inapplicable

with respect to the representations and warranties contained in Sections 2.2, 2.3, 2.4, 2.19 and 2.20 (which representations shall be true and correct at the applicable times in all material respects), and (B) for those representations and warranties which address matters only as of a particular date (which representations shall have been true and correct (subject to the qualifications set forth in the preceding clause (A)) as of such particular date) (it being understood that, for purposes of determining the accuracy of such representations and warranties, any update of or modification to the Company Disclosure Schedule made or purported to have been made after the execution of this Agreement shall be disregarded). Parent shall have received a certificate with respect to the foregoing signed on behalf of the Company by the Chief Executive Officer or Chief Financial Officer of the Company. In the event that the Company shall have given any notice required by Section 5.6 that any representation or warranty by the Company in this Agreement is or has become untrue or inaccurate, such certification shall make specific reference to such notice and shall state concisely the basis of the Company's judgment that the matter or matters identified in any such notice do not individually, or in the aggregate, constitute a Company Material Adverse Effect on the Company as of the Closing Date.

(b) **Agreements and Covenants.** The Company shall have performed or complied in all material respects with all agreements and covenants required by this Agreement to be performed or complied with by it at or prior to the Closing Date, including the agreements and covenants set forth in Section 4.1 regarding conduct of business by the Company, and Parent shall have received a certificate to such effect signed on behalf of the Company by the Chief Executive Officer or Chief Financial Officer of the Company.

(c) **Material Adverse Effect.** No Company Material Adverse Effect shall have occurred since the date of this Agreement and be continuing.

(d) **Consents.** (i) All required approvals or consents of any Governmental Entity in connection with the Merger and the consummation of the other transactions contemplated hereby shall have been obtained (and all relevant statutory, regulatory or other governmental waiting periods, shall have expired) unless the failure to receive any such approval or consent would not be reasonably likely, directly or indirectly, to result in a Company Material Adverse Effect or a material adverse effect on Parent or the Surviving Corporation, considered as separate entities, and (ii) all such approvals and consents which have been obtained shall be on terms that are not reasonably likely, directly or indirectly, to result in a Company Material Adverse Effect or a material adverse effect on Parent or the Surviving Corporation, considered as separate entities.

(e) **Dissenters' Rights.** Holders of no more than five percent of the number of issued and outstanding shares of Company Common Stock shall have indicated in writing to the Company or Parent prior to the Effective Time that they are seeking appraisal or dissenters' rights for such shares under Delaware Law or California Law.

(f) **No Restraints.** There shall not be instituted or pending any action or proceeding by any Governmental Entity (i) seeking to restrain, prohibit or otherwise interfere with the ownership or operation by Parent or any of its subsidiaries of all or any portion of the business of the Company or any of its subsidiaries or of Parent or any of its subsidiaries or to compel Parent or any of its subsidiaries to dispose of or hold separate all or any portion of the

business or assets of the Company or any of its subsidiaries or of Parent or any of its subsidiaries, (ii) seeking to impose or confirm limitations on the ability of Parent or any of its subsidiaries effectively to exercise full rights of ownership of the shares of Company Common Stock (or shares of stock of the Surviving Corporation) including the right to vote any such shares on any matters properly presented to shareholders or (iii) seeking to require divestiture by Parent or any of its subsidiaries of any such shares.

(g) **Employment Arrangements.** Each “*Key Employee*” designated on Part 6.3(g) of the Parent Disclosure Schedule shall have entered into employment arrangements with Parent or the Surviving Corporation, in form and substance satisfactory to Parent, which shall include non-solicitation provisions, and no Key Employee shall have terminated such employment arrangement, or provided notice of his or her intention to do so.

(h) **Termination of Options and Warrants.** All Company Options shall have been canceled in accordance with Section 1.8 and all Company Warrants shall have been terminated in accordance with Section 1.9.

(i) **Resignations of Directors.** Parent shall have received written resignations from all of the directors of the Company and its subsidiaries effective as of the Effective Time.

Article 7

TERMINATION, AMENDMENT AND WAIVER

7.1 **Termination.** This Agreement may be terminated at any time prior to the Effective Time, whether before or after the Company Stockholder Approval has been obtained:

(a) by mutual written consent duly authorized by the Boards of Directors of Parent and the Company;

(b) by either the Company or Parent if the Merger shall not have been consummated by February 28, 2005 for any reason; *provided, however*, that the right to terminate this Agreement under this Section 7.1(b) shall not be available to any party whose action or failure to act has been a principal cause of or resulted in the failure of the Merger to occur on or before such date and such action or failure to act constitutes a breach of this Agreement;

(c) by either the Company or Parent if a Governmental Entity shall have issued an order, decree or ruling or taken any other action, in any case having the effect of permanently restraining, enjoining or otherwise prohibiting the Merger, which order, decree, ruling or other action is final and nonappealable;

(d) by either the Company or Parent, if the Company Stockholder Approval shall not have been obtained by reason of the failure to obtain the required vote at a meeting of the Company stockholders duly convened therefore or at any adjournment thereof; *provided, however*, that the right to terminate this Agreement under this Section 7.1(d) shall not be available to the Company where the failure to obtain the Company Stockholder Approval shall have been caused by (i) the action or failure to act of the Company and such action or failure to

act constitutes a material breach by the Company of this Agreement or (ii) a breach of any of the Voting Agreements by any party thereto other than Parent;

(e) by Parent (at any time prior to the adoption and approval of this Agreement and the Merger by the required vote of the stockholders of the Company) if a Triggering Event (as defined below) shall have occurred;

(f) by the Company, upon a breach of any representation, warranty, covenant or agreement on the part of Parent set forth in this Agreement, or if any representation or warranty of Parent shall have become untrue, in either case such that the conditions set forth in Section 6.2(a) or Section 6.2(b) would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become untrue, provided that if such inaccuracy in Parent's representations and warranties or breach by Parent is curable by Parent, then the Company may not terminate this Agreement under this Section 7.1(f) for 30 days after delivery of written notice from the Company to Parent of such breach and intent to terminate, provided Parent continues to exercise commercially reasonable efforts to cure such breach (it being understood that the Company may not terminate this Agreement pursuant to this paragraph (f) if such breach by Parent is cured during such 30-day period, or if the Company shall have materially breached this Agreement); or

(g) by Parent, upon a breach of any representation, warranty, covenant or agreement on the part of the Company set forth in this Agreement, or if any representation or warranty of the Company shall have become untrue, in either case such that the conditions set forth in Section 6.3(a) or Section 6.3(b) would not be satisfied as of the time of such breach or as of the time such representation or warranty shall have become untrue, *provided* that if such inaccuracy in the Company's representations and warranties or breach by the Company is curable by the Company, then Parent may not terminate this Agreement under this Section 7.1(g) for 30 days after delivery of written notice from Parent to the Company of such breach and intent to terminate, *provided* the Company continues to exercise commercially reasonable efforts to cure such breach (it being understood that Parent may not terminate this Agreement pursuant to this paragraph (g) if such breach by the Company is cured during such 30-day period, or if Parent shall have materially breached this Agreement).

For the purposes of this Agreement, a "**Triggering Event**" shall be deemed to have occurred if: (i) the Board of Directors of the Company or any committee thereof shall for any reason have withdrawn or shall have amended or modified in a manner adverse to Parent its recommendation in favor of the adoption and approval of the Agreement or the approval of the Merger; (ii) the Company shall have failed to include in the Proxy Statement the recommendation of the Board of Directors of the Company in favor of the adoption and approval of the Agreement and the approval of the Merger; (iii) the Board of Directors of the Company fails publicly to reaffirm its recommendation in favor of the adoption and approval of the Agreement and the approval of the Merger within 10 business days after Parent requests in writing that such recommendation be reaffirmed at any time following the public announcement of an Acquisition Proposal; (iv) the Board of Directors of the Company or any committee thereof shall have approved or publicly recommended any Acquisition Proposal; (v) the Company shall have entered into any letter of intent or similar document or any agreement, contract or commitment accepting any Acquisition Proposal; (vi) the Company shall have breached any of

the provisions of Sections 5.1, 5.4 or 5.10; or (vii) a tender or exchange offer relating to securities of the Company shall have been commenced by a person unaffiliated with Parent, and the Company shall not have sent to its securityholders pursuant to Rule 14e-2 promulgated under the Exchange Act, within 10 business days after such tender or exchange offer is first published sent or given, a statement disclosing that the Company recommends rejection of such tender or exchange offer.

7.2 Notice of Termination; Effect of Termination. Any proper termination of this Agreement under Section 7.1 will be effective immediately upon the delivery of written notice of the terminating party to the other parties hereto. In the event of the termination of this Agreement as provided in Section 7.1, this Agreement shall be of no further force or effect, except (i) as set forth in this Section 7.2, Section 7.3 and Article 8, each of which shall survive the termination of this Agreement, and (ii) nothing herein shall relieve any party from liability for any willful breach of this Agreement. No termination of this Agreement shall affect the obligations of the parties contained in the Confidentiality Agreement, all of which obligations shall survive termination of this Agreement in accordance with their terms.

7.3 Fees and Expenses.

(a) Except as set forth in this Section 7.3, all fees and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the party incurring such expenses whether or not the Merger is consummated.

(b) In the event that this Agreement is terminated by Parent or the Company, as applicable, pursuant to Sections 7.1(b), 7.1(d) or 7.1(e), the Company shall promptly, but in no event later than two days after the date of such termination, pay Parent a fee equal to \$650,000 in immediately available funds (the "**Termination Fee**"); *provided*, that in the case of a termination under Sections 7.1(b) or 7.1(d) prior to which no Triggering Event has occurred, (i) such payment shall be made only if (A) following the date of this Agreement and prior to the termination of this Agreement, a person has publicly announced an Acquisition Proposal and (B) within 18 months following the termination of this Agreement a Company Acquisition (as defined below) is consummated or the Company enters into a binding agreement providing for a Company Acquisition and (ii) such payment shall be made promptly, but in no event later than two days after the consummation of such Company Acquisition or the entry by the Company into such agreement.

(c) Each of Parent and the Company acknowledges that the agreements contained in this Section 7.3 are an integral part of the transactions contemplated by this Agreement, and that, without these agreements, neither Parent nor the Company would enter into this Agreement. Accordingly, if the Company fails to pay in a timely manner amounts due pursuant to Section 7.3(b), and, in order to obtain such payment, Parent makes a claim for such amounts that results in a judgment against the Company for the amounts described in Section 7.3(b), the Company shall pay to Parent its reasonable costs and expenses (including reasonable attorneys' fees and expenses as provided in Section 8.7(b)) in connection with such suit, together with interest on the amounts described in Section 7.3(b) (at the prime rate of Bank of America, N.A. in effect on the date such payment was required to be made) from such date until the

payment of such amount (together with such accrued interest). Payment of the fees described in Section 7.3(b) shall not be in lieu of damages incurred in the event of breach of this Agreement.

For the purposes of this Agreement, “*Company Acquisition*” shall mean any of the following transactions (other than the transactions contemplated by this Agreement); (i) a merger, consolidation, business combination, recapitalization, liquidation, dissolution or similar transaction involving the Company pursuant to which the stockholders of the Company immediately preceding such transaction hold less than 50% of the aggregate equity interests in the surviving or resulting entity of such transaction, (ii) a sale or other disposition by the Company of assets representing in excess of 50% of the aggregate fair market value of the Company’s business immediately prior to such sale, or (iii) the acquisition by any person or group (including by way of a tender offer or an exchange offer or issuance by the Company), directly or indirectly, of beneficial ownership or a right to acquire beneficial ownership of shares representing in excess of 50% of the voting power of the then outstanding shares of capital stock of the Company.

7.4 Amendment. Subject to applicable law, this Agreement may be amended by the parties hereto at any time by execution of an instrument in writing signed on behalf of each of Parent and the Company.

7.5 Extension; Waiver. At any time prior to the Effective Time any party hereto 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 made to such party contained herein or in any document delivered pursuant hereto and (iii) waive compliance with any of the agreements or conditions for the benefit of such party 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 an instrument in writing signed on behalf of such party. Delay in exercising any right under this Agreement shall not constitute a waiver of such right.

Article 8 GENERAL PROVISIONS

8.1 Non-Survival of Representations and Warranties. The representations and warranties of the Company, Parent and Merger Sub contained in this Agreement shall terminate at the Effective Time, and only the covenants that by their express terms survive the Effective Time shall survive the Effective Time.

8.2 Notices. All notices and other communications hereunder shall be in writing and shall be deemed given upon delivery either personally or by commercial delivery service, or sent via facsimile (receipt confirmed) to the parties at the following addresses or facsimile numbers (or at such other address or facsimile numbers for a party as shall be specified by like notice):

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

Progress Software Corporation
14 Oak Park
Bedford, MA 01730

Facsimile: (781) 280-4304
Attention: Joseph W. Alsop, Chief Executive Officer

with copies to:

Progress Software Corporation
14 Oak Park
Bedford, MA 01730
Facsimile: (781) 280-4035
Attention: James D. Freedman, Vice President and General Counsel

and

Foley Hoag LLP
Seaport World Trade Center West
155 Seaport Boulevard
Boston, MA 02210
Facsimile: (617) 832-7000
Attention: Robert L. Birnbaum, Esq. and William R. Kolb, Esq.

(b) if to the Company, to:

Persistence Software, Inc.
1720 South Amphlett Blvd., 3rd Floor
San Mateo, CA 94402
Facsimile: (650) 570-4124
Attention: Christopher Keene, Chief Executive Officer

with a copy to:

Heller Ehrman White & McAuliffe LLP
2775 Sand Hill Road
Menlo Park, CA 94205
Facsimile: (650) 854-4488
Attention: Laurel H. Finch, Esq.

8.3 Interpretation; Certain Defined Terms.

(a) When a reference is made in this Agreement to Exhibits, such reference shall be to an Exhibit to this Agreement unless otherwise indicated. When a reference is made in this Agreement to Sections, such reference shall be to a Section of this Agreement unless otherwise indicated. The words "include," "includes" and "including" when used herein shall be deemed in each case to be followed by the words "without limitation." The headings contained in this Agreement are only for reference purposes and shall not affect in any way the meaning or interpretation of this Agreement. When reference is made herein to "the business of" an entity,

such reference shall be deemed to include the business of all direct and indirect subsidiaries of such entity. Reference to the subsidiaries of an entity shall be deemed to include all direct and indirect subsidiaries of such entity. Reference to an agreement herein is to such agreement as amended in accordance with its terms up to the date hereof. Reference to a statute herein is to such statute, as amended.

(b) For purposes of this Agreement, “**knowledge**” means, with respect to any fact, circumstance, event or other matter in question, the actual knowledge of such fact, circumstance, event or other matter of (i) an individual, if used in reference to an individual, or (ii) any officer or director of such party, if used in reference to a person that is not an individual. Any such individual will be deemed to have actual knowledge of a particular fact, circumstance, event or other matter if (x) such fact, circumstance, event or other matter is reflected in one or more documents (whether written or electronic, including e-mails sent to or by such individual) in, or that have been in, such individual’s possession, including personal files of such individual, (y) such fact, circumstance, event or other matter is reflected in one or more documents (whether written or electronic) contained in books and records of such party (in the case of knowledge of a party that is not an individual) that would reasonably be expected to be reviewed by an individual who has the duties and responsibilities of such individual in the customary performance of such duties and responsibilities or (z) such knowledge could be obtained from reasonable inquiry of the persons employed by such party charged with administrative or operational responsibility for such matters for such party.

(c) For purposes of this Agreement, the term “**Company Material Adverse Effect**” means any change, event, circumstance or effect (whether or not such change, event, circumstance or effect constitutes a breach of a representation, warranty or covenant made by the Company in this Agreement) that is or is reasonably likely to be materially adverse to the business, assets (including intangible assets), capitalization, financial condition, operations or results of operations or prospects of the Company taken as a whole with its subsidiaries, including (i) litigation not otherwise disclosed on the Company Disclosure Schedule (or if disclosed on the Company Disclosure Schedule, modified by amendment or otherwise to include additional claims against the Company) that is reasonably likely to be determined adversely to the Company, and if determined adversely to the Company, (A) if money damages are sought, would, in the aggregate, result in liability to the Company or its subsidiaries in excess of \$250,000 (exclusive of any such amount that would be covered and payable, net of all deductible amounts, under any insurance policy of the Company or its subsidiaries) or (B) if equitable relief is sought, which would prohibit or otherwise materially impair the Company and its subsidiaries from conducting their business as a whole in the manner presently conducted; (ii) failure of the Company to disclose to Parent obligations, whether written or oral, due third parties, including customers, including liabilities pursuant to maintenance, consulting, and other service agreements with customers and other third parties, in excess, in the aggregate, of \$250,000; (iii) failure of the Company to disclose to Parent proprietary rights of third parties which may materially impair any Intellectual Property Rights material to the Company or its subsidiaries or may result in the Company being required to pay fees or other damages to third parties in excess, in the aggregate of \$250,000, including the undisclosed incorporation of third party software proprietary rights, directly or indirectly, as components of the Company’s software products and services; and (iv) failure of the Company to disclose to Parent payments or loans, in cash or in kind, made, or to be made, to any officer or director of the Company, other than in accordance

with the Company's customary compensation and cost reimbursement practices; and excluding any change, event, circumstance or effect that directly and primarily results from (A) changes in general economic conditions or changes generally affecting the industry in which the Company operates (*provided* that such changes do not affect the Company in a disproportionate manner) or (B) changes, effects or events resulting from the announcement or pendency of the Merger or from the taking of any action required by this Agreement. Any change in the price at which the shares of Company Common Stock are traded shall not, in and of itself, constitute a Company Material Adverse Effect, in the absence of an underlying change, effect or event that has caused or contributed to such change or failure and which is or is reasonably likely to be materially adverse to the business, assets (including intangible assets) capitalization, operations, results of operations or prospects of the Company taken as a whole with its subsidiaries. The Company shall be required to sustain the burden of demonstrating that any such change, effect or event is directly attributable to the Merger and the taking of any action required by this Agreement.

(d) For purposes of this Agreement, the term "**person**" shall mean any individual, corporation (including any non-profit corporation), general partnership, limited partnership, limited liability partnership, joint venture, estate, trust, company (including any limited liability company or joint stock company), firm or other enterprise, association, organization, entity or Governmental Entity.

(e) For purposes of this Agreement, "**subsidiary**" of a specified entity will be any corporation, partnership, limited liability company, joint venture or other legal entity of which the specified entity (either alone or through or together with any other subsidiary) owns, directly or indirectly, 50% or more of the stock or other equity or partnership interests the holders of which are generally entitled to vote for the election of the Board of Directors or other governing body of such corporation or other legal entity.

8.4 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 party, it being understood that all parties need not sign the same counterpart.

8.5 Entire Agreement; Third Party Beneficiaries. This Agreement, its Exhibits and the documents and instruments and other agreements among the parties hereto as contemplated by or referred to herein, including the Company Disclosure Schedule and the Parent Disclosure Schedule (a) 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, it being understood that the Confidentiality Agreement shall continue in full force and effect until the Closing and shall survive any termination of this Agreement; and (b) are not intended to confer upon any other person any rights or remedies hereunder, except as specifically provided in Section 5.9 and 5.13.

8.6 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.

8.7 Other Remedies; Specific Performance; Fees.

(a) 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. The parties hereto agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. It is accordingly agreed that the parties shall be entitled to seek an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof in any court of the United States or any state having jurisdiction, this being in addition to any other remedy to which they are entitled at law or in equity.

(b) If any action, suit or other proceeding (whether at law, in equity or otherwise) is instituted concerning or arising out of this Agreement or any transaction contemplated hereunder, the prevailing party shall recover, in addition to any other remedy granted to such party therein, all such party's costs and attorneys fees incurred in connection with the prosecution or defense of such action, suit or other proceeding.

8.8 Governing Law; Submission to Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, regardless of the laws that might otherwise govern under applicable principles of conflicts of law thereof. The parties hereby irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts of the United States of America located in Boston, Massachusetts for any actions, suits or proceedings arising out of or relating to this Agreement (and the parties agree not to commence any action, suit or proceeding relating thereto except in such courts), and further agree that service of any process, summons, notice or document by U.S. certified mail shall be effective service of process for any action, suit or proceeding brought against the parties in any such court. The parties hereby irrevocably and unconditionally waive any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement, in the courts of the United States of America located in Boston, Massachusetts, and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

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

8.10 Assignment. No party may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written consent of the other parties hereto. Subject to the preceding sentence, this Agreement shall be binding upon and shall inure to the

benefit of the parties hereto and their respective successors and permitted assigns. Any purported assignment in violation of this Section 8.10 shall be void.

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

* * * * *

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

PROGRESS SOFTWARE CORPORATION

/s/ Joseph W. Alsop

By: Joseph W. Alsop

Title: Chief Executive Officer

PSI ACQUISITION SUB, INC.

/s/ Joseph W. Alsop

By: Joseph W. Alsop

Title: President

PERSISTENCE SOFTWARE, INC.

/s/ Christopher T. Keene

By: Christopher T. Keene

Title: Chief Executive Officer

Schedules and Exhibits Omitted Pursuant to Item 601(b)(2) of Regulation S-K

The following schedules and exhibits to the Agreement and Plan of Merger were omitted from this Exhibit 99.1 pursuant to Item 601(b)(2) of Regulation S-K. We agree to furnish supplementally to the Securities and Exchange Commission copies of these omitted schedules and exhibits upon request.

Company Disclosure Schedule

Parent Disclosure Schedule

Exhibit A Form of Voting Agreement



FOR IMMEDIATE RELEASE

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PROGRESS SOFTWARE CORPORATION TO ACQUIRE PERSISTENCE SOFTWARE TO ACCELERATE GROWTH OF OBJECTSTORE OPERATING COMPANY

Addition of Persistence Strengthens ObjectStore's Real-Time Data Services Offering

Bedford, Mass. and San Mateo, CA—September 27, 2004—Progress Software Corporation (PSC) (Nasdaq: PRGS), a supplier of leading technology to develop, deploy, integrate and manage business applications and Persistence[®] Software, Inc. (Nasdaq: PRSW) today jointly announced an agreement by which PSC will acquire Persistence, the technology and market leader in distributed data access and caching software, in an all-cash transaction for a purchase price of \$5.70 per share or approximately \$16 million in the aggregate. Upon the closing of the transaction, Persistence will become part of ObjectStore, an operating company of PSC that provides products for real-time data management.

“ObjectStore has already established a significant market position in enabling real-time data services, and this acquisition is another step in accelerating the company’s growth and market leadership,” said Joseph Alsop, co-founder and chief executive officer of PSC. “Real time performance is a critical factor in more and more applications as customers implement the ‘real-time enterprise.’ The addition of Persistence will greatly enhance ObjectStore’s ability to deliver open, scalable data caching solutions that simplify the job of architecting performant and scalable data access and allow software developers to concentrate on their application requirements.”

Persistence offers a suite of data caching products designed to enable high volume, high performance applications utilizing standard relational databases. Persistence EdgeXtend provides a distributed “data services” layer that both simplifies and accelerates data access. Proven in customer deployments among many companies within the Global 2000 (including Citicorp, JPMorganChase, FedEx and Reuters), the company’s technology strength is exemplified by a significant portfolio of patents in the areas of object-relational mapping and data caching.

Persistence Accelerates Real Time Data Services Strategy for SOA

“Both ObjectStore and Persistence help businesses make decisions while they still matter — in real time and based on up-to-the-second information,” noted Peter Sliwkowski, president of ObjectStore. “EdgeXtend’s data services products provide tools that provide a real-time view of an enterprise’s existing data assets via a flexible, service oriented architecture (SOA). EdgeXtend’s flexible and open object-to-relational (O/R) mapping modeling tools and support of C++, Java, and C# languages will be leveraged by ObjectStore immediately.”

Acquisition to Enhance ObjectStore’s Organization and Accelerate Growth

To capitalize fully upon the opportunities made available with this acquisition, ObjectStore plans to organize its operations around three complementary lines of business, all of which focus on delivering real-time data service capabilities. These units are: 1) distributed data caching, whose products will be those acquired via this transaction and renamed ObjectStore EdgeXtend, 2) event processing, whose products include ObjectStore Event Engine, and 3) object data management, whose products include the industry’s leading object database, ObjectStore. To help drive execution of this strategy, Chris Keene of Persistence will assume leadership of the ObjectStore distributed data caching line of business.

“Progress Software brings the critical mass of resources and technology needed to extend the leadership of our EdgeXtend product family in the market for data access and caching,” said Chris Keene, chief executive officer of Persistence. “As part of ObjectStore’s real-time data services suite, we can deliver unparalleled performance and scalability.”

Combined Technologies Provide Unique Value to Customers

In addition to existing capabilities, ObjectStore plans to enhance EdgeXtend with functionality currently available in the patented Cache-Forward™ Architecture of ObjectCache. “Data access is a critical performance factor for modern distributed applications. Data caching should be front and center in the minds of system designers concerned about performance,” said Chris Keene. “Persistence’s strengths in modeling tools and O/R mapping should pay real dividends for ObjectStore. And the combination of our products and those from ObjectStore will be backed by the strengths of Progress Software as a software industry leader.”

Both ObjectStore and Persistence share a number of common markets, with many blue-chip customers in financial services, logistics, travel, government, and other sectors that demand scalable architectures that deliver large volumes of data to mission critical applications in real time.

About the Transaction

The acquisition has been approved by the boards of directors of PSC and Persistence and is subject to the approval of Persistence’s stockholders. The acquisition is expected to close within 90 days, subject to satisfaction of customary closing conditions. The impact of this acquisition on PSC’s fiscal 2004 or 2005 results will depend on the timing of the closing. However, PSC anticipates first year revenue related to the acquisition to be in the range of \$8 million to \$9 million and the effect of the acquisition on pro-forma operating income, which excludes the impact of non-cash acquisition-related charges, to be neutral to slightly accretive (under 1 cent per share).

All of the directors, certain officers and the largest stockholder of Persistence, holding approximately 28% of Persistence's outstanding common stock in the aggregate, have entered into stockholders agreements with PSC agreeing to vote in favor of the merger.

Conference Call/WebCast at 10 AM EDT Today

PSC's conference call to discuss this acquisition will be Webcast live today at 10:00 a.m. Eastern via CCBN on the company's Web site, located at www.progress.com/investors. The call will also be Webcast live via Yahoo (www.yahoo.com), Motley Fool (www.fool.com), Streetevents (www.streetevents.com), TD Waterhouse (www.tdwaterhouse.com) and Fidelity.com (www.fidelity.com). An archived version of the conference call will be available for replay.

About Persistence Software, Inc.

Persistence Software (NASDAQ: PRSW) is the Data Services platform for the Real-Time Enterprise. Since 1991, Persistence products have provided reliable, distributed caching infrastructure that is automatically generated by model-driven, object-relational mapping tools. The EdgeXtend product family is the only cross-platform data access and caching software that meets requirements for all stages of the application development lifecycle—from design through performance testing and deployment. Persistence's patented technology supports cross-platform deployment of high-performance, custom applications written in Java, C++ or C#, including those built for BEA WebLogic[®], IBM WebSphere[®] or using the Microsoft[®].NET framework. Over 100 companies in the Forbes Global 2000 have successfully deployed Persistence's software to achieve performance and developer productivity—while dramatically cutting infrastructure and operational costs—including Adobe, Air France, Citigroup, EUROCONTROL, FedEx, Motorola, NetJets, and Reuters. Find Persistence on the web at www.persistence.com.

About ObjectStore

ObjectStore is a global provider of real-time data management products. Its products enable corporate data caching and complex event processing, and its leading object database is renowned for performance and scalability. ObjectStore[®] products are supporting RFID implementations, and are deployed in industries such as finance, telecommunications and travel, where companies rely on them to complement their corporate data management infrastructure.

ObjectStore is an operating company of Progress Software Corporation (Nasdaq: PRGS), a \$300+ million global software industry leader. Headquartered in Bedford, Mass., ObjectStore can be reached on the Web at <http://www.objectstore.net> or by phone at +1-781-280-4000.

About Progress Software Corporation

Progress Software Corporation (Nasdaq: PRGS) is a \$300+ million global software industry leader. PSC supplies technologies for all aspects of the development, deployment, integration and management of business applications through its operating companies: Progress Software, Sonic Software Corporation, DataDirect Technologies, ObjectStore and PeerDirect. Headquartered in Bedford, Mass., PSC can be reached on the Web at <http://www.progress.com> or by phone at +1-781-280-4000.

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ObjectStore, ObjectCache, and Cache Forward are trademarks or registered trademarks of Progress Software Corporation in the United States and other countries. Persistence and EdgeXtend are registered trademarks of Persistence Software, Inc. in the United States and other countries. All other marks contained herein are the property of their respective owners.

In connection with the merger, Persistence plans to file a proxy statement with the Securities and Exchange Commission (the "SEC") and mail the proxy statement and related materials to stockholders of Persistence. Stockholders of Persistence are urged to read these materials when they become available because they will contain important information about Persistence, the merger and other related matters. Investors and security holders can obtain free copies of the proxy statement when it becomes available by contacting Brian Tobin, acting CFO, Persistence Software, 1720 South Amphlett Blvd, Third Floor, San Mateo, California, telephone: (650) 372-3600. Investors and security holders will also be able to obtain free copies of the proxy statement and other documents filed by Persistence and PSC with the SEC in connection with the merger at the SEC's web site at www.sec.gov.

PSC, Persistence and their respective directors, executive officers and certain members of management and other employees may be deemed to be participants in the solicitation of proxies from Persistence's stockholders in connection with the merger. Such individuals may be deemed to have interests in the merger, including as a result of holding options or shares of Persistence stock. Information about the directors and executive officers of Persistence and their ownership of Persistence stock is set forth in Persistence's proxy statement for its 2004 annual meeting of stockholders. Investors may obtain additional information about the interests of the above-mentioned persons in this transaction by reading the proxy statement regarding the merger when it becomes available.

STOCKHOLDERS ARE URGED TO READ THE MERGER PROXY STATEMENT CAREFULLY AND IN ITS ENTIRETY WHEN IT BECOMES AVAILABLE BEFORE MAKING ANY VOTING DECISION.

Safe Harbor Statement

Except for the historical information and discussions contained herein, statements contained in this release about PSC, Persistence and the merger may constitute "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995, including statements concerning the expected benefits and timing of the merger. These forward-looking statements involve a number of risks, uncertainties and other factors that could cause actual results to differ materially, including but not limited to the following: an unexpected increase in costs related to the merger, unexpected delays involved in the closing of the merger, Persistence's or PSC's inability to satisfy the conditions to closing of the merger, failure of Persistence's stockholders to approve the merger, the risk that Persistence's business and technology will not be integrated successfully, the receipt and shipment of new orders for the combined company, the timely release of enhancements to the combined company's products, the growth rates of certain market segments, the positioning of the combined company's products in those market segments, variations in the demand for customer service and technical support from the combined company, pricing pressures and the competitive environment in the software industry, business and consumer use of the Internet, and the combined company's ability to penetrate international markets and manage its international operations. PSC and Persistence disclaim any intent or obligation to update publicly any forward-looking statements whether in response to new information, future events or otherwise. For further information regarding risks and uncertainties associated with PSC and Persistence and information concerning the merger, please refer to PSC's and Persistence's filings with the Securities and Exchange Commission, including PSC's and Persistence's annual reports on Form 10-K for the fiscal years ending 2003 and subsequently filed reports.