

P99000063124

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MERGER OR SHARE EXCHANGE

NetByTel, Inc.

Certificate of Status	1
Certified Copy	1
Page Count	40
Estimated Charge	\$87.50

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TALLAHASSEE  
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DIVISION OF CORPORATIONS

12/31/03  
Merger  
[Signature]



FLORIDA DEPARTMENT OF STATE

Glenda E. Hood  
Secretary of State

December 31, 2003

NETBYTEL, INC.  
1141 S ROGERS CIRCLE  
SUITE 9  
BOCA RATON, FL 33487

SUBJECT: NETBYTEL, INC.  
REF: P99000063124

We received your electronically transmitted document. However, the document has not been filed. Please make the following corrections and refile the complete document, including the electronic filing cover sheet.

THE NAMES OF THE CORPORATION ON THE ARTICLES OF MERGER MUST READ THE SAME AS THE CORPORATE NAMES IN THE HEADING OF THE PLAN. THE NAME OF THE SURVIVOR CHANGES UPON FILING OF THE MERGER. PLEASE CORRECT.

Please return your document, along with a copy of this letter, within 60 days or your filing will be considered abandoned.

If you have any questions concerning the filing of your document, please call (850) 245-6880.

Karen Gibson  
Document Specialist

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Letter Number: 303A00069440

Rebecca Fortuna Black, CLAS  
Paralegal  
561.830.0260 fax 561.329.9197  
cell 561.329.1830  
rblack@talwanbAngell.com

Edwards & Angell LLP

One North Clematis Street  
Suite 300  
West Palm Beach, FL 33411  
Tel 561.7700 fax 561.555.8719  
www.EdwardsAngell.com

*Karen -  
you can see from  
the attached, the  
name was changed  
prior to the merger.  
Becky Black*

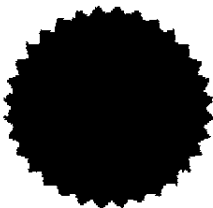
# Delaware

PAGE 1

*The First State*

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "NETBYTEL ACQUISITION CO.", CHANGING ITS NAME FROM "NETBYTEL ACQUISITION CO." TO "NETBYTEL, INC.", FILED IN THIS OFFICE ON THE TWENTY-FOURTH DAY OF DECEMBER, A.D. 2003, AT 3:44 O'CLOCK P.M.

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



*Harriet Smith Windsor*  
Harriet Smith Windsor, Secretary of State

3725177 8100

030836626

AUTHENTICATION: 2838795

DATE: 12-29-03

# Delaware

PAGE 1

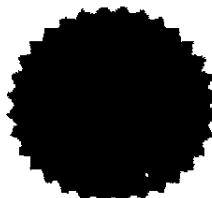
*The First State*

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF MERGER, WHICH MERGES:

"NETBYTEL, INC.", A FLORIDA CORPORATION,

WITE AND INTO "NETBYTEL, INC." UNDER THE NAME OF "NETBYTEL, INC.", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE TWENTY-FOURTH DAY OF DECEMBER, A.D. 2003, AT 3:45 O'CLOCK P.M.

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



*Harriet Smith Windsor*

Harriet Smith Windsor, Secretary of State

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AUTHENTICATION: 2838823

DATE: 12-29-03

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SECRETARY OF STATE  
TALLAHASSEE, FLORIDA

**ARTICLES OF MERGER**

between

**NETBYTEL, INC.**  
**(a Delaware Corporation)**

and

**NETBYTEL, INC.**  
**(a Florida Corporation)**

The following Articles of Merger (the "Articles") are made and entered into this 30<sup>th</sup> day of December, 2003, by and between NetByTel, Inc., a Delaware corporation (the "Surviving Corporation"), and NetByTel, Inc., a Florida corporation (the "Merging Corporation"), in accordance with the Florida Business Corporation Act, pursuant to Section 607.1105, F.S.

**FIRST:** The Surviving Corporation is a corporation duly organized and existing under the laws of the State of Delaware.

**SECOND:** The Merging Corporation is a corporation duly organized and existing under the laws of the State of Florida, Document No. P99000063124.

**THIRD:** The Agreement and Plan of Merger (the "Plan") is attached.

**FOURTH:** The Plan was adopted by the board of directors of the Surviving Corporation on December 24, 2003, and shareholder vote was not required.

**FIFTH:** The Plan was adopted by the board of directors of the Merging Corporation on December 24, 2003, and by the shareholders of the Merging Corporation on December 24, 2003.

**SIXTH:** The Surviving Corporation, NetByTel, Inc., a Delaware Corporation, is located at 1141 South Rogers Circle, Suite 9, Boca Raton, Florida 33487.

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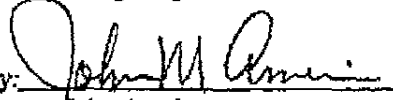
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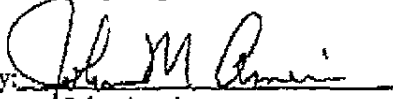
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IN WITNESS WHEREOF, the Surviving Corporation and the Merging Corporation, pursuant to the approval and authority duly given by resolutions adopted by their respective Boards of Directors and shareholders, have caused these Articles of Merger to be executed by the President of each party hereto, as of the date first set forth above.

NetByTel, Inc., a Delaware corporation,  
the Surviving Corporation

By:   
Name: John Amein  
Title: President

NetByTel, Inc., a Florida corporation  
the Merging Corporation

By:   
Name: John Amein  
Title: President

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EXHIBIT A

AGREEMENT AND PLAN OF MERGER

(Schedules Omitted)

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**AGREEMENT AND PLAN OF MERGER**

**DATED AS OF DECEMBER 24, 2003**

**BETWEEN**

**NETBYTEL ACQUISITION CO.,**

**AND**

**NETBYTEL, INC.**

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**AGREEMENT AND PLAN OF MERGER** (this "Agreement"), dated as of December 24, 2003, between **NETBYTEL ACQUISITION CO.**, a Delaware corporation ("Newco") and **NETBYTEL, INC.**, a Florida corporation (the "Company").

**RECITALS**

WHEREAS, the Company has determined that it is in its best interest to reorganize the Company and by merging with and into Newco with Newco continuing as the surviving corporation (the "Merger") in accordance with the Delaware General Corporation Law (the "DGCL") and upon the terms and subject to the conditions set forth herein;

WHEREAS, as a result of the Merger, the existing capital stock of the Company will be converted into capital stock of Newco, with each share of the Company's common stock, par value \$0.01 per share (the "Company Common Stock") will be converted into shares of Newco's common stock, par value \$0.001 per share (the "Newco Common Stock") and each share of the Company's Series A Preferred Stock, par value \$0.01 per share, the Company's Series B Preferred Stock, par value \$0.01 per share and the Company's Series C Preferred Stock, par value \$0.01 per share (collectively, the "Company Preferred Stock") will be converted into shares of Newco's Series AA Convertible Preferred Stock, \$0.001 per share (the "Series AA Preferred Stock"); and

WHEREAS, the Company and Newco desire to set forth the representations, warranties, covenants and agreements in connection with the Merger and the various conditions to the Merger.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants, representations, warranties and agreements contained herein, the parties hereto agree as follows:

**ARTICLE I**

**THE MERGER**

1.1 **The Merger.** Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the DGCL, the Company shall be merged with and into the Newco at the Effective Time (as defined below). At the Effective Time, the separate existence of the Company shall cease, and Newco shall continue as the surviving corporation (the "Surviving Corporation") and shall continue under the name "NetByTel, Inc."

1.2 **Closing.** Unless this Agreement shall have been terminated pursuant to Section 7.1 and subject to the satisfaction or waiver of the conditions set forth in Article VI, the closing of the Merger (the "Closing") will take place on December 24, 2003, or as promptly thereafter as practicable (and in any event within two business days) following satisfaction or waiver of the conditions set forth in Article VI (the "Closing Date"), at 10:00 a.m., Miami, Florida time, at the offices of Edwards & Angell, LLP, One North Clematis Street, Suite 400, West Palm Beach, Florida 33401, unless another date, time or place is agreed to in writing by the parties hereto.

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1.3 **Effective Time of the Merger.** As soon as practicable following the satisfaction or waiver of the conditions set forth in Article VI, Newco shall file the Certificate of Merger conforming to the requirements of Subchapter IX of the DGCL (the "Certificate of Merger") with the Secretary of State of the State of Delaware and make all other filings or recordings required by the DGCL in connection with the Merger. The Merger shall become effective at such time as the Certificate of Merger is duly filed with the Secretary of State of the State of Delaware, or such other time thereafter as is provided in the Certificate of Merger in accordance with the DGCL (the "Effective Time").

1.4 **Effects of the Merger.** The Merger shall have the effects set forth in this Agreement and in the applicable provisions of the DGCL.

1.5 **Articles of Incorporation; Bylaws.** (a) The certificate of incorporation of Newco which is attached as Exhibit B hereto, as in effect immediately prior to the Effective Time, shall be the articles of incorporation of Newco until thereafter changed or amended as provided therein or by applicable law; provided that Article I of the articles of incorporation of Newco shall be amended by the Certificate of Merger to read as follows: "The name of the corporation is: NetByTel, Inc."

(b) The bylaws of Newco which are attached as Exhibit C hereto shall be the bylaws of Newco until thereafter changed or amended as provided therein or by applicable law.

1.6 **Directors; Officers.** (a) The directors of Newco at the Effective Time shall be the directors of Newco, until the earlier of their resignation or removal or until their respective successors are duly elected and qualified, as the case may be.

(b) The officers of Newco at the Effective Time shall be John Amein, President, Chief Executive Officer, Secretary and Treasurer until the earlier of his resignation or removal or until his respective successors are duly elected and qualified, as the case may be.

**ARTICLE II**

**CONVERSION OF THE CAPITAL STOCK AND OPTIONS OF THE COMPANY AND CANCELLATION OF COMPANY'S SERIES A WARRANTS AND SERIES B WARRANTS**

2.1 **Effect on Capital Stock.** At the Effective Time, by virtue of the Merger, and without any action on the part of the holder thereof:

(a) Each share of the Company's outstanding Common Stock issued and outstanding immediately prior to the Effective Time, shall be converted into the right to receive 0.06065 shares of Newco Common Stock (together with the Series AA Preferred Stock set forth in Section 2.1(b) below, the "Merger Consideration") in the manner provided in Section 2.2 hereof.

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(b) Each share of the Company Preferred Stock issued and outstanding immediately prior to the Effective Time, shall be converted into the right to receive 0.06065 shares of Series AA Preferred Stock in the manner provided in Section 2.2 hereof.

(c) In exchange for the consideration set forth in Section 2.1(b), each holder of Company Preferred Stock shall waive any and all accrued but unpaid dividends that such holder is entitled to receive on such holder's shares of Company Preferred Stock under the terms of the Company's Amended and Restated Articles of Incorporation as amended through the date hereof.

## 2.2 Conversion into Newco Common Stock and Series AA Preferred Stock.

### (a) *Exchange Procedures*

As soon as practicable after the Effective Time, Newco shall cause Edwards & Angell, LLP as transfer agent (the "Transfer Agent") to mail to each holder of record of certificates of the Company Common Stock and the Company Preferred Stock (the "Company Certificates") as of the Effective Time that have been converted pursuant to Section 2.1: (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Company Certificates shall pass, only upon actual delivery to the Transfer Agent and shall be in such form and have such other provisions as Newco may reasonably specify) and instructions for effecting the surrender of the Company Certificates and receiving the Merger Consideration to which such holder shall be entitled thereto pursuant to Section 2.1. Upon surrender of a Company Certificate for cancellation to the Transfer Agent or to such other agent or agents as may be appointed by Newco, together with a duly executed letter of transmittal and such other documents as the Transfer Agent may require, the holder of such Company Certificate shall be entitled to receive in exchange therefor the Merger Consideration to which such holder is entitled in accordance with Section 2.1, and the Company Certificate so surrendered shall forthwith be canceled. If payment of the Merger Consideration is to be made to any person other than the person in whose name the surrendered Company Certificate is registered, it shall be a condition of payment that the Company Certificate so surrendered shall be properly endorsed or shall be otherwise in proper form for transfer and that the person requesting such payment shall have paid any transfer and other taxes required by reason of the payment of the Merger Consideration to a person other than the registered holder of the Company Certificate surrendered or shall have established to the satisfaction of Newco that such tax either has been paid or is not applicable. Until surrendered as contemplated by this Section 2.2, each Company Certificate shall be deemed at any time after the Effective Time to represent only the right to receive upon such surrender the Merger Consideration contemplated by Section 2.1.

### (b) *Lost, Stolen or Destroyed Certificates*

In the event any Company Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming such Company Certificate to be lost, stolen or destroyed, the Transfer Agent will issue in exchange for such lost, stolen or destroyed Company Certificate the Merger Consideration deliverable in respect thereof as determined in accordance with Section 2.1; provided, however, that the person to whom the Merger

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Consideration is paid shall, if required by Newco, as a condition precedent to the payment thereof, give the Transfer Agent a bond in such sum as it may ordinarily require and indemnify Newco in a manner satisfactory to it against any claim that may be made against Newco with respect to the Company Certificate claimed to have been lost, stolen or destroyed.

(c) **Closing of Transfer Books.** After the Effective Time, the stock transfer books of the Company shall be closed and there shall be no transfers on the stock transfer books of Newco of shares of Company Common Stock or the Company Preferred Stock that were outstanding immediately prior to the Effective Time. If, after the Effective Time, Company Certificates are presented to Newco, they shall be canceled and exchanged for the appropriate amount of Merger Consideration as provided in Section 2.1 and in this Section 2.2.

(d) **Termination of Exchange Agent.** All funds held by the Exchange Agent for payment to the holders of unsurrendered Company Certificates and unclaimed at the end of one year from the Effective Time shall be returned to Newco, after which time any holder of unsurrendered Company Certificates shall look as a general creditor only to Newco for payment of such funds to which such holder may be due, subject to applicable law.

(e) **Escheat.** Newco shall not be liable to any holder of Company Common Stock or Company Preferred Stock for Merger Consideration delivered to a public official pursuant to any applicable abandoned property, escheat or similar law. Any amounts remaining unclaimed by holders of any such shares of Company Common Stock or Company Preferred Stock five years after the Effective Time (or such earlier date immediately prior to the time at which such amounts would otherwise escheat to or become property of any Governmental Entity shall, to the extent permitted by applicable law, become the property of Newco, free and clear of any claims or interest of any such holders or their successors, assigns or personal representatives previously entitled thereto.

**2.3 Dissenting Shareholders.** (a) Notwithstanding any provision of this Agreement to the contrary, any holder of shares of capital stock of the Company issued and outstanding immediately prior to the Effective Time that are held by any holder of shares of such capital stock who has not voted in favor of the Merger (if entitled to vote) and has properly exercised and perfected appraisal rights in accordance with Section 1320 of the Florida Business Corporation Act (such holders are referred to as "Dissenting Shareholders" and such shares are referred to as "Dissenting Shares") will not be converted into the right to receive the Merger Consideration, but the holder thereof will become entitled to the right to receive such consideration as may be determined to be due to the holders of such Dissenting Shares pursuant to the Florida Business Corporation Act; provided, however, that any holder of Dissenting Shares who will have failed to perfect or who effectively will have withdrawn or lost such rights of appraisal under the Florida Business Corporation Act will forfeit the right to appraisal of such shares of the Company's capital stock, and such shares of the Company's capital stock will no longer be Dissenting Shares and, as of the Effective Time, will be deemed to have been converted into the right to receive the Merger Consideration.

(b) The Company will give Newco prompt notice of any written demands for appraisal, withdrawals of demands for appraisal, and any other related instruments received by

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the Company, and Newco will have the right to participate in all negotiations and proceedings with respect to such demands. Prior to the Effective Time, the Company will not, except with the prior written consent of Newco, make any payment with respect to, or settle or offer to settle, any such demands. Notwithstanding anything to the contrary in this Section 2.3 if (i) the Merger is terminated, rescinded or abandoned or (ii) if the Company shareholders revoke the authority to effect the Merger, then the right of any shareholder to be paid the fair value of such holder's shares of the Company's capital stock will cease.

Newco will comply with all obligations of the Florida Business Corporation Act with respect to Dissenting Shareholders.

**2.4 Conversion of Company Stock Options.** At the Effective Time, by virtue of the Merger, and without any action on the part of the holder thereof:

**(a) Conversion of Company Stock Options.**

The Company shall take all actions necessary pursuant to the terms and provisions of any outstanding options to acquire shares of Company Common Stock, to cause the following: (i) all outstanding options to acquire shares of Company Common Stock granted under the NetByTel.com Employee and Consultant Stock Option Plan, dated November 15, 2001 (the "Company Stock Plan") or otherwise (the "Company Stock Options") at the Effective Time shall be converted into the right to receive options to purchase 0.06065 shares of Newco Common Stock (the "Newco Stock Options") and each such Company Stock Option shall thereafter be canceled.

**(b) Exchange Procedures**

As soon as practicable after the Effective Time, Newco shall cause the Transfer Agent to mail to each holder of record of Company Stock Options as of the Effective Time that have been converted pursuant to Section 2.4(a): (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Company Stock Options shall pass, only upon actual delivery to the Transfer Agent and shall be in such form and have such other provisions as Newco may reasonably specify) and instructions for effecting the surrender of the Company Stock Options and receiving the merger consideration to which such holder shall be entitled thereto pursuant to Section 2.4(a). Upon surrender of a Company Stock Option for cancellation to the Transfer Agent or to such other agent or agents as may be appointed by Newco, together with a duly executed letter of transmittal and such other documents as the Transfer Agent may require, the holder of such Company Stock Options shall be entitled to receive in exchange therefor the merger consideration to which such holder is entitled in accordance with Section 2.4(a), and the Company Stock Options so surrendered shall forthwith be canceled.

**(c) Lost, Stolen or Destroyed Stock Options**

In the event any Company Stock Options shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming such Company Stock Options to be lost, stolen or destroyed, the Transfer Agent will issue in exchange for such lost, stolen or

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destroyed Company Stock Options the merger consideration deliverable in respect thereof as determined in accordance with Section 2.4(a).

(d) **Closing of Transfer Books.** After the Effective Time, the option transfer register of the Company shall be closed and there shall be no transfers on the option transfer register of Newco of Company Stock Options that were outstanding immediately prior to the Effective Time. If, after the Effective Time, Company Stock Options are presented to Newco, they shall be canceled and exchanged for the appropriate amount of merger consideration as provided in Section 2.4.

**2.5 Conversion of Company Common Stock Warrants.** At the Effective Time, by virtue of the Merger, and without any action on the part of the holder thereof:

(a) **Conversion of Warrants**

The Company shall take all actions necessary pursuant to the terms and provisions of any outstanding warrants to acquire shares of Company Common Stock, to cause the following: (i) all outstanding warrants to acquire shares of Company Common Stock (the "Company Common Stock Warrants") at the Effective Time shall be converted into the right to receive warrants to purchase 0.06065 shares of Newco Common Stock (the "Newco Warrants") and each such Company Common Stock Warrant shall thereafter be canceled.

(b) **Exchange Procedures**

As soon as practicable after the Effective Time, Newco shall cause the Transfer Agent to mail to each holder of record of Company Common Stock Warrants as of the Effective Time that have been converted pursuant to Section 2.5(a): (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Company Common Stock Warrants shall pass, only upon actual delivery to the Transfer Agent and shall be in such form and have such other provisions as Newco may reasonably specify) and instructions for effecting the surrender of the Company Common Stock Warrants and receiving the consideration to which such holder shall be entitled thereto pursuant to Section 2.5(a). Upon surrender of a Company Common Stock Warrants for cancellation to the Transfer Agent or to such other agent or agents as may be appointed by Newco, together with a duly executed letter of transmittal and such other documents as the Transfer Agent may require, the holder of such Company Common Stock Warrants shall be entitled to receive in exchange therefor the consideration to which such holder is entitled in accordance with Section 2.5(a), and the Company Common Stock Warrants so surrendered shall forthwith be canceled.

(c) **Lost, Stolen or Destroyed Warrants**

In the event any Company Common Stock Warrants shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming such Company Common Stock Warrants to be lost, stolen or destroyed, the Transfer Agent will issue in exchange for such lost, stolen or destroyed Company Common Stock Warrants the consideration deliverable in respect thereof as determined in accordance with Section 2.5(a).

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(d) **Closing of Transfer Books.** After the Effective Time, the stock warrant transfer register of the Company shall be closed and there shall be no transfers on the warrant transfer register of Newco of Company Common Stock Warrants that were outstanding immediately prior to the Effective Time. If, after the Effective Time, Company Common Stock Warrants are presented to Newco, they shall be canceled and exchanged for the appropriate amount of consideration as provided in Section 2.5.

2.6 **Cancellation of Company's Series A and Series B Warrants** At the Effective Time, each outstanding Series A Warrant (the "Series A Warrants") and each shall outstanding Series B Warrant (the "Series B Warrants") shall terminate and expire as of the Effective Time and shall not receive any Merger Consideration.

### ARTICLE III

#### REPRESENTATIONS AND WARRANTIES

3.1 **Representations and Warranties of the Company.** The Company represents and warrants to Newco that:

(a) **Corporate Organization**

(i) The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Florida. Attached hereto as Exhibit B and Exhibit C, respectively, are true and complete copies of the Amended and Restated Articles of Incorporation and Bylaws of the Company, as amended through the date hereof (collectively, the "Organizational Documents").

(ii) The Company has all requisite power and authority and has all necessary approvals, licenses, permits and authorization to own its properties and to carry on its business as now conducted and as presently contemplated to be conducted except where such failures to have all necessary approvals, licenses, permits and authorizations would not have a Material Adverse Effect (as defined below). The Company has all requisite power and authority to execute and deliver the Transaction Documents and to perform its obligations hereunder and thereunder.

(iii) The Company has filed all necessary documents to qualify to do business as a foreign corporation in, and the Company is in good standing under, the laws of each jurisdiction in which the conduct of the Company's business as now conducted and as presently contemplated to be conducted or the nature of the property owned requires such qualification, except where the failure to so qualify would not have a material adverse effect on the business, properties, assets, liabilities, or financial condition of the Company (a "Material Adverse Effect").

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(b) *Subsidiaries*

The Company has no subsidiaries and no interests or investments in any Person.

(c) *Capitalization*

(i) On the date hereof, the authorized capital stock of the Company consists of 67,775,311 shares of its Common Stock, par value \$0.01 per share and 51,075,439 shares of Preferred Stock, par value \$0.01 per share, of which 5,902,831 have been designated as "Series A Preferred Stock", 3,388,913 have been designated as "Series B Preferred Stock" and 41,783,695 have been designated as Series C Preferred Stock. The issued and outstanding shares of capital stock of the Company consists of 4,685,207 shares of Common Stock, 5,069,497 shares of Series A Preferred Stock, 1,208,334 shares of Series B Preferred Stock and 40,070,876 shares of Series C Preferred Stock, which shares of Common Stock, Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock are held beneficially and of record by the Persons and in the amounts set forth on Schedule 3.1(c). The capitalization table attached to Schedule 3.1(c) fairly and accurately represents the capitalization of the Company immediately before the Closing of the transactions contemplated in this Agreement.

(ii) All the outstanding shares of capital stock of the Company have been duly and validly authorized and issued and are fully paid and non-assessable, and were issued in accordance with the registration or qualification requirements of the Securities Act and any relevant state securities laws or pursuant to valid exemptions therefrom. All of the outstanding shares of capital stock of the Company are duly authorized, validly issued, fully paid and non-assessable shares, free of all preemptive or similar rights, and entitled to the rights therein described.

(d) *Corporate Proceedings*

The Company has authorized the execution, delivery, and performance of this Agreement and each of the transactions and agreements contemplated hereby and thereby. Except as set forth on Schedule 3.1(d), no other corporate action (including shareholder approval) is necessary to authorize such execution, delivery and performance of the Merger Agreement, and upon such execution and delivery of the Merger Agreement shall constitute the valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except that such enforcement may be subject to bankruptcy, insolvency, reorganization, moratorium or other similar laws now or hereafter in effect relating to creditors' rights and general principles of equity.

(e) *Consents and Approvals*

Except as set forth on Schedule 3.1(e), the execution and delivery by the Company of the Merger Agreement, the performance by the Company of its obligations hereunder and thereunder and the consummation by the Company of the transactions contemplated hereby and thereby do not require the Company to obtain any consent, approval or action of, or make any filing with or

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give any notice to, any corporation, person or firm or any public, governmental or judicial authority.

(f) *Absence of Defaults, Conflicts, etc.*

Except as set forth on Schedule 3.1(f) hereto, the execution and delivery of the Merger Agreement does not, and the fulfillment of the terms hereof and thereof by the Company, and will not, result in a breach of any of the terms, conditions or provisions of, or constitute a default under, or permit the acceleration of rights under or termination of, any indenture, mortgage, deed of trust, credit agreement, note or other evidence of indebtedness, or other material agreement of the Company (collectively the "Key Agreements and Instruments"), or the Organizational Documents, or any rule or regulation of any court or federal, state or foreign regulatory board or body or administrative agency having jurisdiction over the Company or over its properties or businesses. No event has occurred and no condition exists which, upon notice or the passage of time (or both), would constitute a material default under any such Key Agreements and Instruments or in any license, permit or authorization to which the Company is a party or by which it may be bound.

(g) *Financial Statements*

Attached as Schedule 3.1(g) are true and complete copies of (i) the unaudited balance sheet of the Company as of December 31, 2002, and the related statements of income, shareholders equity and cash flow for the fiscal year ended on such date, as of September 30, 2003 (the "Balance Sheet"), and the related statements of income, shareholders equity, and (ii) the balance sheet of the Company cash flow for the nine-month period then ended.

The financial statements described in the foregoing sentence of this Section 3.1(g), including the notes thereto, if any, are referred to herein collectively as the "Financial Statements." The Financial Statements (i) were prepared in accordance with GAAP applied on a consistent basis throughout the periods covered thereby, (ii) present fairly the financial position, results of operations and changes in financial position of the Company as at such date and for the period then ended, and (iii) are complete, correct and in accordance with the books of account and records of the Company. The unaudited financial statements included in the Financial Statements indicate all adjustments, which consist of only normal recurring accruals, necessary for such fair presentations. The statements of income included in the Financial Statements do not contain any items of special or nonrecurring income except as expressly specified therein, and the balance sheets included in the Financial Statements do not reflect any write-up or revaluation increasing the book value of any assets. The books and accounts of the Company are complete and correct in all material respects and fairly reflect all of the transactions, items of income and expense and all assets and liabilities of the Company consistent with prior practices of the Company.

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(h) *Absence of Certain Developments*

Since September 30, 2003, and except as listed on Schedule 3.1(h) there has not been:

(i) any adverse change in the assets, liabilities, financial condition or operating results of the Company from that reflected in the Financial Statements, except changes in the ordinary course of business that have not had and would not reasonably be expected to have a Material Adverse Effect;

(ii) any damage, destruction or loss, whether or not covered by insurance, adversely affecting the assets, properties, financial condition, operating results or business of the Company;

(iii) any waiver by the Company of a valuable right or of a debt owed to it;

(iv) any satisfaction or discharge of any lien, claim or encumbrance or payment of any obligation by the Company, except in the ordinary course of business;

(v) any change or amendment to a material contract or arrangement by which the Company or any of its assets or properties is bound or subject;

(vi) any change in any compensation arrangement or agreement with any employee;

(vii) any sale, assignment or transfer of any patents or patent applications, trademarks or trademark applications, service marks, trade names, corporate names, copyrights or copyright registrations, trade secrets or other intangible assets, or disclosure of any proprietary confidential information to any person;

(viii) any resignation or termination of employment of any key officer of the Company; and the Company, to the best of its knowledge, does not know of the impending resignation or termination of employment of any such officer;

(ix) any declaration, payment, setting aside or other distribution of cash or other property to its holders with respect to its capital stock or other equity securities (including without limitation, any warrants, options or other rights to acquire its capital stock or other equity securities);

(x) any mortgage, pledge, transfer of a security interest in, or lien, created by the Company, with respect to any of its properties or assets, except liens for taxes not yet due or payable;

(xi) receipt of notice that there has been a loss of, or order cancellation by, any major customer of the Company;

(xii) made any charitable contributions or pledges;

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(xiii) made capital expenditures or commitments therefor that aggregate in excess of \$50,000;

(xiv) made any loans or advances to, guarantees for the benefit of, or any investments in, any Person (including but not limited to any of the Company's employees, officers or directors, or any members of their immediate families);

(xv) defaulted upon any loan, line of credit or other debt obligation;

(xvi) to the best of the Company's knowledge, any other event or condition of any character that might materially and adversely affect the assets, properties, financial condition, operating results or business of the Company; or

(xvii) any agreement or commitment by the Company to do any of the things described in this Section 3.1(h).

(i) *Compliance with Law*

(i) The Company is in compliance with all laws, ordinances, governmental rules or regulations to which it is subject, including, without limitation, laws or regulations relating to the environment or to occupational health and safety, except to the extent that such noncompliance, individually or in the aggregate would not reasonably be expected to have a Material Adverse Effect. No material expenditures are or will be required in order to cause its current operations or properties to comply with any such laws, ordinances, governmental rules or regulations.

(ii) The Company has all licenses, permits, franchises or other governmental authorizations necessary for the ownership of its property or to the conduct of its business as now conducted and as presently contemplated to be conducted, which if violated or not obtained might have a Material Adverse Effect. The Company has not been denied any application for any such licenses, permits, franchises or other governmental authorizations necessary to its business. There has not been, and there is no proceeding pending, served or threatened to suspend, revoke or limit such license, and there is no circumstance that exists which with notice or passage of time or both, will result in such revocation, suspension or limitation.

(j) *Litigation*

Except as set forth on Schedule 3.1(j), there is no action, suit, proceeding or investigation pending or to the best of the Company's knowledge currently threatened against the Company or, to the best of the Company's knowledge, threatened against or affecting any of the officers, directors or employees of the Company with respect to their businesses or proposed business activities) that questions the validity of this Agreement or the right of the Company to enter into such agreement or to consummate the transactions contemplated hereby, or that might result, either individually or in the aggregate, in any material adverse changes in the business, assets or condition of the Company, financially or otherwise, or any change in the current equity

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ownership of the Company. The foregoing includes, without limitation, actions, suits, proceedings or investigations pending or threatened involving the prior employment of any of the Company's employees, their use in connection with the Company's business of any information or techniques allegedly proprietary to any of their former employers or their obligations under any agreements with prior employers. The Company is not a party or subject to the provisions of any order, writ, injunction, judgment or decree of any court or government agency or instrumentality. The Company has not received any opinion or memorandum or legal advice from legal counsel to the effect that it is exposed, from a legal standpoint, to any liability or disadvantage which may be material to its business. There is no action, suit, proceeding or investigation by the Company currently pending or that the Company intends to initiate.

(k) *Material Contracts; Customers and Suppliers*

(i) Schedule 3.1(k) sets forth a true and complete list of each material contract, agreement, instrument, commitment and other arrangement to which the Company is a party or otherwise relating to or affecting any of its assets or business, including without limitation, employment, severance or consulting agreements; voting or consent agreements with respect to any security of the Company or the voting by any director of the Company; loan, credit or security agreements; joint venture agreements and distribution agreements (each, a "Contract"). Each Contract is valid, binding and enforceable against the Company and, to the Company's best knowledge, the other parties thereto, in accordance with its terms, and in full force and effect on the date hereof. The Company is not in default or breach under any of the Contracts, nor, to the best knowledge of the Company, is any other party thereto in default or breach thereunder, nor, to the best knowledge of the Company, are there facts or circumstances which have occurred which, with or without the giving of notice or the passage of time or both, would constitute a default or breach under any of the Contracts.

(ii) Schedule 3.1(k) sets forth a complete and correct list of (a) the top 10 customers by dollar volume of the Company during the last fiscal year (the "Material Customers") and (b) the top 10 suppliers by dollar expenditure of the Company during the last fiscal year (the "Material Suppliers"). The relationships of the Company with its customers and suppliers are commercial working relationships and no Material Customer or Material Supplier has canceled or otherwise terminated its relationship with the Company. The Company has no notice that any Material Supplier or Material Customer intends to cancel or materially modify its relationship with the Company.

(iii) Except for agreements explicitly contemplated hereby and those set forth on Schedule 3.1(k), there are no agreements, understandings or proposed transactions between the Company and any of its officers, directors, affiliates or any affiliate thereof.

(iv) Except as set forth on Schedule 3.1(k), there are no agreements, understandings, instruments, contracts, proposed transactions, judgments, orders, writs or decrees to which the Company is a party or by which it is bound that may involve (A) obligations (contingent or otherwise) of, or payments to, the Company in excess of \$50,000 (B) provisions restricting or affecting the development, manufacture or distribution of the Company's products or services, (C) a warranty with respect to its services rendered or its

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products sold or leased, or (D) indemnification by the Company with respect to infringements of proprietary rights.

(v) Except as set forth on Schedule 3.1(k) or as shown in the September 30, 2003 financials, the Company has not (A) declared or paid any dividends or authorized or made any distribution upon or with respect to any class or series of its capital stock, (B) incurred any indebtedness for money borrowed or any other liabilities individually in excess of \$5,000 or, in the case of indebtedness and/or liabilities individually less than \$5,000, in excess of \$15,000 in the aggregate, (C) made any loans or advances to any person, other than ordinary advances for travel expenses, or (D) sold, exchanged or otherwise disposed of any of its assets or rights, other than the sale of its inventory in the ordinary course of business.

(vi) For the purposes of subsections (iv) and (v) above, all indebtedness, liabilities, agreements, understandings, instruments, contracts and proposed transactions involving the same person or entity (including persons or entities the Company has reason to believe are affiliated therewith) shall be aggregated for the purpose of meeting the individual minimum dollar amounts of such subsections.

(l) *Absence of Undisclosed Liabilities*

Except as disclosed on Schedule 3.1(l) and the Balance Sheet, the Company does not have any debt, obligation or liability (whether accrued, absolute, contingent, liquidated or otherwise, whether due or to become due, whether or not known to the Company) arising out of any transaction entered into at or prior to the Closing, or any act or omission at or prior to the Closing, or any state of facts existing at or prior to the Closing, including taxes with respect to or based upon the transactions or events occurring at or prior to the Closing, and including, without limitation, unfunded past service liabilities under any pension, profit sharing or similar plan, except current liabilities incurred and obligations under agreements entered into, in the usual and ordinary course of business, none of which (individually or in the aggregate) could have a Material Adverse Effect.

(m) *Employees*

(i) The Company is in full compliance with all laws regarding employment, wages, hours, equal opportunity, collective bargaining and payment of social security and other taxes except to the extent that noncompliance would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. The Company is not engaged in any unfair labor practice or discriminatory employment practice and no complaint of any such practice against the Company is filed or, to the best of the Company's knowledge, threatened to be filed with or by the National Labor Relations Board, the Equal Employment Opportunity Commission or any other administrative agency, federal or state, that regulates labor or employment practices, nor is any grievance filed or, to the best of the Company's knowledge, threatened to be filed, against the Company by any employee pursuant to any collective bargaining or other employment agreement to which the Company is a party or is bound. The Company is not aware that it has any labor relations problems (including without limitation, any union organization activities, threatened or actual strikes or work stoppages or material

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grievances). The Company is in compliance with all applicable federal, state and local laws and regulations regarding occupational safety and health standards except to the extent that noncompliance would not reasonably be expected to have a Material Adverse Effect, and has received no complaints from any federal, state or local agency or regulatory body alleging violations of any such laws and regulations.

(ii) Schedule 3.1(m) sets forth a true and complete list of all employees of the Company and all independent contractors or consultants hired by the Company as of September 30, 2003. Except as set forth on Schedule 3.1(m), the employment of all Persons and officers employed by the Company is terminable at will without any penalty or severance obligation of any kind on the part of the Company. All sums due for employee compensation and benefits and all vacation time owing to any employees of the Company have been duly and adequately accrued on the accounting records of the Company.

(iii) The Company is not aware that any of its employees is obligated under any contract (including licenses, covenants or commitments of any nature) or other agreement, or subject to any judgment, decree or order of any court or administrative agency, that would interfere with the use of such employee's best efforts to promote the interests of the Company or that would conflict with the Company's business as proposed to be conducted.

(iv) Other than Leon Garza, Chief Executive Officer of the Company, the Company is not aware that any officer or key employee, or that any group of key employees, intends to terminate their employment with the Company, nor does the Company have a present intention to terminate the employment of any officer or key employee.

(v) Neither the execution of this Agreement nor the transactions contemplated by this Agreement nor the carrying on of the Company's business by the employees of the Company, nor the conduct of the Company's business as presently proposed to be conducted, conflict with or result in a breach of the terms, conditions or provisions of, or constitute a default under, any contract, covenant or instrument under which any of such employees is now obligated.

(n) *Tax Matters*

There are no federal, state, county or local taxes due and payable by the Company which have not been paid. The provisions for taxes on the unaudited balance sheets described in Section 3.1(g) are sufficient for the payment of all accrued and unpaid federal, state, county and local taxes of the Company whether or not assessed or disputed as of the respective dates of such balance sheets. The Company has made provision for the payment of all taxes which, to the knowledge of the Company, are expected to become due with respect to the Company's business, properties and operations. The Company has duly filed all federal, state, county and local tax returns required to have been filed by it and there are in effect no waivers of applicable statutes of limitations with respect to taxes for any year. The Company has not been subject to a federal or state tax audit of any kind. There are no ongoing or pending tax audits by any taxing authority against the Company, the Company has never filed a consent relating to any assets or property pursuant to Section 341(f) of the Internal Revenue Code of 1986, as amended (the

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"Code"), relating to collapsible corporations and none of the assets or income items of the Company has been or potentially is subject to tax under Code Section 1374 (or any corresponding provision of state, local or foreign law).

(o) *Employee Benefit Plans*

The Company has no employee benefit plans (as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974) covering former and current employees of the Company, or under which the Company has any obligation or liability. Schedule 3.1(o) lists all material plans, contracts, bonuses, commissions, profit-sharing, savings, stock options, insurance, deferred compensation, or other similar fringe or employee benefits covering former or current employees of the Company or under which the Company has any obligation or liability (each, a "Benefit Arrangement"). True and complete copies of all Benefit Arrangements have been provided or made available to the Investors prior to the date hereof. The Benefit Arrangements are and have been administered in substantial compliance with their terms and with the requirements of applicable law. The Company's payments to current or former employees pursuant to the Benefit Arrangements are and have been fully deductible under the Code.

(p) *Intellectual Property*

The Company owns all right, title and interest in and to, or has a valid and enforceable license to use all the Intellectual Property used by it in connection with the Company's business, which represents all intellectual property rights necessary to the conduct of the Company's business as now conducted and as presently contemplated to be conducted. The Company is in compliance with the contractual obligations relating to the protection of such of the Intellectual Property it uses pursuant to license or other agreement. To the best knowledge of the Company, there are no conflicts with or infringements on any of the Company's Intellectual Property by any third party or any Intellectual Property it uses pursuant to a license or other agreement. The conduct of the Company's business as currently conducted or presently contemplated does not conflict with or infringe upon any proprietary right of any third party. There is no claim, suit, action or proceeding pending or, to the knowledge of the Company, threatened against the Company: (i) alleging any such conflict or infringement with any third party's proprietary rights; or (ii) challenging the Company's ownership or use of, or the validity or enforceability of any Intellectual Property.

The Company has taken all necessary and desirable actions to maintain and protect the Intellectual Property that it owns. To the best of the Company's knowledge, the owners of any Intellectual Property rights licensed to the Company have taken all necessary and desirable actions to maintain and protect the Intellectual Property rights that are subject to such licenses. The transactions contemplated by the Transaction Documents shall have no adverse effect on the Company's right, title and interest in and to the Intellectual Property rights listed on Schedule 3.1(p).

Schedule 3.1(p) sets forth a complete and current list of registrations/patents or applications pertaining to the Intellectual Property ("Listed Intellectual Property") and the owner

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of record, date of application or issuance and relevant jurisdiction as to each. Except as described in Schedule 3.1(p), all Listed Intellectual Property is owned by the Company, free and clear of security interests, liens, encumbrances or claims of any nature. All Listed Intellectual Property is valid, subsisting, unexpired, in proper form and enforceable and all renewal fees and other maintenance fees that have fallen due on or prior to the effective date of this Agreement have been paid. Except as listed in Schedule 3.1(p), no Listed Intellectual Property is the subject of any legal or governmental proceeding before any governmental, registration or other authority in any jurisdiction, including any office action or other form of preliminary or final refusal of registration. The consummation of the transactions contemplated hereby will not alter or impair any Intellectual Property.

Schedule 3.1(p) sets forth a complete list of all material: (i) licenses, sublicenses and other agreements in which the Company or any sublicensee of the Company has granted to any person the right to use the Intellectual Property; and (ii) all other consents, indemnifications, forbearances to sue, settlement agreements and licensing or cross-licensing arrangements to which the Company is a party relating to the Intellectual Property or the proprietary rights of any third party. Except as set forth in Schedule 3.1(p) the Company is not under any obligation to pay royalties or other payments in connection with any license, sublicense or other agreement, nor restricted from assigning its rights under any sublicense or agreement respecting Intellectual Property nor will the Company otherwise be, as a result of the execution and delivery of this Agreement or the performance of its obligations under this Agreement, in breach of any license, sublicense or other agreement relating to the Intellectual Property.

No present or former employee, officer or director of the Company, or agent or outside contractor of the Company, holds any right, title or interest, directly or indirectly, in whole or in part, in or to any Intellectual Property. The Company does not believe it is or will be necessary to utilize any inventions of any of its employees (or people it currently intends to hire) made prior to their employment by the Company.

To the Company's knowledge: (i) none of the Intellectual Property has been used, divulged, disclosed or appropriated to the detriment of the Company for the benefit of any Person other than the Company; and (ii) no employee, independent contractor or agent of the Company has misappropriated any trade secrets or other confidential information of any other Person in the course of the performance of his or her duties as an employee, independent contractor or agent of the Company.

The Company's transmission, use, modification (including, but not limited to, framing, if applicable), linking and other practices in respect of content proprietary to any other Person do not infringe or violate any proprietary or other right of any such Person and no claim in respect of any such infringement or violation is pending or, to the Company's knowledge threatened.

(q) *Software*

The operating and applications computer software programs and databases used by the Company that are material to the conduct of the Company's business as now conducted and as presently contemplated to be conducted (collectively, the "Software") are listed on Schedule

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3.1(q) hereto. The Company: (i) holds valid licenses to use, reproduce, modify, distribute and sublicense all copies of the Software, other than any portion thereof (collectively, the "Proprietary Software") that was developed by or under contract with the Company and (ii) either owns outright, or has a perpetual, royalty-free license to use, reproduce, modify, distribute and sublicense the Proprietary Software and, except as listed on Schedule 3.1(q), the Company has not sold, licensed, leased or otherwise transferred or granted any interest or rights in or to any portion thereof. None of the Software used by the Company, nor any use thereof, conflicts with, infringes upon or violates any intellectual property or other proprietary right of any other Person and no claim, suit, action or other proceeding with respect to any such infringement or violation is pending or, to the Company's knowledge threatened. The Company has taken the steps reasonably necessary to protect its right, title and interest in and to the Software, including, without limitation, the execution of appropriate confidentiality agreements.

The Company possesses or has access to the original and all copies of all documentation and all source code or password protected code, as applicable for all the Software it owns. Upon consummation of the transactions contemplated by the Transaction Documents, the Company will continue to own all the Software owned by it, free and clear of all claims, liens, encumbrances, obligations and liabilities and, with respect to all agreements for the lease or license of Software which require consents or other actions as a result of the consummation of the transactions contemplated by this Agreement in order for the Company to continue to use and operate such Software after the Closing Date, the Company will have obtained such consents or taken such other actions so required.

Any programs, modifications, enhancements or other inventions, improvements, discoveries, methods or works of authorship ("Works") that were created by employees of the Company were made in the regular course of such employees' employment or service relationships with the Company using the Company's facilities and resources and, as such, constitute works made for hire.

**(r) Title to Tangible Assets**

Except as disclosed on Schedule 3.1(r), the Company has good title to its properties and assets and good title to all its leasehold estates, in each case subject to no mortgage, pledge, lien, lease, encumbrance or charge, other than or resulting from taxes which have not yet become delinquent and minor liens and encumbrances which do not in any case materially detract from the value of the property subject thereto or materially impair the operations of the Company as now conducted and as presently contemplated to be conducted and which have not arisen otherwise than in the ordinary course of business.

**(s) Condition of Properties**

All facilities, machinery, equipment, fixtures, vehicles and other properties owned, leased or used by the Company are in good operating condition and repair, are reasonably fit and usable for the purposes for which they are being used and are presently contemplated to be used, are adequate and sufficient for the Company's business as now conducted and as presently contemplated to be conducted.

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(t) *Insurance*

The Company and its properties are insured in such amounts, against such losses, including fire and casualty and with such insurers as are prudent when considered in light of the nature of the properties and businesses of the Company as now conducted and as presently contemplated to be conducted, and such insurance is sufficient in amount to replace any properties that might be destroyed. Schedule 3.1(t) sets forth a true and complete listing of material insurance policies of the Company as in effect on the date hereof, including in each case the applicable coverage limits, deductibles and the policy expiration dates. No notice of any termination or threatened termination of any of such policies has been received and such policies are in full force and effect. The Company is not in default with respect to its obligations under any insurance policy maintained by it, and the Company has not been denied insurance coverage.

(u) *Transactions with Related Parties*

Except as disclosed on Schedule 3.1(u), the Company is not a party to any agreement with any of the Company's directors, officers or shareholders or any Affiliate or family member of any of the foregoing under which it: (i) leases any real or personal property (either to or from such Person), (ii) licenses technology (either to or from such Person), (iii) is obligated to purchase any tangible or intangible asset from or sell such asset to such Person, (iv) purchases products or services from such Person or (v) has borrowed money from or lent money to such Person, and no such person has any direct or indirect ownership interest in any firm or corporation with which the Company is affiliated or with which the Company has a business relationship, or any firm or corporation that competes with the Company, except that such persons may own stock in publicly traded companies that may compete with the Company. Except as set forth in Schedule 3.1(u), the Company does not employ as an employee or engage as a consultant any family member of any of the Company's directors, officers or shareholders nor are such Persons directly or indirectly interested in a material contract with the Company. To the best knowledge of the Company, except for the Second Amended and Restated Shareholders' Agreement dated the date hereof, there exist no agreements among shareholders of the Company to act in concert with respect to their voting or holding of Company securities.

(v) *Registration Rights*

Except as set forth in Schedule 3.1(v), the Company will not, as of the Effective Date, be under any obligation to register any of its outstanding securities, or any of its securities that may be issued subsequently, under the Securities Act.

(w) *Exchange Act Registration*

None of the Company's securities are registered, or required to be registered, under Section 12 of the Exchange Act.

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(x) *Environmental and Safety Laws*

The Company is not in violation of any applicable statute, law, or regulation relating to the environment or occupational health and safety, and to the best of its knowledge, no material expenditures are or will be required in order to comply with any such existing statute, law, or regulation.

(y) *Brokerage*

There are no claims for brokerage commissions or finder's fees or similar compensation in connection with the transactions contemplated by this Agreement based on any arrangement made by or on behalf of the Company and the Company agrees to indemnify and hold the Investors harmless against any costs or damages incurred as a result of any such claim.

3.2 **Representations and Warranties of Newco.** Newco represents and warrants to the Company that:

(a) *Corporate Organization*

(i) Newco is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Attached hereto as Exhibit C and Exhibit D, respectively, are true and complete copies of the Certificate of Incorporation and Bylaws of Newco as amended through the date hereof (collectively, "Newco Organizational Documents").

(ii) Newco has all requisite power and authority and has all necessary approvals, licenses, permits and authorization to own its properties and to carry on its business as now conducted and as presently contemplated to be conducted except where such failures to have all necessary approvals, licenses, permits and authorizations would not have a Material Adverse Effect (as defined below). Newco has all requisite power and authority to execute and deliver the Merger Agreement and to perform its obligations hereunder and thereunder.

(iii) Newco has filed all necessary documents to qualify to do business as a foreign corporation in, and Newco is in good standing under, the laws of each jurisdiction in which the conduct of Newco's business as now conducted and as presently contemplated to be conducted or the nature of the property owned requires such qualification, except where the failure to so qualify would not have a Material Adverse Effect.

(b) *Ownership of Newco*

Newco's authorized capital at the Effective Time consists of 26,750,000 shares of Newco Common Stock, 3,425,000 shares of Series AA Preferred Stock and 8,500,000 shares of Series B13 Preferred Stock. No shares of common stock of Newco have been issued.

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(c) *Interim Operations of Newco*

Newco was incorporated on November 7, 2003 has engaged in no other business activities and has conducted its operations only as contemplated hereby.

(d) *Brokerage.*

There are no claims for brokerage commissions or finder's fees or similar compensation in connection with the transactions contemplated by this Agreement based on any arrangement made by or on behalf of the Company and the Company agrees to indemnify and hold the investors harmless against any costs or damages incurred as a result of any such claim.

#### ARTICLE IV

#### COVENANTS RELATING TO CONDUCT OF BUSINESS

4.1 Covenants of Company. During the period from the date of this Agreement and continuing until the Effective Time, the Company agrees that (except as expressly contemplated or permitted by this Agreement or to the extent that Newco shall otherwise consent in writing):

(a) *Ordinary Course.* The Company shall carry on its businesses in the usual, regular and ordinary course and use commercially reasonable efforts to preserve intact their present business organizations, maintain their rights and preserve their relationships with employees, officers, customers, suppliers and others having business dealings with them. The Company shall maintain in force all insurance policies and Consents (as defined in Section 6.1(b)) with respect to the Company and shall maintain all assets and properties of the Company in customary repair, order and condition, reasonable wear and tear excepted. The Company shall not, (i) enter into any new material line of business or (ii) incur or commit to any significant capital expenditures or any obligations or liabilities other than capital expenditures and obligations or liabilities incurred or committed to as disclosed in the Disclosure Schedule. The Company will comply with all applicable laws and regulations wherever its business is conducted, including without limitation the timely filing of all reports, forms or other documents with the SEC required pursuant to the Securities Act, except where such noncompliance would not have a Material Adverse Effect on the Company.

(b) *Dividends; Changes in Stock.* The Company shall not, nor shall the Company propose to, (i) declare or pay any dividends on or make other distributions in respect of any of its capital stock, (ii) split, combine or reclassify any of its capital stock or issue or authorize or propose the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock, or (iii) repurchase, redeem or otherwise acquire any shares of its capital stock or any securities convertible into or exercisable for any shares of its capital stock.

(c) *Issuance of Securities.* The Company shall not issue, deliver or sell, or authorize or propose the issuance, delivery or sale of, any shares of its capital stock of any class, any Voting Debt or any securities convertible into or exercisable for (including any stock

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appreciation rights, phantom stock plans or stock equivalents), or any rights, warrants or options to acquire, any such shares, or enter into any agreement with respect to any of the foregoing, other than issuances of Company Common Stock pursuant to exercises of Company Stock Options.

(d) **Governing Documents.** The Company shall not amend or propose to amend, its articles of incorporation, bylaws or other governing instruments.

(e) **No Acquisitions.** The Company shall not, (i) acquire or agree to acquire by merging or consolidating with, or by purchasing a substantial equity interest in or a substantial portion of the assets of, or by any other manner, any business or any corporation, limited liability company, partnership, association or other business organization or division thereof or (ii) other than in the ordinary course of business, otherwise acquire or agree to acquire any assets which, in the case of this clause (ii), are material, individually or in the aggregate, to the Company.

(f) **No Dispositions.** The Company shall not sell, lease, encumber or otherwise dispose of, or agree to sell, lease, encumber or otherwise dispose of any of its assets, except for dispositions in the ordinary course of business and consistent with past practice and of substantially the same character, type and magnitude as dispositions in the past.

(g) **Indebtedness.** The Company shall not, (i) incur any indebtedness for borrowed money or guarantee any such indebtedness or issue or sell any debt securities or warrants or rights to acquire any long-term debt securities of the Company or guarantee any long-term debt securities of others or enter into or amend any contract, agreement, commitment or arrangement with respect to any of the foregoing, other than borrowing under existing lines of credit in the ordinary course of business consistent with prior practice and of substantially the same character, type and magnitude as borrowings made in the past or (ii) make any loans, advances or capital contributions to any person.

(h) **Other Actions.** The Company shall not take any action that would, or might reasonably be expected to, result in any of its representations and warranties set forth in this Agreement being or becoming untrue in any material respect, or in any of the conditions to the Merger set forth in Article VI not being satisfied, or which would adversely affect the ability of any of them to obtain any of the Requisite Regulatory Approvals without imposition of a condition or restriction of the type referred to in Section 6.2(d) and the Company shall, in the event of, or promptly after the occurrence of, or promptly after obtaining knowledge of the occurrence of or the impending or threatened occurrence of, any fact or event which would cause or constitute a breach of any of the representations and warranties set forth in this Agreement, the non-satisfaction of any of the conditions to the Merger set forth in Article VI or the failure to obtain the Requisite Regulatory Approvals, in each case at any time after the date hereof and through the Closing Date, give detailed notice thereof to Newco, and the Company shall use its best efforts to prevent or promptly to remedy such breach, non-satisfaction or failure, as the case may be.

(i) **Advice of Changes; Government Filings.** The Company shall confer on a regular basis with Newco, report on operational matters and promptly advise Newco, orally and in

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writing, of any material change or event or any change or event which would cause or constitute a material breach of any of the representations, warranties or covenants of the Company contained herein. The Company shall cooperate with Newco in determining whether any filings are required to be made with, or consents required to be obtained from, or fees or expenses required to be paid to, any third party or Governmental Entity prior to the Effective Time in connection with this Agreement or the transactions contemplated hereby, and shall cooperate in making any such filings promptly and in seeking to obtain timely any such consents and, subject to Newco's approval, paying any such fees or expenses. The Company shall promptly provide Newco with copies of all other filings made by the Company with any Governmental Entity in connection with this Agreement, the Merger or the other transactions contemplated hereby.

(j) **Accounting Methods.** The Company shall not change its methods of accounting in effect at January 1, 2003, except as required by changes in GAAP as concurred in by the Company's independent auditors.

(k) **Benefit Plans.** During the period from the date of this Agreement and continuing until the Effective Time, the Company agrees that it will not, without the prior written consent of Newco except as set forth in the Disclosure Schedule, (i) enter into, adopt, amend (except as may be required by law) or terminate any employee benefit plan or any agreement, arrangement, plan or policy between the Company and one or more of its or their directors or officers, (ii) except for normal increases in the ordinary course of business and consistent with past practice and of substantially the same character, type and magnitude as increases in the past that in the aggregate, do not result in a material increase in benefits or compensation expense to the Company, increase in any manner the compensation or fringe benefits of any director, officer or employee or pay any benefit not required by any plan and arrangement as in effect as of the date hereof (including, without limitation, the granting of stock options, stock appreciation rights, restricted stock, restricted stock units or performance units or shares) or enter into any contract, agreement, commitment or arrangement to do any of the foregoing, or (iii) enter into or renew any contract, agreement, commitment or arrangement providing for the payment to any director, officer or employee of the Company of compensation or benefits contingent, or the terms of which are materially altered, upon the occurrence of any of the transactions contemplated by this Agreement.

(l) **Tax Elections.** Except in the ordinary course of business and consistent with past practice and of substantially the same character, type and magnitude as elections made in the past, the Company shall not make any material tax election or settle or compromise any material federal, state, local or foreign income tax claim or liability or amend any previously filed tax return in any respect.

4.2 **Covenants of Newco.** Except as expressly contemplated by this Agreement, after the date hereof and prior to the Effective Time, without the prior written consent of the Company:

(a) **Other Actions.** Newco shall not take any action that would, or might reasonably be expected to, result in any of its representations and warranties set forth in this Agreement being or becoming untrue in any material respect, or in any of the conditions to the Merger set

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forth in Article VI not being satisfied, or which would adversely affect the ability of any of them to obtain any of the Requisite Regulatory Approvals without imposition of a condition or restriction of the type referred to in Section 6.2(d).

(b) **Government Filings.** Newco shall cooperate with the Company in determining whether any filings are required to be made with, or consents required to be obtained from, any third party or Governmental Entity prior to the Effective Time in connection with this Agreement or the transactions contemplated hereby, and shall cooperate in making any such filings promptly and in seeking to obtain timely any such consents. Newco shall promptly provide the Company with copies of all other filings made by it with any state or Federal Governmental Entity in connection with this Agreement, the Merger or the other transactions contemplated hereby.

## ARTICLE V

### ADDITIONAL AGREEMENTS

5.1 **Legal Conditions to Merger.** Each of the Company and Newco shall use all reasonable best efforts (i) to take, or cause to be taken, all actions necessary to comply promptly with all legal requirements which may be imposed on such party with respect to the Merger and to consummate the transactions contemplated by this Agreement, subject to the approval of the stockholders of the Company described in Section 6.1 (a), (and to cooperate with the other party to obtain) any consent, authorization, order or approval of, or any exemption by, any Governmental Entity and of any other public or private third party which is required to be obtained or made by such party in connection with the Merger and the transactions contemplated by this Agreement; provided, however, that a party shall not be obligated to take any action pursuant to the foregoing if the taking of such action or such compliance or the obtaining of such consent, authorization, order, approval or exemption is likely, in such party's reasonable opinion, (x) to be materially burdensome to such party or to impact in a materially adverse manner the economic or business benefits of the transactions contemplated by this Agreement so as to render uneconomic the consummation of the Merger or (y) in the case of the Company, to result in the imposition of a condition or restriction on the Company or Newco of the type referred to in Section 6.2(d). Each of the Company and Newco will promptly cooperate with and furnish information to the other in connection with any such burden suffered by, or requirement imposed upon, any of them in connection with the foregoing.

5.2 **Brokers or Finders.** Except as disclosed to the other party in writing prior to the date hereof, each of Newco and the Company represents, as to itself, and its affiliates, that no agent, broker, investment banker, financial advisor or other firm or person is or will be entitled to any broker's or finder's fee or any other commission or similar fee in connection with any of the transactions contemplated by this Agreement, and each party agrees to indemnify the other party and hold the other party harmless from and against any and all claims, liabilities or obligations with respect to any other fees, commissions or expenses asserted by any person on the basis of any act or statement alleged to have been made by such first party or its affiliates.

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5.3 **Indemnification.** (a) The Company will maintain, through the Effective Time, the Company's existing directors' and officers' insurance in full force and effect without reduction of coverage. As of the Effective Time, the certificate of incorporation of Newco shall contain provisions no less favorable with respect to indemnification than are set forth in the articles of incorporation of the Company, which provisions shall 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 at the Effective Time were directors, officers or employees of the Company. Newco and the Company agree that the directors, officers and employees of the Company covered thereby are intended to be third party beneficiaries under this Section 5.3 and shall have the right to enforce the obligations of Newco.

(b) In addition to the indemnification provisions set forth in the articles of incorporation of Newco as described in subsection (a) above, Newco shall indemnify and hold harmless the individuals who at any time from the date hereof to the Effective Time were members of the Board and/or any committee thereof (collectively, the "Indemnified Parties") from and against any and all claims, losses, liabilities and damages, including amounts paid in settlement, costs of investigation and fees and disbursements of counsel (whether at the pre-trial, trial or appellate levels), arising out of or resulting from any action brought against an Indemnified Party by a third party (including a security holder of the Company) in their capacity as a member of the Board and/or any committee thereof for any of the following:

(i) any breach of duty, neglect, error, misstatement, misleading statement, omission or act by such Indemnified Party in their respective capacities, or any matter claimed against such Indemnified Party solely by reason of their status as directors of the Company; or

(ii) an alleged violation of any law, regulation or rule, whether statutory or common law, which arises out of, is based upon or is attributable to, in part or in whole, the purchase or sale, or offer or solicitation of an offer to purchase or sell, any securities of the Company.

## ARTICLE VI

### CONDITIONS PRECEDENT

6.1 **Conditions to Each Party's Obligation To Effect the Merger.** The respective obligation of each party to effect the Merger shall be subject to the satisfaction prior to the Closing Date of the following conditions:

(a) **Shareholder Approval.** The Company Shareholder Approval shall have been obtained. "Shareholder Approval" shall include approval of: (i) a majority of the holders of Company Common Stock, including the holders of Company Preferred Stock voting on an as converted basis; (ii) at least 82% of the holders of each class (the Company's Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock) of the Company Preferred Stock; (iii) waivers by the holders of the Company Preferred Stock of all accumulated dividends; and (iv) the cancellation by the holders of the Series A Warrants and Series B Warrants of all of those warrants.

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(b) **Other Approvals.** All authorizations, consents, orders or approvals of, or declarations or filings with, and all expirations or early terminations of waiting periods imposed by, any Governmental Entity (all the foregoing, "Consents") which are necessary for the consummation of the Merger shall have been filed, occurred or been obtained (all such permits, approvals, filings and consents and the lapse of all such waiting periods being referred to as the "Requisite Regulatory Approvals") and all such Requisite Regulatory Approvals shall be in full force and effect.

(c) **No Injunctions or Restraints; Illegality.** No temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal restraint or prohibition preventing the consummation of the Merger shall be in effect, nor shall any proceeding by any Governmental Entity seeking any of the foregoing be pending. There shall not be any action taken, or any statute, rule, regulation or order enacted, entered, enforced or deemed applicable to the Merger, which makes the consummation of the Merger illegal.

6.2 **Conditions to Obligations of Newco** The obligations of Newco to effect the Merger are subject to the satisfaction of the following conditions unless waived by Newco:

(a) **Representations and Warranties.** The representations and warranties of the Company set forth in this Agreement shall be true and correct in all respects as of the Effective Time as though made on or as of such time (ignoring for purposes of this determination any materiality or Material Adverse Effect qualifications contained within individual representations and warranties), except for (i) those representations and warranties that address matters only as of a particular date or only with respect to a specific period of time which need only be true and correct as of such date or with respect to such period and (ii) such failures to be true and correct as would not, individually or in the aggregate, reasonably be expected to result in a Material Adverse Effect on the Company.

(b) **Performance of Obligations of Company.** The Company shall have performed and complied in all material respects with all obligations required to be performed or complied with by it under this Agreement at or prior to the Closing Date, and Newco shall have received a certificate signed on behalf of the Company by the President and Chief Executive Officer of the Company and by the Chief Financial Officer of the Company to such effect.

(c) **Consents Under Agreements.** The Company shall have obtained the consent or approval of, except for those consents or approvals for which failure to obtain such consents or approvals could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on the Company, each Person (other than the Requisite Regulatory Approvals) whose consent or approval shall be required in order to permit the succession by Newco pursuant to the Merger to any obligation, right or interest of the Company under any loan or credit agreement, note, mortgage, indenture, lease, license or other agreement or instrument.

(d) **Burdensome Condition.** After the date hereof, there shall not be any action taken, or any statute, rule, regulation or order enacted, entered, enforced or deemed applicable to the

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Merger, by any Governmental Entity which, in connection with the grant of a Requisite Regulatory Approval, imposes any requirement upon Newco which would so materially adversely impact the economic or business benefits of the transactions contemplated by this Agreement as to render uneconomic the consummation of the Merger, or which would require Newco to dispose of any asset which is material to Newco prior to the Effective Time.

(e) **Material Adverse Effect.** Since the date of this Agreement, there shall not have occurred any Material Adverse Effect with respect to the Company.

(f) **Proceedings.** All proceedings to be taken on the part of the Company in connection with the transactions contemplated by this Agreement and all documents incident thereto shall be reasonably satisfactory in form and substance to Newco, and Newco shall have received copies of all such documents and other evidences as Newco may reasonably request in order to establish the consummation of such transactions and the taking of all proceedings in connection therewith.

6.3 **Conditions to Obligations of Company.** The obligation of the Company to effect the Merger is subject to the satisfaction of the following conditions unless waived by the Company:

(a) **Representations and Warranties.** The representations and warranties of Newco set forth in this Agreement shall be true and correct in all respects as of the Effective Time as though made on or as of such time (ignoring for purposes of this determination any materiality or Material Adverse Effect qualifications contained within individual representations and warranties), except for (i) those representations and warranties that address matters only as of a particular date or only with respect to a specific period of time which need only be true and correct as of such date or with respect to such period and (ii) such failures to be true and correct as would not, individually or in the aggregate, reasonably be expected to result in a Material Adverse Effect on Newco.

(b) **Performance of Obligations of Newco.** Newco shall have performed and complied in all material respects with all obligations required to be performed by it under this Agreement at or prior to the Closing Date, and the Company shall have received a certificate signed on behalf of Newco by the President and Chief Executive Officer of Newco or a Corporate Vice President of Newco, and by the Senior Vice President and Chief Financial Officer of Newco or the Corporate Vice President and Treasurer of Newco to such effect.

(c) **Authorization.** Newco shall provide to the Company copies of all Board and shareholder resolutions and/or consents necessary to authorize the Merger, certified by its secretary as true, correct, complete and in full force and effect as of the Effective Time.

(d) **Additional Actions.** Newco shall have executed and delivered such other documents and taken such other actions as the Company shall have reasonably requested.

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## ARTICLE VII

### TERMINATION AND AMENDMENT

7.1 **Termination.** This Agreement may be terminated at any time prior to the Effective Time, whether before or after approval of the matters presented in connection with the Merger by the stockholders of the Company:

(a) by mutual consent of Newco and the Company in a written instrument, whether or not the Merger has been approved by the stockholders of the Company;

(b) by Newco, upon a material 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 such that the conditions set forth in Section 6.2, would be incapable of being satisfied by November 14, 2003 (or such later date as Newco may agree to in writing);

(c) by the Company, upon a material breach of any representation, warranty, covenant or agreement on the part of Newco set forth in this Agreement, or if any representation or warranty of Newco shall have become untrue such that the conditions set forth in Section 6.3, would be incapable of being satisfied by November 14, 2003;

(d) by either Newco or the Company, if any permanent injunction or action by any Governmental Entity preventing the consummation of the Merger shall have become final and nonappealable;

(e) by either Newco or the Company, if the Merger shall not have been consummated on or prior to November 14, 2003 (or such later date as may be agreed to in writing by the Company and Newco) (other than due to the failure of the party seeking to terminate this Agreement to perform its obligations under this Agreement required to be performed at or prior to the Effective Time); or

(f) by either Newco or the Company, if any approval of the stockholders of the Company required for the consummation of the Merger shall not have been obtained by reason of the failure to obtain the required vote at a Stockholders' Meeting or at any adjournment thereof or by written consent.

7.2 **Effect of Termination.** In the event of termination of this Agreement and abandonment of the Merger by either the Company or Newco as provided in Section 7.1, this Agreement shall forthwith terminate and there shall be no liability or obligation on the part of Newco or the Company or their respective officers or directors; provided, however, that, subject to the provisions of Section 8.8, nothing herein shall relieve any party of liability for any breach hereof.

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7.3 Fees, Expenses and Other Payments. Whether or not the Merger is consummated, all costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby (including, without limitation, fees and disbursements of counsel, financial advisors and accountants) shall be borne solely and entirely by the party which has incurred such costs and expenses.

7.4 Amendment. This Agreement may be amended by the parties hereto, by action taken or authorized by their respective Boards of Directors, at any time before or after approval of the matters presented in connection with the Merger by the stockholders of the Company or of Newco, but, after any such approval, no amendment shall be made which by law requires further approval by such stockholders without such further approval. This Agreement may not be amended except by an instrument in writing signed on behalf of each of the parties hereto.

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

## ARTICLE VIII

### GENERAL PROVISIONS

8.1 Survival of Representations, Warranties and Agreements. None of the representation, warranties, covenants and agreements in this Agreement or in any instrument delivered to this Agreement shall survive the Effective Time, except for the agreements contained in Articles I, II, V, Sections 7.2, 7.3 and Article VIII.

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8.2 **Notices.** All notices and other communications hereunder shall be in writing and shall be deemed given if delivered personally, telecopied (with confirmation) or mailed by registered or certified mail (return receipt requested) to the parties at the following addresses (or at such other address for a party as shall be specified by like notice):

- (a) if to Newco, to:

Newco  
1141 South Rogers Circle  
Suite 9  
Boca Raton, Florida 33487  
Attention:  
Facsimile: (561) 892-2660

With a copy to:

Edwards & Angell, LLP  
One North Clematis Street  
Suite 400  
West Palm Beach, Florida 33401  
Attention: John G. Igoe, Esq.  
Facsimile: (561) 655-8719

- (b) if to the Company, to:

NetByTel, Inc.  
1141 South Rogers Circle  
Suite 9  
Boca Raton, Florida 33487  
Attention:  
Facsimile: (561) 892-2660

With copies to:

Edwards & Angell, LLP  
One North Clematis Street  
Suite 400  
West Palm Beach, Florida 33401  
Attention: John G. Igoe, Esq.  
Facsimile: (561) 655-8719

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8.3 **Certain Definitions.** For purposes of this Agreement:

(a) an "Affiliate" of any person means another person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such first person;

(b) "Beneficially Own" or "Beneficial Ownership" with respect to any securities, means having "beneficial ownership" of such securities in accordance with the provisions of Rule 13d-3 under the Exchange Act. Without duplicative counting of the same securities by the same holder, securities beneficially owned by a person include securities beneficially owned by all other persons with whom such person would constitute a group;

(c) "Group" means two or more persons acting together for the purpose of acquiring, holding, voting or disposing of any securities, which persons would be required to file a Schedule 13D or Schedule 13G with the SEC as a "person" within the meaning of Section 13(d)(3) of the Exchange Act if such persons beneficially owned a sufficient amount of such securities to require such a filing under the Exchange Act;

(d) "Person" means an individual, corporation, limited liability company, partnership, joint venture, association, trust, unincorporated organization or other legal entity;

(e) Any accounting term that is used in the context of describing or referring to an accounting concept and that is not specifically defined herein shall be construed in accordance with GAAP as applied in the preparation of the financial statements of the Company included in the Company SEC Documents (including, without limitation, the Year-End Financial Statements and the Balance Sheet).

8.4 **Interpretation.** When a reference is made in this Agreement to Sections or Exhibits, such reference shall be to a Section of or Exhibit to this Agreement unless otherwise indicated. The recitals hereto constitute an integral part of this Agreement. The table of contents and headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. Whenever the words "include", "includes" or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation". The phrase "made available" in this Agreement shall mean that the information referred to has been made available if requested by the party to whom such information is to be made available. The phrases "the date of this Agreement", the date hereof and terms of similar import, unless the context otherwise requires, shall be deemed to refer to November \_\_, 2003.

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

8.6 **Entire Agreement; No Third Party Beneficiaries; Rights of Ownership.** This Agreement (including the documents and the instruments referred to herein) (a) constitutes the

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entire agreement and supersedes all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof; and (b) except as provided in Section 2.3, is not intended to confer upon any person other than the parties hereto any rights or remedies hereunder. The parties hereby acknowledge that, except as hereinafter agreed to in writing, no party shall have the right to acquire or shall be deemed to have acquired shares of common stock of the other party pursuant to the Merger until consummation thereof.

**8.7 Governing Law; Consent to Jurisdiction.** (a) This Agreement shall be governed by and construed in accordance with the laws of the State of Florida without regard to the principles of conflicts of laws thereof.

(b) Each of the parties hereto (i) consents to submit itself to the exclusive personal jurisdiction of any Delaware state court or any federal court located in the State of Delaware, in the event any dispute arises out of this Agreement or any of the transactions contemplated by this Agreement and (ii) agrees that it shall not attempt to deny or defeat such personal jurisdiction or object to such venue by motion or other request for leave from any such court.

**8.8 Severability; No Remedy in Certain Circumstances.** Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction. If the final judgment of a court of competent jurisdiction declares that any term or provision hereof is invalid or unenforceable, the parties agree that the court making the determination of invalidity or unenforceability shall have the power to reduce the scope, duration, or area of the term or provision, to delete specific words or phrases, or to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision, and this Agreement shall be enforceable as so modified after the expiration of the time within which the judgment may be appealed unless the foregoing inconsistent action or the failure to take an action constitutes a material breach of this Agreement or makes this Agreement impossible to perform, in which case this Agreement shall terminate pursuant to Article VII hereof. Except as otherwise contemplated by this Agreement, to the extent that a party hereto took an action inconsistent herewith or failed to take action consistent herewith or required hereby pursuant to an order or judgment of a court or other competent authority, such party shall incur no liability or obligation unless such party did not in good faith seek to resist or object to the imposition or entering of such order or judgment.

**8.9 Publicity.** So long as this Agreement is in effect, neither the Company nor Newco shall issue or cause the publication of any press release or other public announcement with respect to the transactions contemplated by this Agreement without the consent of the other party, which consent shall not be unreasonably withheld.

**8.10 Assignment.** Neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by any of the parties hereto (whether by operation of law or otherwise) without the prior written consent of the other parties. Subject to the preceding

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sentence, this Agreement will be binding upon, inure to the benefit of and be enforceable by the parties and their respective successors and assigns.

8.11 Adjustment. All dollar amounts and share numbers set forth herein, including without limitation the Merger Consideration, shall be subject to equitable adjustment in the event of any stock split, stock dividend, reverse stock split or similar event affecting the Company Common Stock, between the date of this Agreement and the Effective Time, to the extent appropriate.

8.12 Headings. Headings of the Articles and Sections of this Agreement are for the convenience of the parties only and shall be given no substantive or interpretive effect whatsoever.

8.13 Waiver. All waivers must be in writing. Except as provided in this Agreement, no action taken pursuant to this Agreement, including any investigation by or on behalf of any party, shall be deemed to constitute a waiver by the party taking such action of compliance with any representations, warranties, covenants or agreements contained in this Agreement. The waiver by any party hereto of a breach of any provision hereunder shall operate or be construed as a waiver of any prior or subsequent breach of the same or any other provision hereunder.

8.14 Enforcement of Agreement. The parties hereto agree that irreparable damage would occur in the event that any of the provisions of this Agreement was not performed in accordance with its specific terms or was otherwise breached. It is accordingly agreed that the parties shall be entitled to an injunction to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof in any court of competent jurisdiction, this being in addition to any other remedy to which they are entitled at law or in equity.

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IN WITNESS WHEREOF, Newco and the Company have caused this Agreement, to be signed by their respective officers thereunto duly authorized, all as of the date first written above.

**NETBYTEL ACQUISTION CO.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**NETBYTEL, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

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