

P93000069796

(Requestor's Name)

(Address)

(Address)

(City/State/Zip/Phone #)

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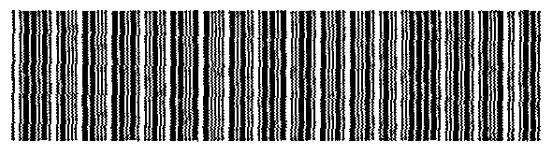
(Business Entity Name)

(Document Number)

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07 AUG 29 PM 5:25  
SECRETARY OF STATE  
TALLAHASSEE, FLORIDA

merger  
sf



FLORIDA DEPARTMENT OF STATE  
Division of Corporations

August 8, 2007

Joe Emas  
Attorney at Law  
1224 Washington Avenue  
Miami Beach, FL 33139

SUBJECT: EXCELSIOR HEALTH CLINIC, INC.  
Ref. Number: P93000069796

We have received your document for EXCELSIOR HEALTH CLINIC, INC. and check(s) totaling \$78.75. However, the enclosed document has not been filed and is being returned to you for the following reason(s):

I tried to reach you by phone but was unsuccessful.

The Articles of Merger reflect that EXCELSIOR HEALTH CLINIC, INC. is the surviving corporation, but the Plan of Merger shows it as the merging corporation. Also the exhibits referred to in the Agreement and Plan are not attached. Specifically on page 7 of the plan 1.5 references Exhibit A which is not attached.

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) 245-6901.

Susan Payne  
Senior Section Administrator

Letter Number: 007A00048619

**COVER LETTER**

**TO:** Amendment Section  
Division of Corporations

**SUBJECT:** Excelsior Health Clinic, Inc.  
(Name of Surviving Corporation)

The enclosed Articles of Merger and fee are submitted for filing.

Please return all correspondence concerning this matter to following:

Joe Emas  
(Contact Person)

Attorney at Law  
(Firm/Company)

1224 Washington Avenue  
(Address)

Miami Beach, Florida 33139  
(City/State and Zip Code)

For further information concerning this matter, please call:

Joe Emas At ( 305 ) 531-1174  
(Name of Contact Person) (Area Code & Daytime Telephone Number)

Certified copy (optional) \$8.75 (Please send an additional copy of your document if a certified copy is requested)

**STREET ADDRESS:**  
Amendment Section  
Division of Corporations  
Clifton Building  
2661 Executive Center Circle  
Tallahassee, Florida 32301

**MAILING ADDRESS:**  
Amendment Section  
Division of Corporations  
P.O. Box 6327  
Tallahassee, Florida 32314

## ARTICLES OF MERGER (Profit Corporations)

The following articles of merger are submitted in accordance with the Florida Business Corporation Act, pursuant to section 607.1105, Florida Statutes.

**First:** The name and jurisdiction of the surviving corporation:

<u>Name</u>	<u>Jurisdiction</u>	<u>Document Number</u> <small>(If known/ applicable)</small>
Excelsior Health Clinic, Inc.	Florida	

**Second:** The name and jurisdiction of each merging corporation:

<u>Name</u>	<u>Jurisdiction</u>	<u>Document Number</u> <small>(If known/ applicable)</small>
Excelsior Health Clinic, Inc.	Florida	
My Medical, Inc	Florida	

FILED  
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 TALLAHASSEE, FLORIDA

**Third:** The Plan of Merger is attached.

**Fourth:** The merger shall become effective on the date the Articles of Merger are filed with the Florida Department of State.

**OR** \_\_\_\_/\_\_\_\_/\_\_\_\_ (Enter a specific date. NOTE: An effective date cannot be prior to the date of filing or more than 90 days after merger file date.)

**Fifth:** Adoption of Merger by surviving corporation - (COMPLETE ONLY ONE STATEMENT)

The Plan of Merger was adopted by the shareholders of the surviving corporation on \_\_\_\_\_

The Plan of Merger was adopted by the board of directors of the surviving corporation on July 7, 2007 and shareholder approval was not required.

**Sixth:** Adoption of Merger by merging corporation(s) (COMPLETE ONLY ONE STATEMENT)

The Plan of Merger was adopted by the shareholders of the merging corporation(s) on \_\_\_\_\_

The Plan of Merger was adopted by the board of directors of the merging corporation(s) on July 7, 2007 and shareholder approval was not required.

*(Attach additional sheets if necessary)*


**Seventh: SIGNATURES FOR EACH CORPORATION**

Name of Corporation

Signature of an Officer or Director

Typed or Printed Name of Individual & Title

Excelsior Health Clinic, Inc.



Nancy Horne, President

My Medical, Inc



Jim Pugh, President

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**AGREEMENT AND PLAN OF MERGER AND REORGANIZATION**

**BY AND AMONG**

**MY MEDICAL, INC.**

**AND**

**EXCELSIOR HEALTH CLINIC, INC.**

**DATED**

**July 11, 2007**

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EXHIBITS

## AGREEMENT AND PLAN OF MERGER AND REORGANIZATION

This **AGREEMENT AND PLAN OF MERGER AND REORGANIZATION** (the "Agreement") is made and entered into as of July 11, 2007, by and among EXCELSIOR HEALTH CLINIC, INC., a Florida corporation ("Company"), and MY MEDICAL, INC., a Florida corporation ("Merging Company").

### RECITALS

- A. The Boards of Directors of Company and Merging Company believe it is in the best interests of their respective companies and the stockholders of their respective companies that Company and Merging Company combine into a single company through the statutory merger of Merging Company with and into Company (the "Merger") and, in furtherance thereof, have approved the Merger.
- B. Pursuant to the Merger, among other things, the outstanding shares of the Merging Company Common Stock, \$0.00 par value ("Merging Company Common Stock"), shall be converted into the right to receive shares of Company Common Stock, \$0.001 par value ("Company Common Stock"), at the rate set forth herein.
- C. Company and Merging Company desire to make certain representations and warranties and other agreements in connection with the Merger.
- D. The parties intend, by executing this Agreement, to adopt a plan of reorganization within the meaning of Section 368 of the Internal Revenue Code of 1986, as amended (the "Code"), and to cause the Merger to qualify as a reorganization under the provisions of Sections 368 of the Code, so that such exchange will constitute a tax-free share exchange under the Code.

**NOW, THEREFORE**, in consideration of the mutual covenants and premises contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, the parties hereto, intending to be legally bound, agree as follows:

### ARTICLE 1

#### THE MERGER

1.1. THE MERGER. At the Effective Time (as defined in Section 1.2) and subject to and upon the terms and conditions of this Agreement Merging Company will, upon the filing of the Certificate of Merger contemplated by the General Corporation Law of the State of Florida (the

"Effective Date"), merge with and into Company, and thereafter the separate existence of Merging Company will cease. Merging Company will be dissolved and merge into Company. As of the Effective Date, Company shall succeed to all of the rights, privileges, powers and property, including, without limitation, all rights, privileges, franchises, patents, trademarks, licenses, registrations, bank accounts, contracts, patents, copyrights and other assets of every kind and description of Merging Company, and Company shall assume all of the obligations and liabilities of Merging Company, excepting and excluding, (i) the minute books and stock records of Merging Company insofar as they relate solely to its organization and capitalization, and (ii) the rights of Merging Company arising out of this Agreement. The Merger will occur in accordance with the General Corporation Law of the State of Florida. Merging Company as the surviving corporation after the Merger is hereinafter sometimes referred to as the "Surviving Corporation."

1.2. PENDING AND SUBSEQUENT ACTIONS. Merging Company will cooperate, and will cause its officers, directors and other employees to cooperate, with Company on and after the Effective Date (i) in effecting the collection receivables (if any) and other items owing to Merging Company and (ii) furnishing financial information for the subsequent two years in Securities and Exchange Commission ("SEC") qualified audited financial format and other assistance in connection with all actions, proceedings, arrangements or valuations based upon contracts, arrangements or acts of Merging Company which were in effect or which occurred on or prior to the Merger.

1.3. CLOSING; EFFECTIVE TIME. The closing of the transactions contemplated hereby (the "Closing") shall take place as soon as practicable after the satisfaction or waiver of each of the conditions set forth in Article VI hereof or at such other time as the parties hereto agree (the "Closing Date"). The Closing shall take place at the offices of Company, or at such other location as the parties hereto agree. Simultaneously with or as soon as practicable following the Closing, the parties hereto shall cause the Merger to be consummated by filing the Certificate of Merger with the Secretary of State of the State of Florida, in accordance with the relevant provisions of Florida Law (the time of such filing being the "Effective Time").

1.4. EFFECT OF THE MERGER. At the Effective Time, the effect of the Merger shall be as provided in this Agreement, the Certificate of Merger and the applicable provisions of Florida Law. Without limiting the generality of the foregoing, and subject thereto, at the Effective Time, all the property, rights, privileges, powers and franchises of Company and Merging Company shall vest in the Surviving Corporation, and all debts, liabilities and duties of Company and Merging Company shall become the debts, liabilities and duties of the Surviving Corporation.

1.5. CERTIFICATE OF INCORPORATION; BYLAWS.

1.5.1. At the Effective Time, the Certificate of Incorporation of Company shall be the Certificate of Incorporation of the Surviving Corporation until thereafter amended as provided by Florida Law and such Certificate of Incorporation.

1.5.2. The Bylaws of Merging Company, as in effect immediately prior to the Effective Time, shall be the Bylaws of the Surviving Corporation until thereafter amended.

1.6. DIRECTORS AND OFFICERS. At the Effective Time, the directors of the Surviving Corporation shall remain as directors of the Surviving Corporation, in each case until their successors are elected or appointed and qualified or until their earlier resignation or removal. The officers of the Surviving Corporation shall remain as officers of the Surviving Corporation, until their respective successors are duly elected or appointed and qualified or until their earlier resignation or removal.

1.7. EFFECT ON CAPITAL STOCK. By virtue of the Merger and without any action on the part of Merging Company, Company or the holders of any of the following securities:

1.7.1. CONVERSION OF COMPANY COMMON STOCK. At the Effective Time, each of the 1,000 shares of Merging Company Common Stock issued and outstanding immediately prior to the Effective Time will be canceled and extinguished and be converted automatically into the right to receive 96,000 share of Company Common Stock for each of the 1,000 shares of Company Common Stock (the "Exchange Ratio"), subject to any adjustments made pursuant to Section 1.7.5 (the "Merger Consideration"). Each certificate evidencing shares represented by the Merger Consideration issued pursuant to this Section 1.7.1 shall bear the following legend (in addition to any legend required under applicable state securities laws):

"THE SECURITIES EVIDENCED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), AND MAY NOT BE SOLD, TRANSFERRED, ASSIGNED OR HYPOTHECATED UNLESS THERE IS AN EFFECTIVE REGISTRATION STATEMENT UNDER SUCH ACT COVERING SUCH SECURITIES, THE SALE IS MADE IN ACCORDANCE WITH RULE 144 UNDER THE ACT, OR THE CORPORATION RECEIVES AN OPINION OF COUNSEL FOR THE HOLDER OF THESE SECURITIES REASONABLY SATISFACTORY TO THE CORPORATION STATING THAT SUCH SALE, TRANSFER, ASSIGNMENT OR HYPOTHECATION IS EXEMPT FROM REGISTRATION AND PROSPECTUS DELIVERY REQUIREMENTS OF SUCH ACT."

1.7.2. CANCELLATION OF COMPANY COMMON STOCK. At the Effective Time, all shares of Company Common Stock that are owned by Company as treasury stock immediately prior to the Effective Time shall be canceled and extinguished without any conversion thereof.

1.7.3. COMPANY STOCK OPTIONS, WARRANTS TO PURCHASE COMPANY COMMON STOCK AND CONVERTIBLE NOTES. At the Effective Time, there shall be no options to purchase Company Common Stock outstanding, there shall be no warrants

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outstanding, there shall be no promissory notes convertible into shares of Company Common Stock outstanding, and there shall be no securities convertible into shares of Company Common Stock outstanding.

1.7.4. CAPITAL STOCK OF MERGING COMPANY. At the Effective Time, each share of common stock, \$0.00 par value, of Merging Company ("Merging Company Common Stock") issued and outstanding immediately prior to the Effective Time shall be converted into and exchanged for 96,000 validly issued, fully paid and nonassessable share of common stock of the Surviving Corporation. Each stock certificate of Merging Company evidencing ownership of any such shares shall continue to evidence ownership of such shares of capital stock of the Surviving Corporation.

1.7.5. ADJUSTMENTS TO EXCHANGE RATIO. The Exchange Ratio shall be adjusted to reflect fully the effect of any stock split, reverse split, stock dividend (including any dividend or distribution of securities convertible into Company Common Stock, reorganization, recapitalization or other like change with respect to Company Common Stock occurring after the date hereof and prior to the Effective Time, so as to provide holders of Company Common Stock the same economic effect as contemplated by this Agreement prior to such stock split, reverse split, stock dividend, reorganization, recapitalization or like change; except for the stock split and debt elimination of Company as contemplated by this Agreement.

1.7.6. NO FRACTIONAL SHARES. No fractional shares of Company Common Stock shall be issued in connection with the Merger, and no certificates or scrip for any such fractional shares shall be issued. Any holder of Merging Company Common Stock who would otherwise be entitled to receive a fraction of a share of Company Common Stock (after aggregating all fractional shares of Company Common Stock issuable to such holder) shall, in lieu of such fraction of a share, be rounded up to the nearest whole number of shares of Company Common Stock.

1.8. SURRENDER OF CERTIFICATES.

1.8.1. EXCHANGE AGENT. Company's transfer agent shall act as exchange agent (the "Exchange Agent") in the Merger.

1.8.2. COMPANY TO PROVIDE COMMON STOCK. Promptly after the Effective Time, Company shall make available to the Exchange Agent for exchange in accordance with this Article I, through such reasonable procedures as Company may adopt, certificates representing the shares of Company Common Stock issuable pursuant to Section 1.7.1 in exchange for shares of Company Common Stock outstanding immediately prior to the Effective Time (provided that delivery of any shares that are subject to vesting and/or repurchase rights or other restrictions shall be in book entry form until such vesting and/or repurchase rights or other restrictions lapse).

1.8.3. EXCHANGE PROCEDURES. Promptly after the Effective Time,

Company shall cause the Exchange Agent to mail to each holder of record of a certificate or certificates (the "Certificates") which immediately prior to the Effective Time represented outstanding shares of Merging Company Common Stock, whose shares were converted into the right to receive shares of Company Common Stock pursuant to Section 1.7, (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Certificates shall pass, only upon receipt of the Certificates by the Exchange Agent, and shall be in such form and have such other provisions as Parent may reasonably specify) and (ii) instructions for use in effecting the surrender of the Certificates in exchange for certificates (or book entries in the case of shares that are subject to vesting and/or repurchase rights or other restrictions) representing shares of Company Common Stock. Upon surrender of a Certificate for cancellation to the Exchange Agent or to such other agent or agents as may be appointed by Company, together with such letter of transmittal, duly completed and validly executed in accordance with the instructions thereto, the holder of such Certificate shall be entitled to receive in exchange therefor a certificate (or book entry in the case of shares that are subject to vesting and/or repurchase rights or other restrictions) representing the number of whole shares of Company Common Stock which such holder has the right to receive pursuant to Section 1.7, and the Certificate so surrendered shall forthwith be canceled. Until so surrendered, each outstanding Certificate that, prior to the Effective Time, represented shares of Merging Company Common Stock will be deemed from and after the Effective Time, for all corporate purposes, other than the payment of dividends, to evidence the ownership of the number of full shares of Company Common Stock into which such shares of Merging Company Common Stock shall have been so converted.

#### 1.8.4. DISTRIBUTIONS WITH RESPECT TO UNEXCHANGED SHARES.

No dividends or other distributions with respect to Company Common Stock with a record date after the Effective Time will be paid to the holder of any unsurrendered Certificate with respect to the shares of Company Common Stock represented thereby until the holder of record of such Certificate shall surrender such Certificate. Subject to applicable law, following surrender of any such Certificate, there shall be paid to the record holder of the certificates representing whole shares of Company Common Stock issued in exchange therefor, without interest, at the time of such surrender, the amount of any such dividends or other distributions with a record date after the Effective Time theretofore payable (but for the provisions of this Section 1.8.4) with respect to such shares of Company Common Stock.

1.8.5. TRANSFERS OF OWNERSHIP. If any certificate for shares of Company Common Stock is to be issued in a name other than that in which the Certificate surrendered in exchange therefor is registered, it will be a condition of the issuance thereof that the Certificate so surrendered will be properly endorsed and otherwise in proper form for transfer and that the person requesting such exchange will have paid to Company or any agent designated by it any transfer or other taxes required by reason of the issuance of a certificate for shares of Company Common Stock in any name other than that of the registered holder of the Certificate surrendered, or established to the satisfaction of Company or any agent designated by it that such tax has been paid or is not payable.

1.8.6. NO LIABILITY. Notwithstanding anything to the contrary in this Section 1.8, none of the Exchange Agent, the Surviving Corporation, Company or any party hereto shall be liable to any person for any amount properly paid to a public official pursuant to any applicable abandoned property, escheat or similar law. "Person" herein shall mean any individual, corporation, limited liability company, partnership, firm, joint venture, association, joint-stock company, trust, unincorporated organization, or other organization, whether or not a legal entity, and any Governmental Authority.

1.9. NO FURTHER OWNERSHIP RIGHTS IN COMPANY COMMON STOCK. All shares of Company Common Stock issued upon the surrender for exchange of shares of Merging Company Common Stock in accordance with the terms hereof shall be deemed to have been issued in full satisfaction of all rights pertaining to such shares of Merging Company Common Stock, and there shall be no further registration of transfers on the records of the Surviving Corporation of shares of Merging Company Common Stock which were outstanding immediately prior to the Effective Time. If, after the Effective Time, Certificates are presented to the Surviving Corporation for any reason, they shall be canceled and exchanged as provided in this Article I.

1.10. LOST, STOLEN OR DESTROYED CERTIFICATES. In the event any Certificates shall have been lost, stolen or destroyed, the Exchange Agent shall issue in exchange for such lost, stolen or destroyed Certificates, upon the making of an affidavit of that fact by the holder thereof, such shares of Company Common Stock as may be required pursuant to Section 1.7; provided, however, that Company may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost, stolen or destroyed Certificates to deliver a bond in such sum as it may reasonably direct as indemnity against any claim that may be made against Company, the Surviving Corporation or the Exchange Agent with respect to the Certificates alleged to have been lost, stolen or destroyed.

1.11. TAX CONSEQUENCES. It is intended by the parties hereto that the Merger shall constitute a reorganization within the meaning of Section 368 of the Code.

1.12. WITHHOLDING RIGHTS. Company and the Surviving Corporation shall be entitled to deduct and withhold from the number of shares of Company Common Stock otherwise deliverable under this Agreement, such amounts as Company and the Surviving Corporation are required, and Merging Company acknowledges and agrees are required, to deduct and withhold with respect to such delivery and payment under the Code or any provisions of state, local, provincial or foreign tax law. To the extent that amounts are so withheld, such withheld amounts shall be treated for all purposes of this Agreement as having been delivered and paid to the holder of shares of Merging Company Common Stock in respect of which such deduction and withholding was made by Company and the Surviving Corporation.

1.13. TERMINATION OF EXCHANGE AGENT FUNDING. Any certificates for shares of Company Common Stock held by the Exchange Agent which have not been delivered to holders of Certificates pursuant to this Article I within six months after the Effective Time



shall promptly be delivered to Company, and thereafter holders of Certificates who have not theretofore complied with the exchange procedures set forth in and contemplated by Section 1.7 shall thereafter look only to Company (subject to abandoned property, escheat and similar laws) for their claim for shares of Company Common Stock and any dividends or distributions (with a record date after the Effective Time) with respect to Company Common Stock to which they are entitled.

1.14. TAKING OF NECESSARY ACTION; FURTHER ACTION. If, at any time after the Effective Time, any further action is necessary or desirable to carry out the purposes of this Agreement and to vest the Surviving Corporation with full right, title and possession to all assets, property, rights, privileges, powers and franchises of Company and Merging Company, the officers and directors of Company and Merging Company are fully authorized in the name of their respective corporations or otherwise to take, and will take, all such lawful and necessary action, so long as such action is not inconsistent with this Agreement.

1.15. APPRAISAL RIGHTS. Notwithstanding anything in this Agreement to the contrary, Merging Company Common Stock that are issued and outstanding immediately prior to the Effective Time and which are held by stockholders who did not vote in favor of the Merger (the "Dissenting Shares"), which stockholders comply with all of the relevant provisions of Florida Law (the "Dissenting Stockholders"), shall not be converted into or be exchangeable for the right to receive the Merger Consideration, unless and until such holders shall have failed to perfect or shall have effectively withdrawn or lost their rights to appraisal under Florida Law. If any Dissenting Shareholder shall have failed to perfect or shall have effectively withdrawn or lost such right, such holder's Merging Company Common Stock shall thereupon be converted into and become exchangeable for the right to receive, as of the Effective Time, the Merger Consideration without any interest thereon. The Merging Company shall give Company (a) prompt notice of any written demands for appraisal of any Merging Company Common Stock, attempted withdrawals of such demands and any other instruments served pursuant to Florida Law and received by the Merging Company relating to stockholders' rights of appraisal, and (b) the opportunity to direct, in its reasonable business judgment, all negotiations and proceedings with respect to demands for appraisal under Florida Law. Neither the Merging Company nor the Surviving Corporation shall, except with the prior written consent of Company, voluntarily make any payment with respect to, or settle or offer to settle, any such demand for payment. If any Dissenting Shareholder shall fail to perfect or shall have effectively withdrawn or lost the right to dissent, the Merging Company Common Stock held by such Dissenting Shareholder shall thereupon be treated as though such Merging Company Common Stock had been converted into the right to receive the Merger Consideration pursuant to Section 1.7.1.

## **ARTICLE II REPRESENTATIONS AND WARRANTIES OF MERGING COMPANY**

In this Agreement, any reference to any event, change, condition or effect being "material" with respect to any person means any material event, change, condition or effect related to the condition (financial or otherwise), properties, assets (including intangible assets), liabilities,

business, operations or results of operations of such person and its subsidiaries, taken as a whole. In this Agreement, any reference to a "Material Adverse Effect" with respect to any person means any event, change or effect that is materially adverse to the condition (financial or otherwise), properties, assets, liabilities, business, operations or results of operations of such person and its subsidiaries, taken as a whole.

In this Agreement, any reference to a party's "Knowledge" means such party's actual knowledge after reasonable inquiry of executive officers and directors (within the meaning of Rule 405 under the Securities Act of 1933, as amended ("Securities Act")).

Except as disclosed in that section of the document of even date herewith delivered by Merging Company to Company prior to the execution and delivery of this Agreement corresponding to the Section of this Agreement to which any of the following representations and warranties specifically relate or if it is reasonably apparent from the nature of the disclosure that it is applicable to another Section of this Agreement, Merging Company represents and warrants to Company as follows:

2.1 ORGANIZATION, STANDING AND POWER. The Merging Company is a corporation duly organized, validly existing and in good standing in the state of Florida, and no certificate of dissolution has been filed under the laws of its jurisdiction of organization. The Merging Company has no subsidiaries. The Company has the power to own its properties and to carry on its business as now being conducted and as presently proposed to be conducted and is duly authorized and qualified to do business and is in good standing in each jurisdiction in which the failure to be so qualified and in good standing would have a Material Adverse Effect on Merging Company. Merging Company has delivered or made available to Company a true and correct copy of the Certificate of Incorporation (the "Merging Company Certificate of Incorporation"), and the Bylaws, or other charter documents, as applicable, of the merging Company each as amended to date. The Merging Company is not in violation of any of the provisions of its charter or bylaws or equivalent organization documents. The Merging Company has delivered to Company correct and complete copies of the minute books (containing the records of meetings of the Stockholders, the board of directors and committees of the board of directors). Such minute books accurately reflect in all material respects the matters referenced therein. The Merging Company has also delivered to Company correct and complete copies of the stock certificate books and the stock record books of the Merging Company and such books and records accurately reflect the matters referenced therein. The Merging Company has no subsidiaries and never had any subsidiaries.

2.2 CAPITAL STRUCTURE. The authorized capital stock of Merging Company consists of 1,000 shares of common stock, \$0.00 par value of which there were issued and outstanding as of the close of business on June 30, 2007, 1,000 shares of common stock and no additional shares of common stock have been issued through the date of this Agreement. All outstanding shares of Merging Company Common Stock are duly authorized, validly issued, fully paid and non-assessable and are free of any liens or encumbrances other than any liens or encumbrances created by or imposed upon the holders thereof, and are not subject to preemptive

rights or rights of first refusal created by statute, the Merging Company Certificate of Incorporation or Bylaws of Merging Company or any agreement to which Merging Company is a party or by which it is bound. Except as set forth on Schedule 2.2, there are no outstanding subscriptions, options, warrants, rights (including phantom stock or stock appreciation rights), preemptive rights or other contracts, commitments, understandings or arrangements, including any right of conversion or exchange under any outstanding security, instrument or agreement (collectively, referred to as "Merging Company Options"), obligating the Merging Company to issue or sell any shares of capital stock of the Merging Company or to grant, extend or enter into any security, instrument or agreement with respect thereto. Schedule 2.2 sets forth (i) each plan, arrangement or agreement pursuant to which Merging Company Options may be granted or under which Merging Company Options have been granted and are outstanding, (ii) in the aggregate by plan, arrangement or agreement, the number and type of Merging Company Options outstanding, their grant price, the date of grant and the number of shares of Merging Company Common Stock reserved for issuance pursuant to the plan, arrangement or agreement, and (iii) the name of each holder of a Merging Company Option, a description of the exercise or purchase prices, vesting schedules, expiration dates and number of shares of Common Stock subject to such Merging Company Option. Immediately after the Closing, no options, warrants, convertible securities or rights will be exercisable or exchangeable for, convertible into, or otherwise give its holder any right to acquire shares of capital stock of the Merging Company. All Merging Company Options are duly authorized and validly issued. Except as disclosed on Schedule 2.2, there are no voting trusts, proxies or other similar commitments, understandings, restrictions or arrangements in favor of any other person other than the Merging Company. No bonds, debentures, notes or other indebtedness having the right to vote on any matter on which stockholders of the Merging Company may vote are issued or outstanding.

2.3 AUTHORITY. Merging Company has all requisite corporate power and authority to enter into this Agreement and to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate action on the part of Merging Company, subject only to the adoption of this Agreement by Merging Company's stockholders holding a majority of the outstanding shares of Merging Company Common Stock. This Agreement has been duly executed and delivered by Merging Company and constitutes the valid and binding obligation of Merging Company enforceable against Merging Company in accordance with its terms, except as enforceability may be limited by bankruptcy and other laws affecting the rights and remedies of creditors generally and general principles of equity. The execution and delivery of this Agreement by Merging Company does not, and the consummation of the transactions contemplated hereby will not, conflict with, or result in any violation of, or default under (with or without notice or lapse of time, or both), or give rise to a right of termination, cancellation or acceleration of any obligation or loss of any benefit under (i) any provisions of the Merging Company Certificate of Incorporation or Bylaws of Merging Company, as amended, or (ii) any mortgage, indenture, lease, contract or other agreement or instrument, permit, concession, franchise, license, judgment, order, decree, statute, law, ordinance, rule or regulation applicable to the Merging Company or any of its properties or assets. No consent, approval, order or authorization of, or registration, declaration or filing with,

any court, administrative agency or commission or other governmental authority or instrumentality ("Governmental Entity") is required by or with respect to Merging Company in connection with the execution and delivery of this Agreement by Merging Company or the consummation by Merging Company of the transactions contemplated hereby, except for (i) the filing of the Certificate of Merger as provided herein.

2.4 FINANCIAL STATEMENTS. Attached hereto as Schedule 2.4 are balance sheets for the Merging Company as of December 31, 2004, December 31, 2005, December 31, 2006 and March 31, 2007, and related statements of operations, and cash flows for the periods including United States Federal Income Tax Returns for the years 1993 through 2006 (the "Merging Company Financial Statements"). The Merging Company Financial Statements have been prepared from, and are in accordance with, the books and records of the Merging Company. The Merging Company Financial Statements have been prepared in accordance with United States generally accepted accounting principles ("GAAP") applied on a basis consistent throughout the periods indicated and consistent with each other and fairly present the consolidated financial condition and operating results of Merging Company at the dates and during the periods indicated therein (subject, in the case of unaudited statements, to normal, recurring year-end adjustments).

2.5 ABSENCE OF CERTAIN CHANGES. The Merging Company has no liabilities or obligations (whether known or unknown, absolute, accrued, contingent or otherwise and whether due or to become due) other than those liabilities and obligations (a) set forth or adequately provided for in the March 31, 2007 balance sheet included in the Financial Statements, (b) not required by GAAP to be set forth in the March 31, 2007 balance sheet or disclosed in the notes thereto, (c) incurred since March 31, 2007 in the ordinary course of business and (d) those incurred in connection with the execution of this Agreement..

2.6 ACCOUNTING PRACTICES. The Merging Company makes and keeps accurate books and records reflecting its assets and maintains internal accounting controls that provide reasonable assurance that (i) transactions are executed with management's authorization, (ii) transactions are recorded as necessary to permit preparation of the Merging Company financial statements and to maintain accountability for the assets of the Merging Company and (iii) the reported accountability of the assets of the Merging Company other than furniture, equipment and fixtures is compared with existing assets at reasonable intervals.

2.7 RECEIVABLES. Attached hereto as Schedule 2.7, are a true and correct list of all of the Merging Company's accounts receivables as of March 31, 2007.

2.8 PAYABLES. Attached hereto as Schedule 2.8 is a true and correct list of all accounts payable of the Merging Company as of March 31, 2007 in excess of \$10,000 to any one payee. Except as set forth on Schedule 2.8, as of March 31, 2007, no account payable of the Merging Company that has arisen subsequent to March 31, 2007 has exceeded \$10,000.

2.9 SUPPLIERS. Attached hereto as Schedule 2.9 are (a) the names of all suppliers

from which the Merging Company orders, supplies, merchandise and other goods and services with an aggregate purchase price for each such supplier of \$50,000 or more during the year ended December 31, 2006, and (b) the amount for which each such supplier invoiced the Merging Company during such period. The Merging Company has not received any notice to the effect that any such supplier will not sell supplies, merchandise and other goods to the Merging Company at any time after the Closing on terms and conditions similar to those used in its current sales to the Merging Company. To the Merging Company's Knowledge, except as set forth on Schedule 2.9, neither the Merging Company, nor any officer or director of the Merging Company possesses, directly or indirectly, any financial interest in, or is a director, officer or employee of, any entity which is a client, supplier, customer, lessor, lessee or competitor or potential competitor of the Merging Company except for an interest of less than five percent in a publicly held company.

2.10 INVENTORY. All inventory of the Merging Company reflected on the March 31, 2007 balance sheets consisted, and all such inventory acquired since March 31, 2007 consists, of a quality and quantity usable and salable in the ordinary course of business, subject to normal and customary allowances in the industry for damage and outdated items. Except as disclosed in the notes to the Financial Statements and on Schedule 2.10, all items included in the inventory of the Merging Company are the property of the Merging Company, free and clear of any Lien, have not been pledged as collateral, are not held by the Merging Company on consignment from others and conform in all material respects to all standards applicable to such inventory or its use or sale imposed by Governmental Authorities.

## 2.11 INTELLECTUAL PROPERTY.

2.11.1 Schedule 2.11 contains a complete and accurate list and description of:

2.11.1(a) all United States and foreign patents and patent applications and patent disclosures, all United States and foreign copyright registrations and applications, all material computer software (excluding "shrink-wrap" or licenses for common business and office applications, such as word processors and spreadsheets, having a cost of less than \$1,000), all United States, state and foreign trademarks, service marks and trade names for which registrations have been issued or applied for, all other United States, state and foreign trademarks, service marks and trade names, and all Internet domain names owned by or under obligation of assignment to the Merging Company or in which the Merging Company holds any right, license or interest, showing in each case the registered or other owner, expiration date and number, if any;

2.11.1(b) all agreements and licenses (excluding "shrink-wrap" or similar licenses for computer software) relating or pertaining to any Intellectual Property to which the Merging Company is a party, showing in each case the parties thereto. All such agreements and licenses are valid and subsisting and the Merging Company is not in breach of any material provisions of any such agreements or licenses;

2.11.1(c) all licenses or agreements pertaining to mailing lists, know-how, trade secrets, inventions, disclosures or uses of ideas to which the Merging Company is a party, showing in each case the parties thereto;

2.11.1(d) all registered assumed or fictitious names under which the Merging Company is currently conducting business; and

2.11.1(e) all maintenance, support, training, consulting, outsourcing, facilities management and other contracts and agreements relating to computer hardware, software or services and that involve expenditures in excess of \$25,000.

2.11.2 To the Company's knowledge, there is no unauthorized use, disclosure, infringement or misappropriation of any Merging Company Intellectual Property rights, or any Intellectual Property right of any third party to the extent licensed to the Merging Company, by any third party, including any employee or former employee of Merging Company. The Merging Company has not entered into any agreement to indemnify any other person against any charge of infringement of any Intellectual Property, other than indemnification provisions contained in purchase orders, license agreements and distribution and other customer agreements, copies of which have been provided or made available to Parent.

2.11.3 The Merging Company is not, nor will it 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 Merging Company Intellectual Property or Third Party Intellectual Property Rights.

2.11.4 To the Merging Company's knowledge, all patents, trademarks, service marks and copyrights held by Merging Company are valid and subsisting. Merging Company (i) has not been sued in any suit, action or proceeding (or received any notice or, to Merging Company's knowledge, threat) which involves a claim of infringement of any patents, trademarks, service marks, copyrights or violation of any trade secret or other proprietary right of any third party and (ii) has not brought any action, suit or proceeding for infringement of Merging Company Intellectual Property or breach of any license or agreement involving Merging Company Intellectual Property against any third party. To Merging Company's knowledge, the manufacture, use, marketing, licensing or sale of Merging Company's products does not infringe any patent, trademark, service mark, copyright, trade secret or other proprietary right of any third party.

2.11.5 The Merging Company has secured valid written assignments from all consultants and employees who contributed to the creation or development of Merging Company Intellectual Property of the rights to such contributions that Merging Company does not already own by operation of law.

2.11.6 The Merging Company has taken all reasonably necessary steps to protect and preserve the confidentiality of all Merging Company Intellectual Property not

otherwise protected by patents or copyright ("Confidential Information"). All uses, disclosure or appropriation of Confidential Information owned by Merging Company by or to a third party has been pursuant to the terms of a written agreement between Merging Company and such third party. All use, disclosure or appropriation of Confidential Information not owned by Merging Company has been pursuant to the terms of a written agreement between Merging Company and the owner of such Confidential Information, or is otherwise lawful.

2.11.7 There are no actions that must be taken by Merging Company within sixty (60) days of the Closing Date that, if not taken, will result in the loss of any Merging Company Intellectual Property, including the payment of any registration, maintenance or renewal fees or the filing of any responses to the U.S. Patent and Trademark Office actions, documents, applications or certificates for the purposes of obtaining, maintaining, perfecting or preserving or renewing any Merging Company Intellectual Property.

2.11.8 The Merging Company has not received any formal written opinion of counsel stating that: (i) there is or has been any unauthorized use, disclosure, infringement, or misappropriation of any Merging Company Intellectual Property; (ii) any of the Merging Company Intellectual Property is invalid or unenforceable; or (iii) Merging Company has engaged in unauthorized use, disclosure, infringement or misappropriation of any third party intellectual property.

2.12 LITIGATION. There is no private or governmental action, suit, proceeding, claim, arbitration, audit or investigation pending before any agency, court or tribunal, foreign or domestic, or, to the knowledge of Merging Company, threatened against Merging Company or any of its respective properties or any of their respective officers or directors (in their capacities as such) that, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect on Merging Company. There is no injunction, judgment, decree, order or regulatory restriction imposed upon Company or any of their its assets or business, or, to the knowledge of Merging Company and any of its directors or officers (in their capacities as such), that would prevent, enjoin, alter or materially delay any of the transactions contemplated by this Agreement, or that could reasonably be expected to have a Material Adverse Effect on Merging Company. Schedule 2.12 lists all actions, suits, proceedings, claims, arbitrations, audits and investigations pending before any agency, court or tribunal that involve Merging Company.

2.13 RESTRICTIONS ON BUSINESS ACTIVITIES. There is no agreement, judgment, injunction, order or decree binding upon Merging Company which has or reasonably could be expected to have the effect of prohibiting or materially impairing any business practice of Merging Company, any acquisition of property by Merging Company or the conduct of business by Merging Company.

2.14 GOVERNMENTAL AUTHORIZATION. The Merging Company has obtained each federal, state, county, local or foreign governmental consent, license, permit, grant, or other authorization of a Governmental Entity (i) pursuant to which Merging Company currently operates or holds any interest in any of its properties or (ii) that is required for the operation of

Merging Company's business or the holding of any such interest ((i) and (ii) herein collectively called "Merging Company Authorizations"), and all of such Merging Company Authorizations are in full force and effect, except where the failure to obtain or have any of such Company Authorizations or where the failure of such Merging Company Authorizations to be in full force and effect would not reasonably be expected to have a Material Adverse Effect on Merging Company.

2.15 TITLE TO PROPERTY. The Merging Company has good and valid title to all of its properties, interests in properties and assets, real and personal, reflected in the Merging Company Balance Sheet or acquired after the Merging Company Balance Sheet Date (except properties, interests in properties and assets sold or otherwise disposed of since the Merging Company Balance Sheet Date in the ordinary course of business), or in the case of leased properties and assets, valid leasehold interests in, free and clear of all mortgages, liens, pledges, charges or encumbrances of any kind or character, except (i) the lien of current taxes not yet due and payable, (ii) such imperfections of title, liens and easements as do not and will not materially detract from or interfere with the use of the properties subject thereto or affected thereby, or otherwise materially impair business operations involving such properties, (iii) liens securing debt which is reflected on the Merging Company Balance Sheet, and (iv) liens that in the aggregate would not have a Material Adverse Effect on Merging Company. The property and equipment of the Merging Company that are used in the operations of its businesses are in good operating condition and repair, except where the failure to be in good operating condition or repair would not have a Material Adverse Effect. All properties used in the operations of Merging Company are reflected in the Merging Company Balance Sheet to the extent generally accepted accounting principles require the same to be reflected. Schedule 2.15 identifies each parcel of real property owned or leased by Merging Company.

2.16 PRIVACY POLICIES; THIRD PARTY PRIVACY OBLIGATIONS; WEB SITE TERMS AND CONDITIONS.

2.16.1 For purposes of this Section 2.16:

(i) "Merging Company Sites" means the Merging Company's public sites on the World Wide Web;

(ii) "Privacy Statements" means, collectively, any and all of Merging Company's privacy policies published on the Merging Company Sites or otherwise made available by the Merging Company regarding the collection, retention, use and distribution of the personal information of individuals, including, without limitation, from visitors of any of the Merging Company Sites ("Individuals"); and

(iii) "Terms and Conditions" means any and all of the visitor terms and conditions published on the Merging Company Sites governing Individuals' use of or access to the Merging Company Sites.



2.16.2 A Privacy Statement is posted and is accessible to Individuals at all times on each Merging Company Site. Company maintains a hypertext link to a Privacy Statement from the homepage of the Merging Company Site, and Merging Company uses commercially reasonable efforts to include a hypertext link to a Privacy Statement from every page of the Merging Company Sites on which personal information is collected from Individuals.

2.16.3. The Privacy Statements are clearly written and include, at a minimum, accurate notice to Individuals about Merging Company's collection, retention, use and disclosure policies and practices with respect to Individuals' personal information. The Privacy Statements are accurate and consistent with the Terms and Conditions and Merging Company's actual practices with respect to the collection, retention, use and disclosure of Individuals' personal information.

2.16.4 Merging Company (i) complies with the Privacy Statements as applicable to any given set of personal information collected by Merging Company from Individuals; (ii) to Merging Company's knowledge complies with all applicable privacy laws and regulations regarding the collection, retention, use and disclosure of personal information; and (iii) takes appropriate measures to protect and maintain the confidential nature of the personal information provided to the Merging Company by Individuals. The Merging Company has adequate technological and procedural measures in place to protect personal information collected from Individuals against loss, theft and unauthorized access or disclosure. The Merging Company does not sell, rent or otherwise make available to third parties any personal information submitted by Individuals.

2.16.5 The Merging Company's collection, retention, use and distribution of all personal information collected by Merging Company from Individuals is governed by the Privacy Statement pursuant to which the data was collected. Other than as constrained by the Privacy Statements and by applicable laws and regulations, the Merging Company is not restricted in its use and/or distribution of personal information collected by Merging Company.

2.16.6 The Merging Company has the full power and authority to transfer all rights that Merging Company has in all Individuals' personal information in their possession and/or control to Company, to the extent permitted by applicable law. The Merging Company is not a party to any contract, or is subject to any other obligation that, following the date of this Agreement, would prevent Company and/or its affiliates from using the information governed by the Privacy Statements in a manner consistent with applicable privacy laws and industry standards regarding the disclosure and use of information. No claims or controversies have arisen regarding the Privacy Statements or the implementation thereof or of any of the foregoing.

2.16.7 The Merging Company has complied in all material respects with and, to Merging Company's Knowledge, is not in violation of any applicable privacy obligations under any legal requirements or under any contract to which the Merging Company is a party or by which their properties are bound ("Third Party Privacy Obligations"). Neither the execution, delivery nor performance of this Agreement nor the consummation of the Merger will violate,

contravene or conflict with the Third Party Privacy Obligations. No claims or controversies have arisen regarding the Third Party Privacy Obligations or of the implementation thereof or of any of the foregoing.

## 2.17 ENVIRONMENTAL MATTERS.

2.17.1 The following terms shall be defined as follows:

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

(ii) "Merging Company Facilities" shall mean all buildings and improvements on the Merging Company Property.

(iii) "Governmental Entity" shall mean any federal, state, local or foreign court or governmental agency, authority, instrumentality or regulatory body.

(iv) "Hazardous Materials" shall mean any man-made or naturally occurring substance, material product, by-product, waste, emission, residual or odor that is described as a toxic or hazardous substance, waste, material, pollutant, contaminant, infectious waste, designated waste or words of similar import, in any of the Environmental and Safety Laws, or any other words which are intended to define, list or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, or reproductive toxicity and includes, without limitation, asbestos, asbestos-containing materials, lead-based paint, petroleum (including crude oil or any fraction thereof, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel, or any mixture thereof), petroleum products, waste oil, polychlorinated biphenyls, urea formaldehyde, radon gas, radioactive matter, medical waste, otherwise regulated or listed materials and chemicals which may cause cancer or reproductive toxicity.

(v) "Legal Rules" shall mean codes, statutes, ordinances, orders, judgments, decrees, injunctions, determinations, approvals, rules, regulations, permits, licenses and authorizations of all Governmental Entities with jurisdiction.

(vi) "Merging Company Property" shall mean all real property leased or owned by the Merging Company either currently or in the past.

2.17.2 To Merging Company's knowledge, except in all cases as, in the aggregate, would not have a vii) except in material compliance with all Legal Rules and except for possible small operational releases, no Hazardous Materials have been released in, on, or

about the Merging Company Property or any other location; (viii) the Merging Company has not received any written notice that a lien in favor of any Governmental Entity for (A) any liability under any Environmental and Safety Laws or (B) damages arising from or costs incurred in responses to a release of any Hazardous Materials into the environment has been filed against Merging Company's interest in the Merging Company Property; and (ix) the Merging Company has all the permits and licenses required to be issued under applicable Environmental and Safety Laws and are in full compliance with the terms and Material Adverse Effect on Merging Company, (i) the Merging Company Property and Merging Company Facilities, and the present and former activities of the Merging Company thereon, comply in all material respects with all applicable Environmental and Safety Laws; (ii) all Hazardous Materials and wastes have been disposed of in accordance with all Environmental and Safety Laws; (iii) the Merging Company has not received notice (oral or written) of any noncompliance of the Merging Company Facilities or its past or present operations with Environmental and Safety Laws; (iv) no notices, administrative actions or suits are pending or, to Merging Company's knowledge, threatened relating to a violation of any Environmental and Safety Laws; (v) to Merging Company's knowledge, the Merging Company is not potentially responsible party under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or state analog statute, arising out of events occurring prior to the Closing Date; (vi) the Merging Company has not have received any notice that it is the subject of any federal, state or local order, agreement or investigation concerning any use, release, discharge, storage, generation or disposal of any Hazardous Materials; (conditions of those permits and licenses.

## 2.18 TAXES.

2.18.1 For purposes of this Agreement, the following terms have the following meanings: "Tax" (and, with correlative meaning, "Taxes" and "Taxable") means (i) any net income, alternative or add-on minimum tax, gross income, gross receipts, sales, use, ad valorem, transfer, franchise, profits, license, withholding, payroll, employment, excise, severance, stamp, occupation, premium, property, environmental or windfall profit tax, custom, duty or other tax, governmental fee or other like assessment or charge of any kind whatsoever, together with any interest or any penalty, addition to tax or additional amount imposed by any Governmental Entity (a "Tax authority") responsible for the imposition of any such tax (domestic or foreign); (ii) any liability for the payment of any amounts of the type described in (i) as a result of being a member of an affiliated, consolidated, combined or unitary group for any Taxable period; and (iii) any liability for the payment of any amounts of the type described in (i) or (ii) as a result of being a transferee of or successor to any person or as a result of any express or implied obligation to indemnify any other person, including pursuant to any Tax sharing or Tax allocation agreement. "Tax Return" shall mean any return, statement, report or form (including, without limitation estimated Tax returns and reports, withholding Tax returns and reports and information reports and returns) required to be filed with respect to Taxes.

2.18.2 Except as set forth on Schedule 2.18.2:

2.18.2.1 The Merging Company has duly filed on a timely basis (taking into account any extensions of time for filing), has filed for an extension for, or has been included in, all Tax Returns, relating to all Taxes for which the Merging Company may be liable, required to be filed by or on behalf of the Merging Company, for any taxable period ending on or before the Closing Date. Each such Tax Return is true and correct in all material respects. The Merging Company has duly paid, or made adequate provisions (by a tax accrual or tax reserve) for all Taxes for which the Merging Company may be liable and other charges shown as due on such Tax Returns. The Merging Company has paid, or made adequate provisions for, all material Taxes for which the Merging Company may be liable which are required to be paid without the filing of any Tax Return;

2.18.2.2 Any Taxes for which the Merging Company may be liable incurred or accrued since the date of the most recent balance sheets of the Merging Company have arisen in the Ordinary Course of Business determined in the same manner as in the last taxable period ending on or before such date;

2.18.2.3 The Merging Company has duly paid in full or made adequate provisions for all Taxes claimed to be due by any taxing authority except such Taxes as are being contested in good faith, which amounts are set forth on Schedule 2.18.2. There are no liens for any Taxes, assessments or government charges or levies upon any property or assets of the Merging Company, nor are there any outstanding deficiencies or assessments or written proposals for assessment of any Taxes proposed, asserted or assessed against the Merging Company except such Taxes as are being contested in good faith, which amounts are set forth on Schedule 2.18.2. No actions, proceedings, or examinations are pending or, to the Merging Company's knowledge, threatened to be brought by any taxing authority for the determination, assessment or collection of any Taxes for which the Merging Company may be liable except such Taxes as are being contested in good faith, which amounts are set forth on Schedule 2.18.2. The Merging Company has not requested any extension of time within which to file or send any Tax Return which Tax Return has not since been filed, and the Merging Company is not bound by any election, consent, or agreement that extends or waives any applicable statute of limitation with respect to any taxable periods of the Merging Company. The information set forth in Schedule 2.18.2 indicates the date through which the taxable years relating to particular Tax Returns of the Merging Company are closed by applicable statutes of limitation or otherwise;

2.18.2.4 All liabilities for Taxes of the Merging Company for the current year through the Closing Date and all prior years, whether or not they have become due and payable, have been duly paid in full or adequate provisions therefore have been made by a tax accrual or tax reserve;

2.18.2.5 The Merging Company is not a party to any outstanding tax sharing or other allocation agreement with respect to any Taxes and has no liability relating to any tax sharing or other allocation agreement;

2.18.2.6 The Merging Company does not have and has never owned stock in a foreign corporation;

2.18.2.7 No election under section 341(f) of the Code has been made by the Merging Company. An election has been made to be treated as an S Corporation under section 1362(a) of the Code since inception of the Merging Company. No election under section 382(l)(5) is in effect for the Merging Company. The Merging Company has not agreed to, or been required to, make any section 481(a) adjustment because of a change of accounting. There are no closing agreements, irrevocable elections, or similar binding agreements or decisions of any court or other governmental authority which will restrict the choices of the Merging Company regarding the treatment of any item of income, deduction, credit, or allowance in taxable periods subsequent to the Closing Date, and the Merging Company has not elected to use LIFO for inventory purposes. The Merging Company has withheld all material Taxes required to have been withheld and has paid all Taxes withheld in connection with amounts paid or owing to any employee, creditor, independent contractor, or other third party. The Merging Company has not made any payments, is not obligated to make any payments, and is not a party to any agreement that under certain circumstances could obligate it to make any payments that will not be deductible under section 280G of the Code. The Merging Company has not been a United States real property holding corporation within the meaning of section 897(c)(2) of the Code during the applicable period specified in section 897(c)(1)(A)(ii) of the Code;

2.18.2.8 The Merging Company has never been (or has any liability or potential liability for unpaid Taxes because it once was) a member of an affiliated group (as defined in section 1504(a) of the Code) during any part of any consolidated return year; and

2.18.2.9 No claim has ever been made by an authority in a jurisdiction where the Merging Company does not file Tax Returns that it is or may be subject to taxation by that jurisdiction.

2.18.3 Schedule 2.18.3 sets forth the following information which, to the Merging Company's Knowledge, is true, complete and correct: (A) the amount of foreign income taxes (or taxes in lieu thereof) which are creditable for federal income tax purposes or for foreign income tax purposes; and (B) the yearly net operating losses, net capital losses, investment or other tax credits or excess charitable contributions allocable to the Merging Company which are available for carryover to subsequent years for federal income tax purposes and the extent to which such losses or credits are subject to limitation, or will be subject to limitation upon consummation of the transactions contemplated herein, under section 382 of the Code, section 383 of the Code or any other section thereunder, or are limited for foreign income tax purposes.

2.18.4 Schedule 2.18.4 sets forth, a true, complete and correct list of the assets held by the Merging Company and the adjusted tax bases as of the date indicated of such assets for federal tax purposes.

## 2.19 EMPLOYEE BENEFIT PLANS.

2.19.1 Schedule 2.19.1 lists, with respect to Merging Company and any trade or business (whether or not incorporated) which is treated as a single employer with Merging Company (an "ERISA Affiliate") within the meaning of Section 414(b), (c), (m) or (o) of the Code, (i) all employee benefit plans (as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") other than Foreign Plans (as defined below)); (ii) each loan to a non-officer employee in excess of \$50,000, loans to officers and directors and any stock option, stock purchase, phantom stock, stock appreciation right, supplemental retirement, severance, sabbatical, medical, dental, vision care, disability, employee relocation, cafeteria benefit (Code Section 125) or dependent care (Code Section 129), life insurance or accident insurance plans, programs or arrangements; (iii) all bonus, pension, profit sharing, savings, deferred compensation or incentive plans, programs or arrangements; (iv) other fringe or employee benefit plans, programs or arrangements; and (v) any current or former employment or executive compensation, change in control or severance agreements, written or otherwise, as to which unsatisfied obligations of Merging Company remain for the benefit of, or relating to, any present or former employee, consultant or director of Merging Company (together, the "Merging Company Employee Plans").

2.19.2 The Merging Company has furnished or made available to Parent a copy of each of the Merging Company Employee Plans and related plan documents (including trust documents, insurance policies or contracts, employee booklets, summary plan descriptions and other authorizing documents, and any material employee communications relating thereto) and has, with respect to each Merging Company Employee Plan which is subject to ERISA reporting requirements, provided copies of the Form 5500 reports filed for the last three plan years. Any Merging Company Employee Plan intended to be qualified under Section 401(a) of the Code has obtained from the Internal Revenue Service a favorable determination letter as to its qualified status under the Code. The Merging Company has also furnished Parent with the most recent Internal Revenue Service determination letter issued with respect to each such Merging Company Employee Plan, and nothing has occurred since the issuance of each such letter that would reasonably be expected to cause the loss of the tax-qualified status of any such Merging Company Employee Plan. The Merging Company has also furnished Parent with all registration statements and prospectuses prepared in connection with each Merging Company Employee Plan.

2.19.3 (i) None of the Merging Company Employee Plans promises or provides retiree medical or other retiree welfare benefits to any person, except as required by applicable law; (ii) there has been no "prohibited transaction," as such term is defined in Section 406 of ERISA and Section 4975 of the Code, with respect to any Merging Company Employee Plan; (iii) each Merging Company Employee Plan has been administered in accordance with its terms and in compliance with the requirements prescribed by any and all statutes, rules and regulations (including ERISA and the Code), except as would not have, in the aggregate, a Material Adverse Effect on Merging Company, ERISA Affiliate have performed in all material respects all obligations required to be performed by them under, are not in default in any material respect under or violation of, and have no knowledge of any material default or violation by any other party to, any of the Merging Company Employee Plans; (iv) neither Merging Company nor

ERISA Affiliate is subject to any material liability or material penalty under Sections 4976 through 4980 of the Code or Title I of ERISA with respect to any of the Merging Company Employee Plans; (v) all material contributions required to be made by Merging Company or ERISA Affiliate to any Merging Company Employee Plan have been made on or before their due dates and a reasonable amount has been accrued for contributions to each Merging Company Employee Plan for the current plan years; (vi) with respect to each Merging Company Employee Plan, no "reportable event" within the meaning of Section 4043 of ERISA (excluding any such event for which the thirty (30) day notice requirement has been waived under the regulations to Section 4043 of ERISA) nor any event described in Section 4062, 4063 or 4041 of ERISA has occurred; (vii) no Merging Company Employee Plan is covered by, and neither Merging Company nor any ERISA Affiliate has incurred or expects to incur any liability under Title IV of ERISA or Section 412 of the Code; and (viii) each Merging Company Employee Plan can be amended, terminated or otherwise discontinued after the Effective Time in accordance with its terms, without liability to Company greater than an aggregate of \$5,000 (other than for benefits accrued through the date of termination and ordinary administrative expenses typically incurred in a termination event). With respect to each Merging Company Employee Plan subject to ERISA as either an employee pension plan within the meaning of Section 3(2) of ERISA or an employee welfare benefit plan within the meaning of Section 3(1) of ERISA, Merging Company has prepared in good faith and timely filed all requisite governmental reports (which were true and correct as of the date filed) and has properly and timely filed and distributed or posted all notices and reports to employees required to be filed, distributed or posted with respect to each such Merging Company Employee Plan, except where the failure to do so would not have a Material Adverse Effect. No suit, administrative proceeding, action or other litigation has been brought, or to Merging Company's knowledge is threatened, against or with respect to any such Merging Company Employee Plan, including any audit or inquiry by the IRS or United States Department of Labor. No payment or benefit which will or may be made by the Merging Company to any employee will be characterized as an "excess parachute payment" within the meaning of Section 280G(b)(1) of the Code.

2.19.4 With respect to each Merging Company Employee Plan, the has complied except to the extent that such failure to comply would not, individually or in the aggregate, have a Material Adverse Effect on Merging Company, with (i) the applicable health care continuation and notice provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") and the regulations (including proposed regulations) thereunder, (ii) the applicable requirements of the Family Medical and Leave Act of 1993 and the regulations thereunder, and (iii) the applicable requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the regulations (including proposed regulations) thereunder. SCHEDULE 2.16(d) describes all obligations of the Merging Company as of the date of this Agreement under any of the provisions of COBRA and the Family and Medical Leave Act of 1993.

2.19.5 The consummation of the transactions contemplated by this Agreement will not (i) entitle any current or former employee or other service provider of Merging Company or any other ERISA Affiliate to severance benefits or any other payment, except as expressly provided in this Agreement, or (ii) accelerate the time of payment or vesting, or

increase the amount of compensation due any such employee or service provider under any Merging Company Employee Plan.

2.19.6 There has been no amendment to, written interpretation or announcement (whether or not written) by the Merging Company or other ERISA Affiliate relating to, or change in participation or coverage under, any Merging Company Employee Plan which would materially increase the expense of maintaining such Plan above the level of expense incurred with respect to that Plan for the most recent fiscal quarter included in Merging Company's financial statements.

2.19.7 The Merging Company does not currently maintain, sponsor, participate in or contribute to, nor has it ever maintained, established, sponsored, participated in, or contributed to, any pension plan (within the meaning of Section 3(2) of ERISA) that is subject to Part 3 of Subtitle B of Title I of ERISA, Title IV of ERISA or Section 412 of the Code.

2.19.8 Neither the Merging Company nor other ERISA Affiliate is a party to, or has made any contribution to or otherwise incurred any obligation under, any "multiemployer plan" as defined in Section 3(37) of ERISA.

2.19.9 SCHEDULE 2.1.8 identifies each employee of any of the Merging Company who is not fully available to perform work because of disability or other leave and sets forth the basis of such disability or leave and the anticipated date of return to full service.

2.20 CONTRACTS. Schedule 2.20.1 lists and the Merging Company has delivered or made available to Parent true and complete copies (or, in the case of oral contracts, summaries), of:

2.20.1 each Contract that is executory in whole or in part and involves performance of services or delivery of goods or materials (A) by the Merging Company of an amount or value in excess of \$50,000 or (B) to the Company of an amount or value in excess of \$50,000;

2.20.2 each Contract that is executory in whole or in part and was not entered into in the Ordinary Course of Business and that involves expenditures or receipts of the Merging Company in excess of \$50,000;

2.20.3 each licensing agreement (other than "shrink-wrap" and licenses related to common business and office applications, such as word processing and spreadsheets, with a cost of less than \$2,000) or any other Contract with respect to patents, trademarks, copyrights, trade names, service marks, licenses and other intellectual property;

2.20.4 each collective bargaining agreement and any other Contract to or with any labor union or other employee representative of a group of employees of the Merging Company;



2.20.5 each joint venture, partnership or similar contract involving a sharing of profits, losses, costs or liabilities by the Merging Company with any other Person;

2.20.6 each Contract containing covenants that in any way purport to restrict the business activity of the Merging Company or limit the freedom of the Company to engage in any line of business or to compete with any Person;

2.20.7 each Contract providing for payments to or by any Person based on sales, purchases, or profits, other than direct payments for goods;

2.20.8 each power of attorney that is currently effective and outstanding granted by and relating to the Merging Company;

2.20.9 each Contract that is executory in whole or in part and involves capital expenditures in excess of \$50,000;

2.20.10 each written warranty, guaranty, and/or other similar undertaking with respect to contractual performance extended by the Company other than in the Ordinary Course of Business;

2.20.11 each Contract with any employee, director or officer of the Merging Company;

2.20.12 each Contract relating to indebtedness of the Merging Company for borrowed money in excess of \$50,000 and each contract relating to the guarantee by the Merging Company of indebtedness of any Person for borrowed money in excess of \$50,000;

2.20.13 each Contract for the purchase or sale of real property;

2.20.14 each Contract for the sale of products or services by the Merging Company that involves expenditures or receipts of the Merging Company in excess of \$50,000;

2.20.15 each Contract imposing a Lien on any asset of the Merging Company;

2.20.16 each Contract relating to any loans or advances to, or investment in, any Person;

2.20.17 each Contract providing for the payment of cash or other compensation upon consummation of the Merger;

2.20.18 each non-disclosure and non-compete agreement Contract;

2.20.19 each Contract or group of related Contracts not terminable on 30 days' Notice and that involves expenditures or receipts of the Merging Company in excess of \$50,000;

2.20.20 each sales distribution Contract, franchise Contract and advertising Contract that involves expenditures or receipts of the Merging Company in excess of \$50,000; and

2.20.21 any other Contract which is material to the Merging Company and that involves expenditures or receipts of the Merging Company in excess of \$50,000.

2.20.22 Each of the Material Contracts is in full force and effect and constitutes a valid and binding obligation of the Merging Company and, to the Knowledge of the Merging Company, the other party thereto. Except (i) with respect to the Contracts relate to shareholder indebtedness and (ii) as set forth on Schedule 2.20, the Merging Company is not in breach or default under a material provision of any Material Contract, and no event has occurred and no condition or state of facts exists which, with the passage of time or the giving of notice or both, would constitute such a default or breach by the Merging Company or, to the Knowledge of the Merging Company, by any such other party. The Merging Company has not received written notice of such a breach or default or event or condition.

2.21 CERTAIN AGREEMENTS AFFECTED BY THE MERGER. Neither the execution and delivery of this Agreement nor the consummation of the transaction contemplated hereby will (i) result in any entitlement, payment or benefit (including, without limitation, severance, unemployment compensation, golden parachute, bonus or benefit under any Merging Company plan or policy or otherwise) becoming due to any current or former directors or Merging Company Employees (defined in Section 2.22 below) of the Merging Company, (ii) increase the amount of any entitlements, payments or benefits otherwise payable by the Merging Company, or (iii) result in the acceleration of the time of payment or vesting of any such entitlements, payments or benefits.

## 2.22 EMPLOYEE MATTERS.

2.22.1 Schedule 2.22.1 contains a true, complete and accurate list (and, as indicated below, description) of (i) the names and titles of all consultants, independent contractors, full-time, part-time, temporary, contract, leased or casual employees employed by or who provided services for Merging Company (collectively, "Merging Company Employees"), together with their status and location of their employment; (ii) the date each Merging Company Employee was hired or retained; (iii) a list of all written employment, consulting or service contracts or offer letters between Merging Company and the Merging Company Employees; (iv) the rate of annual remuneration of each Merging Company Employee at the date hereof, any bonuses paid since the end of the last completed financial year and all other bonuses, incentive schemes and benefits to which such Merging Company Employee is or may be entitled; (v) the annual accrual rate and the total current accrued and unused amount of vacation or paid time off for each Merging Company Employee as of the date hereof; (vi) the names of all inactive Merging Company Employees, the reason they are inactive Merging Company Employees, whether they are expected to return to work, and if so when, and the nature of any benefits to which such inactive Merging Company Employees are entitled from the Merging Company; (vii)

any employee handbook or personnel policies or procedures manual in effect that governs the terms and conditions or privileges of employment of the Merging Company Employees; and (viii) particulars of all other material terms and conditions of employment or engagement of the Merging Company Employees and the positions, title or classification held by them (collectively, "Merging Company Employee Matters").

2.22.2 The Merging Company has provided or made available to Company correct and complete copies of all documents including but not limited to all agreements, correspondence, files and policies, relating to the Merging Company Employee Matters.

2.22.3 The Merging Company is in compliance in all respects with all currently applicable laws and regulations respecting terms and conditions of employment, including without limitation applicant and employee background checking, immigration laws, verification of employment eligibility, document retention and record keeping, discrimination in employment, wages and hours, leaves of absence (including, as legally applicable, the Family and Medical Leave Act), classification of workers as employees and independent contractors, classification of workers as exempt or nonexempt employees, and occupational safety and health and employment practices, and are not engaged in any unfair labor practice. The Merging Company has in all material respects withheld all amounts required by law or by agreement to be withheld from the wages, salaries, and other payments to employees; and is not liable for any arrears of wages or any taxes or any penalty for failure to comply with any of the foregoing. The Merging Company is not liable for any payment to any trust or other fund or to any governmental or administrative authority, with respect to unemployment compensation benefits, social security or other benefits or obligations for Merging Company Employees (other than routine payments to be made in the normal course of business and consistent with past practice). There are no pending claims, or claims reasonably expected or, to Merging Company's knowledge, threatened, against Merging Company under any workers compensation plan or policy or long-term or short-term disability plan or policy. To the knowledge of Merging Company, there are no controversies, including claims, complaints, charges, investigations, or proceedings pending or, to Merging Company's knowledge, reasonably expected or threatened between Merging Company, on the one hand, and any of its respective Merging Company Employees, on the other hand, including without limitation any claims for actual or alleged harassment or discrimination based on race, national origin, age, sex, sexual orientation, religion, disability, or similar tortuous conduct, breach of contract, wrongful termination, defamation, intentional or negligent infliction of emotional distress, interference with contract or interference with actual or prospective economic disadvantage, which controversies have or would reasonably be expected to result in an action, suit, proceeding, claim, arbitration, audit or investigation before any agency, court or tribunal, foreign or domestic.

2.22.4 The Merging Company is not a party to any collective bargaining agreement or other labor union contract nor does the Merging Company know of any activities or proceedings of any labor union to organize any such Merging Company Employees.

2.22.5 No labor dispute, walk out, strike, slowdown, hand billing, picketing,

work stoppage (sympathetic or otherwise), or other "concerted action" involving the Merging Company Employees has occurred, is in progress or has been, to the knowledge of Merging Company, threatened.

2.22.6 The Merging Company has each provided all current and former Merging Company Employees with all wages, benefits, relocation benefits, stock options, bonuses and incentives, and all other compensation, remuneration and benefits that became due and payable through the date hereof and has reimbursed all current and former Merging Company Employees for all expenses incurred and due such individual.

2.22.7 In the last five (5) years, no citation has been issued by the Occupational Safety and Health Administration ("OSHA") or by a state or provincial occupational safety and health board or agency against the Merging Company and no notice of contest, claim, complaint, charge, investigation or other administrative enforcement proceeding involving the Merging Company has been filed or is pending or, to the Knowledge of the Merging Company, threatened against the Merging Company under OSHA or any provincial occupational safety and health board or any other applicable law relating to occupational safety and health.

2.22.8 To Merging Company's knowledge, no Merging Company Employees are in violation of any term of any employment contract, confidentiality agreement, patent disclosure agreement, noncompetition agreement, or any restrictive covenant to a former employer relating to the right of any such Merging Company Employee to be employed by the Merging Company because of the nature of the business conducted or presently proposed to be conducted by Merging Company or to the use of trade secrets or proprietary information of others. No Merging Company Employees have given notice to the Merging Company, nor is the Merging Company otherwise aware, that any such Merging Company Employee intends to terminate his or her employment with the Merging Company.

2.22.9 The Merging Company has maintained and currently maintains adequate insurance as required by applicable law with respect to workers' compensation claims and unemployment benefits claims. The Merging Company has paid or accrued all current assessments under workers' compensation and unemployment legislation, and has not been subject to any special or penalty assessment under such legislation which has not been paid.

2.23 INSURANCE. The Merging Company has policies of insurance and bonds of the type and in amounts customarily carried by persons conducting businesses or owning assets similar to those of the Merging Company. There is no claim pending under any of such policies or bonds as to which coverage has been questioned, denied or disputed by the underwriters of such policies or bonds. All premiums due and payable under all such policies and bonds have been paid and the Merging Company is otherwise in compliance in all material respects with the terms of such policies and bonds. The Merging Company has no knowledge of any threatened termination of, or material premium increase with respect to, any of such policies.

2.24 BANK ACCOUNTS; POWERS OF ATTORNEY. Schedule 2.24 contains a

complete and correct list showing: (a) all banks in which the Merging Company maintains a bank account or safe deposit box (collectively, "Bank Accounts"), together with, as to each such Bank Account, the account number, the names of all signatories thereof and the authorized powers of each such signatory and, with respect to each such safe deposit box, the number thereof and the names of all persons having access thereto; and (b) the names of all persons holding powers of attorney from the Merging Company, true and correct copies thereof which have been delivered to Company.

2.25 COMPLIANCE WITH LAWS. The Merging Company has complied with and is not in violation of, and have not received any notices of violation with respect to, any federal, state, local or foreign statute, law or regulation with respect to the conduct of its business, or the ownership or operation of its business, except for such violations or failures to comply as would not be reasonably expected to have a Material Adverse Effect on Merging Company.

2.26 MINUTE BOOKS. The minute books of Merging Company made available to Company contain a complete and accurate summary of all meetings of directors and stockholders or actions by written consent of Merging Company during the past three years and through the date of this Agreement, and reflect all transactions referred to in such minutes accurately in all material respects.

2.27 COMPLETE COPIES OF MATERIALS. The Merging Company has delivered or made available true and complete copies of each document that has been requested by Company or its counsel in connection with their legal and accounting review of Merging Company.

2.28 BROKERS' AND FINDERS' FEES. The Merging Company has not incurred, nor will it incur, directly or indirectly, any liability for brokerage or finders' fees or agents' commissions or investment bankers' fees or any similar charges in connection with this Agreement or any transaction contemplated hereby.

2.29 VOTE REQUIRED. The Merging Company has or will have the affirmative vote of the holders of at least a majority of the shares of Merging Company Common Stock outstanding on the record date set for the meeting of the Merging Company stockholders (the "Merging Company Stockholders Meeting") and such vote is the only vote of the holders of any of Merging Company's capital stock necessary to approve this Agreement and the transactions contemplated hereby.

2.30 BOARD APPROVAL. The Board of Directors of Merging Company has (i) approved this Agreement and the Merger, (ii) determined that this Agreement and the Merger are advisable and in the best interests of the stockholders of Merging Company and are on terms that are fair to such stockholders and (iii) recommended that the stockholders of Merging Company adopt and approve this Agreement and the consummation of the Merger.

2.31 STATE TAKEOVER STATUTES. The Board of Directors of Merging Company

has taken all actions necessary so that the restrictions of the Florida Law applicable to a "business combination" shall not apply to the execution, delivery or performance of this Agreement or the consummation of the Merger or the other transactions contemplated by this Agreement. To Merging Company's knowledge, no other "fair practice," "moratorium," "control share acquisition," "business combination," or other state takeover statute or similar statute or regulation applies to Company, Merging Company, the Merger, or this Agreement.

2.32 REPRESENTATIONS COMPLETE. None of the representations or warranties made by Merging Company herein or in any Schedule hereto, including the Merging Company Disclosure Schedule, or certificates furnished by Merging Company pursuant to this Agreement, when all such documents are read together in their entirety, contains or will contain at the Effective Time any untrue statement of a material fact, or omits or will omit at the Effective Time to state any material fact necessary in order to make the statements contained herein or therein, in the light of the circumstances under which made, not misleading. All projected, forecasted or prospective financial information provided by Merging Company to Company has been prepared in good faith on the basis of assumptions Merging Company believes are reasonable and supportable.

### ARTICLE III

#### REPRESENTATIONS AND WARRANTIES OF COMPANY

Except as disclosed in that section of the document of even date herewith delivered by Company to the Merging Company prior to the execution and delivery of this Agreement (the "Company Disclosure Schedule") corresponding to the Section of this Agreement to which any of the following representations and warranties specifically relate or as disclosed in another section of the Company Disclosure Schedule if it is reasonably apparent on the face of the disclosure that it is applicable to another Section of this Agreement, Company represents and warrants to the Merging Company as follows:

3.1 ORGANIZATION, STANDING AND POWER. Company is a corporation duly organized, validly existing and in good standing, and no certificates of dissolution have been filed under the laws of its jurisdiction of organization. Company has the power to own its properties and to carry on its business as now being conducted and as presently proposed to be conducted and is duly authorized and qualified to do business and is in good standing in each jurisdiction in which the failure to be so qualified and in good standing would have a Material Adverse Effect on Company. Company has delivered to the Merging Company a true and correct copy of the Certificate of Incorporation (the "Company Certificate of Incorporation"), and the Bylaws, or other charter documents, as applicable, of Company, as amended to date. Company is not in violation of any of the provisions of their respective charter or bylaws or equivalent organization documents. Company is the owner of all outstanding shares of capital stock of Company and all such shares are duly authorized, validly issued, fully paid and nonassessable. There are no outstanding subscriptions, options, warrants, puts, calls, rights, exchangeable or convertible securities or other commitments or agreements of any character relating to the issued

or unissued capital stock or other securities of any such subsidiary, or otherwise obligating Company to issue, transfer, sell, purchase, redeem or otherwise acquire any such securities, except as disclosed in Company SEC Documents (as defined in Section 3.4).

3.2 CAPITAL STRUCTURE. The authorized capital stock of Company consists of 700,000,000 shares of common stock, \$0.001 par value, and 1,000,000 shares of preferred stock, \$1.00 par value, of which there were 24,000,000 shares of common stock issued and outstanding as of the close of business on the Effective Date, and no shares of Preferred Stock. The shares of Company Common Stock to be issued pursuant to the Merger will be duly authorized, validly issued, fully paid, and non-assessable, free of any liens or encumbrances imposed by Company. There are no other outstanding shares of capital stock or voting securities and no outstanding commitments to issue any shares of capital stock or voting securities after the date hereof, except as disclosed in Company SEC Documents (as defined in Section 3.4). All outstanding shares of Company Common Stock are duly authorized, validly issued, fully paid and non-assessable and are free of any liens or encumbrances other than any liens or encumbrances created by or imposed upon the holders thereof, and are not subject to preemptive rights or rights of first refusal created by statute, the Certificate of Incorporation or Bylaws of Company or any agreement to which Company is a party or by which it is bound. There are no contracts, commitments or agreements relating to voting, purchase or sale of Company's capital stock (i) between or among Company and any of its stockholders and (ii) to the best of Company's knowledge, between or among any of Company's stockholders.

3.3 AUTHORITY. Company has all requisite corporate power and authority to enter into this Agreement and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action on the part of Company. This Agreement has been duly executed and delivered by Company and constitutes the valid and binding obligations of Company enforceable against Company in accordance with its terms, except as enforceability may be limited by bankruptcy and other laws affecting the rights and remedies of creditors generally and general principles of equity. The execution and delivery of this Agreement do not, and the consummation of the transactions contemplated hereby will not, conflict with, or result in any violation of, or default under (with or without notice or lapse of time, or both), or give rise to a right of termination, cancellation or acceleration of any obligation or loss of any benefit under

3.3.1 any provision of the Certificate of Incorporation or Bylaws of Company, as amended, or;

3.3.2 any mortgage, indenture, lease, contract or other agreement or instrument, permit, concession, franchise, license, judgment, order, decree, statute, law, ordinance, rule or regulation applicable to Parent or its properties or assets. No consent, approval, order or authorization of, or registration, declaration or filing with, any Governmental Entity is required by or with respect to Company in connection with the execution and delivery of this Agreement by Company or the consummation by Company of the transactions contemplated hereby, except

for (i) the filing of the Certificate of Merger as provided in Section 1.2; (ii) the filing of a Form 8-K with the SEC within 15 days after the Closing Date; (iii) any filings as may be required under applicable state securities laws and the securities laws of any foreign country; and (iv) such other consents, authorizations, filings, approvals and registrations which, if not obtained or made, would not have a Material Adverse Effect on Parent and would not prevent or materially alter or delay any of the transactions contemplated by this Agreement.

3.4 SEC DOCUMENTS; FINANCIAL STATEMENTS. Company has made available to the Merging Company a true and complete copy of each statement, report, registration statement (with the prospectus in the form filed pursuant to Rule 424(b) of the Securities Act), definitive proxy statement, and other documents filed with the SEC by Company as filed by Company since February 2004, and, prior to the Effective Time, Company will have furnished or made available to Merging Company true and complete copies of any additional documents filed with the SEC by Company prior to the Effective Time (collectively, the "Company SEC Documents"). The Merging Company acknowledges and agrees that all Company SEC Documents are available through the EDGAR system. Company has timely filed all forms, statements and documents required to be filed by it with the SEC. All documents required to be filed as exhibits to the Company SEC Documents have been so filed, and all material contracts so filed as exhibits are in full force and effect, except those that have expired in accordance with their terms, and Company is not in default thereunder. As of their respective filing dates, the Company SEC Documents complied in all respects with the requirements of the Securities Exchange Act of 1934, as amended ("the "Exchange Act") and the Securities Act, and none of the Company SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances in which they were made, not misleading, except to the extent corrected by a subsequently filed Company SEC Document. The financial statements of Company, including the notes thereto, included in the Company SEC Documents (the "Company Financial Statements") were complete and correct in all material respects as of their respective dates, complied as to form in all material respects with applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto as of their respective dates, and have been prepared in accordance with GAAP applied on a basis consistent throughout the periods indicated and consistent with each other (except as may be indicated in the notes thereto or, in the case of unaudited statements included in Quarterly Reports on Form 10-Q, as permitted by Form 10-Q of the SEC). The Company Financial Statements fairly present the consolidated financial condition and operating results of Company and its subsidiaries at the dates and during the periods indicated therein (subject, in the case of unaudited statements, to normal, recurring year-end adjustments).

3.5 SARBANES-OXLEY ACT OF 2002. There has been no change in Company accounting policies since December 31, 2002 except as described in the notes to the Company Financial Statements. Each required form, report and document containing financial statements that has been filed with or submitted to the SEC since December 31, 2002, was accompanied by the certifications required to be filed or submitted by Company's chief executive officer and chief financial officer pursuant to the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"), and at



the time of filing or submission of each such certification, such certification was true and accurate and complied with the Sarbanes-Oxley Act and the rules and regulations promulgated thereunder. Since December 31, 2002, Company has not, to the knowledge of the Company or any director, officer, employee, auditor, accountant or representative of Company have not, received or otherwise had or obtained knowledge of any complaint, allegation, assertion or claim, whether written or oral, regarding the accounting or auditing practices, procedures, methodologies or methods of Company or its respective internal accounting controls, including any complaint, allegation, assertion or claim that Company has engaged in questionable accounting or auditing practices, except for (A) any complaint, allegation, assertion or claim as has been resolved without any resulting change to Company's accounting or auditing practices, procedures methodologies or methods of Company or its internal accounting controls and (b) questions regarding such matters raised and resolved in the ordinary course in connection with the preparation and review of Company's financial statements and periodic reports. No attorney representing Company, whether or not employed by Company or any such subsidiary, has reported evidence of a material violation of securities laws, breach of fiduciary duty or similar violation by Company or any of its officers, directors, employees or agents to the Board of Directors of Company or any committee thereof or to any director or officer of Company. To the knowledge of Company, no employee of Company has provided or is providing information to any law enforcement agency regarding the commission or possible commission of any crime or the violation or possible violation of any applicable law.

3.6 ABSENCE OF UNDISCLOSED LIABILITIES. Company has no material obligations or liabilities of any nature (matured or unmatured, fixed or contingent) other than (i) those set forth or adequately provided for in the Balance Sheet included in the most recent Company SEC Documents Balance Sheet (the "Company Balance Sheet"), (ii) those incurred in the ordinary course of business and not required to be set forth in the Company Balance Sheet under GAAP, (iii) those incurred in the ordinary course of business since the Company Balance Sheet date and not reasonably likely to have a Material Adverse Effect on Company, and (iv) those incurred in connection with the execution of this Agreement.

3.7 LITIGATION. There is no private or governmental action, suit, proceeding, claim, arbitration, audit or investigation pending before any agency, court or tribunal, foreign or domestic, or, to the knowledge of Company, threatened against Company or any of its respective properties or any of its respective officers or directors (in their capacities as such) that, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect on Company. There is no injunction, judgment, decree, order or regulatory restriction imposed upon Company or any of its assets or business, or, to the knowledge of Company, any of its directors or officers (in their capacities as such), that would prevent, enjoin, alter or materially delay any of the transactions contemplated by this Agreement, or that could reasonably be expected to have a Material Adverse Effect on Company. Schedule 3.7 lists all actions, suits, proceedings, claims, arbitrations, audits and investigations pending before any agency, court or tribunal that involve Parent.

3.8 RESTRICTIONS ON BUSINESS ACTIVITIES. There is no agreement,

judgment, injunction, order or decree binding upon Company which has or reasonably could be expected to have the effect of prohibiting or materially impairing any business practice of Company, any acquisition of property by Company or the conduct of business by Company.

3.9 CERTAIN AGREEMENTS AFFECTED BY THE MERGER. Neither the execution and delivery of this Agreement nor the consummation of the transaction contemplated hereby will (i) result in any entitlement, payment or benefit (including, without limitation, severance, unemployment compensation, golden parachute, bonus or benefit under any Company plan or policy or otherwise) becoming due to any current or former director or employee of Company, (ii) increase the amount of any entitlements, payments or benefits otherwise payable by Company, or (iii) result in the acceleration of the time of payment or vesting of any such entitlements, payments or benefits.

3.10 INTERESTED PARTY TRANSACTIONS. Except as disclosed in the Company SEC Documents, Company is not indebted to any director or officer of Company (except for amounts due as normal salaries and bonuses and in reimbursement of ordinary expenses), and no such person is indebted to Company, and there are no other transactions of the type required to be disclosed pursuant to Items 402 or 404 of Regulation S-B under the Securities Act and the Exchange Act.

3.11 COMPLIANCE WITH LAWS. Company has complied with, are is in violation of, and has not received any notices of violation with respect to, any federal, state, local or foreign statute, law or regulation with respect to the conduct of its business, or the ownership or operation of its business, except for such violations or failures to comply as would not be reasonably expected to have a Material Adverse Effect on Company.

3.12 COMPLETE COPIES OF MATERIALS. Company has delivered or made available true and complete copies of each document that has been requested by Merging Company or its counsel in connection with their legal and accounting review of Company.

3.13 INTELLECTUAL PROPERTY. Schedule 3.13 contains a complete and accurate list and description of:

3.13.1 all United States and foreign patents and patent applications and patent disclosures, all United States and foreign copyright registrations and applications, all material computer software (excluding "shrink-wrap" or licenses for common business and office applications, such as word processors and spreadsheets, having a cost of less than \$1,000), all United States, state and foreign trademarks, service marks and trade names for which registrations have been issued or applied for, all other United States, state and foreign trademarks, service marks and trade names, and all Internet domain names owned by or under obligation of assignment to the Company or in which the Company holds any right, license or interest, showing in each case the registered or other owner, expiration date and number, if any;

3.13.2 all agreements and licenses (excluding "shrink-wrap" or similar licenses

for computer software) relating or pertaining to any Intellectual Property to which the Company is a party, showing in each case the parties thereto. All such agreements and licenses are valid and subsisting and the Parent is not in breach of any material provisions of any such agreements or licenses;

3.13.3 all licenses or agreements pertaining to mailing lists, know-how, trade secrets, inventions, disclosures or uses of ideas to which the Company is a party, showing in each case the parties thereto;

3.13.4 all registered assumed or fictitious names under which the Company is currently conducting business; and

3.13.5 all maintenance, support, training, consulting, outsourcing, facilities management and other contracts and agreements relating to computer hardware, software or services and that involve expenditures in excess of \$25,000.

3.13.6 To the Company's knowledge, there is no unauthorized use, disclosure, infringement or misappropriation of any Company Intellectual Property rights, or any Intellectual Property right of any third party to the extent licensed to the Company, by any third party, including any employee or former employee of Company. The Company has not entered into any agreement to indemnify any other person against any charge of infringement of any Intellectual Property, other than indemnification provisions contained in purchase orders, license agreements and distribution and other customer agreements, copies of which have been provided or made available to Company.

3.13.7 The Company is not, nor will it 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 Company Intellectual Property or Third Party Intellectual Property Rights.

3.13.8 To the Company's knowledge, all patents, trademarks, service marks and copyrights held by Company are valid and subsisting. Company (i) has not been sued in any suit, action or proceeding (or received any notice or, to Company's knowledge, threat) which involves a claim of infringement of any patents, trademarks, service marks, copyrights or violation of any trade secret or other proprietary right of any third party and (ii) has not brought any action, suit or proceeding for infringement of Company Intellectual Property or breach of any license or agreement involving Company Intellectual Property against any third party. To Company's knowledge, the manufacture, use, marketing, licensing or sale of Company's products does not infringe any patent, trademark, service mark, copyright, trade secret or other proprietary right of any third party.

3.13.9 The Company has secured valid written assignments from all consultants and employees who contributed to the creation or development of Company Intellectual Property of the rights to such contributions that Company does not already own by operation of law.

3.13.10 The Company has not received any formal written opinion of counsel stating that: (i) there is or has been any unauthorized use, disclosure, infringement, or misappropriation of any Company Intellectual Property; (ii) any of the Company Intellectual Property is invalid or unenforceable; or (iii) Parent has engaged in unauthorized use, disclosure, infringement or misappropriation of any third party intellectual property.

3.14 GOVERNMENTAL AUTHORIZATION. The Company has obtained each federal, state, county, local or foreign governmental consent, license, permit, grant, or other authorization of a Governmental Entity (i) pursuant to which Company currently operates or holds any interest in any of its properties or (ii) that is required for the operation of Company's business or the holding of any such interest ((i) and (ii) herein collectively called "Company Authorizations"), and all of such Company Authorizations are in full force and effect, except where the failure to obtain or have any of such Company Authorizations or where the failure of such Company Authorizations to be in full force and effect would not reasonably be expected to have a Material Adverse Effect on Company.

3.15 PRIVACY POLICIES; THIRD PARTY PRIVACY OBLIGATIONS; WEB SITE TERMS AND CONDITIONS.

3.15.1 For purposes of this Section 3.15:

(i) "Company Sites" means the Parent's public sites on the World Wide Web;

(ii) "Privacy Statements" means, collectively, any and all of Company's privacy policies published on the Parent Sites or otherwise made available by the Company regarding the collection, retention, use and distribution of the personal information of individuals, including, without limitation, from visitors of any of the Company Sites ("Individuals"); and

(iii) "Terms and Conditions" means any and all of the visitor terms and conditions published on the Parent Sites governing Individuals' use of or access to the Parent Sites.

3.15.2 A Privacy Statement is posted and is accessible to Individuals at all times on each Company Site. Company maintains a hypertext link to a Privacy Statement from the homepage of the Company Site, and Company uses commercially reasonable efforts to include a hypertext link to a Privacy Statement from every page of the Company Sites on which personal information is collected from Individuals.

3.15.3 The Privacy Statements are clearly written and include, at a minimum, accurate notice to Individuals about Company's collection, retention, use and disclosure policies and practices with respect to Individuals' personal information. The Privacy Statements are accurate and consistent with the Terms and Conditions and Company's actual practices with

respect to the collection, retention, use and disclosure of Individuals' personal information.

3.15.4 Company (i) complies with the Privacy Statements as applicable to any given set of personal information collected by Company from Individuals; (ii) to Company's knowledge complies with all applicable privacy laws and regulations regarding the collection, retention, use and disclosure of personal information; and (iii) takes appropriate measures to protect and maintain the confidential nature of the personal information provided to the Parent by Individuals. The Company has adequate technological and procedural measures in place to protect personal information collected from Individuals against loss, theft and unauthorized access or disclosure. The Company does not sell, rent or otherwise make available to third parties any personal information submitted by Individuals.

3.15.5 The Company's collection, retention, use and distribution of all personal information collected by Company from Individuals is governed by the Privacy Statement pursuant to which the data was collected. Other than as constrained by the Privacy Statements and by applicable laws and regulations, the Company is not restricted in its use and/or distribution of personal information collected by Company.

3.15.6 The Company has the full power and authority to transfer all rights Company has in all Individuals' personal information in their possession and/or control to the extent permitted by applicable law. The Company is not a party to any contract, or is subject to any other obligation that, following the date of this Agreement, would prevent Company and/or its affiliates from using the information governed by the Privacy Statements in a manner consistent with applicable privacy laws and industry standards regarding the disclosure and use of information. No claims or controversies have arisen regarding the Privacy Statements or the implementation thereof or of any of the foregoing.

3.15.7 The Company has complied in all material respects with and, to Company's Knowledge, is not in violation of any applicable privacy obligations under any legal requirements or under any contract to which the Company is a party or by which their properties are bound ("Third Party Privacy Obligations"). Neither the execution, delivery nor performance of this Agreement nor the consummation of the Merger will violate, contravene or conflict with the Third Party Privacy Obligations. No claims or controversies have arisen regarding the Third Party Privacy Obligations or of the implementation thereof or of any of the foregoing.

### 3.16 ENVIRONMENTAL MATTERS.

3.16.1 The following terms shall be defined as follows:

(i) "Environmental and Safety Laws" shall mean any federal, state or local laws, ordinances, codes, regulations, rules, policies and orders that are intended to assure the protection of the environment, or that classify, regulate, call for the remediation of, require reporting with respect to, or list or define air, water, groundwater, solid waste, hazardous or toxic substances, materials, wastes, pollutants or contaminants, or which are intended to assure the

safety of employees, workers or other persons, including the public.

(ii) "Company Facilities" shall mean all buildings and improvements on the Company Property.

(iii) "Governmental Entity" shall mean any federal, state, local or foreign court or governmental agency, authority, instrumentality or regulatory body.

(iv) "Hazardous Materials" shall mean any man-made or naturally occurring substance, material product, by-product, waste, emission, residual or odor that is described as a toxic or hazardous substance, waste, material, pollutant, contaminant, infectious waste, designated waste or words of similar import, in any of the Environmental and Safety Laws, or any other words which are intended to define, list or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, or reproductive toxicity and includes, without limitation, asbestos, asbestos-containing materials, lead-based paint, petroleum (including crude oil or any fraction thereof, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel, or any mixture thereof), petroleum products, waste oil, polychlorinated biphenyls, urea formaldehyde, radon gas, radioactive matter, medical waste, otherwise regulated or listed materials and chemicals which may cause cancer or reproductive toxicity.

(v) "Legal Rules" shall mean codes, statutes, ordinances, orders, judgments, decrees, injunctions, determinations, approvals, rules, regulations, permits, licenses and authorizations of all Governmental Entities with jurisdiction.

(vi) "Company Property" shall mean all real property leased or owned by the Company either currently or in the past.

3.16.2 To Company's knowledge, except in all cases as, in the aggregate, would not have a (i) except in material compliance with all Legal Rules and except for possible small operational releases, no Hazardous Materials have been released in, on, or about the Company Property or any other location; (ii) the Company has not received any written notice that a lien in favor of any Governmental Entity for (A) any liability under any Environmental and Safety Laws or (B) damages arising from or costs incurred in responses to a release of any Hazardous Materials into the environment has been filed against Company's interest in the Company Property; and (ix) the Company has all the permits and licenses required to be issued under applicable Environmental and Safety Laws and are in full compliance with the terms and Material Adverse Effect on Parent, (i) the Company Property and Company Facilities, and the present and former activities of the Company thereon, comply in all material respects with all applicable Environmental and Safety Laws; (ii) all Hazardous Materials and wastes have been disposed of in accordance with all Environmental and Safety Laws; (iii) the Company has not received notice (oral or written) of any noncompliance of the Company Facilities or its past or present operations with Environmental and Safety Laws; (iv) no notices, administrative actions or suits are pending or, to Company's knowledge, threatened relating to a violation of any

Environmental and Safety Laws; (v) to Company's knowledge, the Company is not potentially responsible party under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or state analog statute, arising out of events occurring prior to the Closing Date; (vi) the Company has not have received any notice that it is the subject of any federal, state or local order, agreement or investigation concerning any use, release, discharge, storage, generation or disposal of any Hazardous Materials; (conditions of those permits and licenses.

### 3.17 TAXES.

3.17.1 For purposes of this Agreement, the following terms have the following meanings: "Tax" (and, with correlative meaning, "Taxes" and "Taxable") means (i) any net income, alternative or add-on minimum tax, gross income, gross receipts, sales, use, ad valorem, transfer, franchise, profits, license, withholding, payroll, employment, excise, severance, stamp, occupation, premium, property, environmental or windfall profit tax, custom, duty or other tax, governmental fee or other like assessment or charge of any kind whatsoever, together with any interest or any penalty, addition to tax or additional amount imposed by any Governmental Entity (a "Tax authority") responsible for the imposition of any such tax (domestic or foreign); (ii) any liability for the payment of any amounts of the type described in (i) as a result of being a member of an affiliated, consolidated, combined or unitary group for any Taxable period; and (iii) any liability for the payment of any amounts of the type described in (i) or (ii) as a result of being a transferee of or successor to any person or as a result of any express or implied obligation to indemnify any other person, including pursuant to any Tax sharing or Tax allocation agreement. "Tax Return" shall mean any return, statement, report or form (including, without limitation estimated Tax returns and reports, withholding Tax returns and reports and information reports and returns) required to be filed with respect to Taxes.

#### 3.17.2 Except as set forth on Schedule 3.17.2:

3.17.2.1 The Company has duly filed on a timely basis (taking into account any extensions of time for filing), has filed for an extension for, or has been included in, all Tax Returns, relating to all Taxes for which the Parent may be liable, required to be filed by or on behalf of the Company, for any taxable period ending on or before the Closing Date. Each such Tax Return is true and correct in all material respects. The Company has duly paid, or made adequate provisions (by a tax accrual or tax reserve) for all Taxes for which the Company may be liable and other charges shown as due on such Tax Returns. The Company has paid, or made adequate provision for, all material Taxes for which the Company may be liable which are required to be paid without the filing of any Tax Return; any Taxes for which the Company may be liable incurred or accrued since the date of the most recent balance sheets of the Company have arisen in the Ordinary Course of Business determined in the same manner as in the last taxable period ending on or before such date;

3.17.2.2 The Company has duly paid in full or made adequate provisions for all Taxes claimed to be due by any taxing authority except such Taxes as are being contested in good faith, which amounts are set forth on Schedule 3.17.2. There are no liens for

any Taxes, assessments or government charges or levies upon any property or assets of the Company, nor are there any outstanding deficiencies or assessments or written proposals for assessment of any Taxes proposed, asserted or assessed against the Company except such Taxes as are being contested in good faith, which amounts are set forth on Schedule 3.17.2.

3.17.2.3 No actions, proceedings, or examinations are pending or, to the Company's knowledge, threatened to be brought by any taxing authority for the determination, assessment or collection of any Taxes for which the Company may be liable except such Taxes as are being contested in good faith, which amounts are set forth on Schedule 3.17.2.

3.17.2.4 The Company has not requested any extension of time within which to file or send any Tax Return which Tax Return has not since been filed, and the Company is not bound by any election, consent, or agreement that extends or waives any applicable statute of limitation with respect to any taxable periods of the Company. The information set forth in Schedule 3.17.2 indicates the date through which the taxable years relating to particular Tax Returns of the Company are closed by applicable statutes of limitation or otherwise;

3.17.2.5 All liabilities for Taxes of the Company for the current year through the Closing Date and all prior years, whether or not they have become due and payable, have been duly paid in full or adequate provisions therefore have been made by a tax accrual or tax reserve;

3.17.2.6 The Company is not a party to any outstanding tax sharing or other allocation agreement with respect to any Taxes and has no liability relating to any tax sharing or other allocation agreement;

3.17.2.7 The Company does not have and has never owned stock in a foreign corporation;

3.17.2.8 No election under section 341(f) of the Code has been made by the Company, nor has any election been made to be treated as an S Corporation under section 1362(a) of the Code. No election under section 382(l)(5) is in effect for the Company. The Company has not agreed to, or been required to, make any section 481(a) adjustment because of a change of accounting. There are no closing agreements, irrevocable elections, or similar binding agreements or decisions of any court or other governmental authority which will restrict the choices of the Company regarding the treatment of any item of income, deduction, credit, or allowance in taxable periods subsequent to the Closing Date, and the Company has not elected to use LIFO for inventory purposes. The Company has withheld all material Taxes required to have been withheld and has paid all Taxes withheld in connection with amounts paid or owing to any employee, creditor, independent contractor, or other third party. The Company has not made any payments, is not obligated to make any payments, and is not a party to any agreement that under certain circumstances could obligate it to make any



payments that will not be deductible under section 280G of the Code. The Company has not been a United States real property holding corporation within the meaning of section 897(c)(2) of the Code during the applicable period specified in section 897(c)(1)(A)(ii) of the Code;

3.17.2.9 The Company has never been (or has any liability or potential liability for unpaid Taxes because it once was) a member of an affiliated group (as defined in section 1504(a) of the Code) during any part of any consolidated return year; and no claim has ever been made by an authority in a jurisdiction where the Company does not file Tax Returns that it is or may be subject to taxation by that jurisdiction.

3.17.3 Schedule 3.17.3 sets forth the following information which, to the Company's Knowledge, is true, complete and correct: (A) the amount of foreign income taxes (or taxes in lieu thereof) which are creditable for federal income tax purposes or for foreign income tax purposes; and (B) the yearly net operating losses, net capital losses, investment or other tax credits or excess charitable contributions allocable to the Company which are available for carryover to subsequent years for federal income tax purposes and the extent to which such losses or credits are subject to limitation, or will be subject to limitation upon consummation of the transactions contemplated herein, under section 382 of the Code, section 383 of the Code or any other section thereunder, or are limited for foreign income tax purposes.

3.17.4 Schedule 3.17.4 sets forth, a true, complete and correct list of the assets held by the Company and the adjusted tax bases as of the date indicated of such assets for federal tax purposes.

### 3.18 EMPLOYEE BENEFIT PLANS.

3.18.1 Schedule 3.18.1 lists, with respect to Company and any trade or business (whether or not incorporated) which is treated as a single employer with Company (an "ERISA Affiliate") within the meaning of Section 414(b), (c), (m) or (o) of the Code, (i) all employee benefit plans (as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") other than Foreign Plans (as defined below)); (ii) each loan to a non-officer employee in excess of \$50,000, loans to officers and directors and any stock option, stock purchase, phantom stock, stock appreciation right, supplemental retirement, severance, sabbatical, medical, dental, vision care, disability, employee relocation, cafeteria benefit (Code Section 125) or dependent care (Code Section 129), life insurance or accident insurance plans, programs or arrangements; (iii) all bonus, pension, profit sharing, savings, deferred compensation or incentive plans, programs or arrangements; (iv) other fringe or employee benefit plans, programs or arrangements; and (v) any current or former employment or executive compensation, change in control or severance agreements, written or otherwise, as to which unsatisfied obligations of Company remain for the benefit of, or relating to, any present or former employee, consultant or director of Parent (together, the "Company Employee Plans").

3.18.2 The Company has furnished or made available to Company a copy of each of the Company Employee Plans and related plan documents (including trust documents,

insurance policies or contracts, employee booklets, summary plan descriptions and other authorizing documents, and any material employee communications relating thereto) and has, with respect to each Company Employee Plan which is subject to ERISA reporting requirements, provided copies of the Form 5500 reports filed for the last three plan years. Any Company Employee Plan intended to be qualified under Section 401(a) of the Code has obtained from the Internal Revenue Service a favorable determination letter as to its qualified status under the Code. The Company has also furnished Company with the most recent Internal Revenue Service determination letter issued with respect to each such Company Employee Plan, and nothing has occurred since the issuance of each such letter that would reasonably be expected to cause the loss of the tax-qualified status of any such Company Employee Plan. The Company has also furnished Company with all registration statements and prospectuses prepared in connection with each Company Employee Plan.

3.18.3 (i) None of the Company Employee Plans promises or provides retiree medical or other retiree welfare benefits to any person, except as required by applicable law; (ii) there has been no "prohibited transaction," as such term is defined in Section 406 of ERISA and Section 4975 of the Code, with respect to any Company Employee Plan; (iii) each Company Employee Plan has been administered in accordance with its terms and in compliance with the requirements prescribed by any and all statutes, rules and regulations (including ERISA and the Code), except as would not have, in the aggregate, a Material Adverse Effect on Company, ERISA Affiliate have performed in all material respects all obligations required to be performed by them under, are not in default in any material respect under or violation of, and have no knowledge of any material default or violation by any other party to, any of the Company Employee Plans; (iv) neither Company nor ERISA Affiliate is subject to any material liability or material penalty under Sections 4976 through 4980 of the Code or Title I of ERISA with respect to any of the Company Employee Plans; (v) all material contributions required to be made by Company or ERISA Affiliate to any Company Employee Plan have been made on or before their due dates and a reasonable amount has been accrued for contributions to each Company Employee Plan for the current plan years; (vi) with respect to each Company Employee Plan, no "reportable event" within the meaning of Section 4043 of ERISA (excluding any such event for which the thirty (30) day notice requirement has been waived under the regulations to Section 4043 of ERISA) nor any event described in Section 4062, 4063 or 4041 or ERISA has occurred; (vii) no Company Employee Plan is covered by, and neither Company nor any ERISA Affiliate has incurred or expects to incur any liability under Title IV of ERISA or Section 412 of the Code; and (viii) each Company Employee Plan can be amended, terminated or otherwise discontinued after the Effective Time in accordance with its terms, without liability to Company greater than an aggregate of \$5,000 (other than for benefits accrued through the date of termination and ordinary administrative expenses typically incurred in a termination event). With respect to each Company Employee Plan subject to ERISA as either an employee pension plan within the meaning of Section 3(2) of ERISA or an employee welfare benefit plan within the meaning of Section 3(1) of ERISA, Company has prepared in good faith and timely filed all requisite governmental reports (which were true and correct as of the date filed) and has properly and timely filed and distributed or posted all notices and reports to employees required to be filed, distributed or posted with respect to each such Company Employee Plan, except where the

failure to do so would not have a Material Adverse Effect. No suit, administrative proceeding, action or other litigation has been brought, or to Company's knowledge is threatened, against or with respect to any such Company Employee Plan, including any audit or inquiry by the IRS or United States Department of Labor. No payment or benefit which will or may be made by the Company to any employee will be characterized as an "excess parachute payment" within the meaning of Section 280G(b)(1) of the Code.

3.18.4 With respect to each Company Employee Plan, the has complied except to the extent that such failure to comply would not, individually or in the aggregate, have a Material Adverse Effect on Parent, with (i) the applicable health care continuation and notice provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") and the regulations (including proposed regulations) thereunder, (ii) the applicable requirements of the Family Medical and Leave Act of 1993 and the regulations thereunder, and (iii) the applicable requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the regulations (including proposed regulations) thereunder. SCHEDULE 2.16(d) describes all obligations of the Company as of the date of this Agreement under any of the provisions of COBRA and the Family and Medical Leave Act of 1993.

3.18.5 The consummation of the transactions contemplated by this Agreement will not (i) entitle any current or former employee or other service provider of Company or any other ERISA Affiliate to severance benefits or any other payment, except as expressly provided in this Agreement, or (ii) accelerate the time of payment or vesting, or increase the amount of compensation due any such employee or service provider under any Company Employee Plan.

3.18.6 There has been no amendment to, written interpretation or announcement (whether or not written) by the Company or other ERISA Affiliate relating to, or change in participation or coverage under, any Company Employee Plan which would materially increase the expense of maintaining such Plan above the level of expense incurred with respect to that Plan for the most recent fiscal quarter included in Company's financial statements.

3.18.7 The Company does not currently maintain, sponsor, participate in or contribute to, nor has it ever maintained, established, sponsored, participated in, or contributed to, any pension plan (within the meaning of Section 3(2) of ERISA) that is subject to Part 3 of Subtitle B of Title I of ERISA, Title IV of ERISA or Section 412 of the Code.

3.18.8 Neither the Company nor other ERISA Affiliate is a party to, or has made any contribution to or otherwise incurred any obligation under, any "multiemployer plan" as defined in Section 3(37) of ERISA.

3.18.9 SCHEDULE 3.18.1 identifies each employee of any of the Company who is not fully available to perform work because of disability or other leave and sets forth the basis of such disability or leave and the anticipated date of return to full service.

3.19 CONTRACTS. Schedule 3.19.1 lists and the Company has delivered or made

available to Company true and complete copies (or, in the case of oral contracts, summaries), of:

3.19.1 each Contract that is executory in whole or in part and involves performance of services or delivery of goods or materials (A) by the Parent of an amount or value in excess of \$50,000 or (B) to the Company of an amount or value in excess of \$50,000;

3.19.2 each Contract that is executory in whole or in part and was not entered into in the Ordinary Course of Business and that involves expenditures or receipts of the Company in excess of \$50,000;

3.19.3 each licensing agreement (other than “shrink-wrap” and licenses related to common business and office applications, such as word processing and spreadsheets, with a cost of less than \$2,000) or any other Contract with respect to patents, trademarks, copyrights, trade names, service marks, licenses and other intellectual property;

3.19.4 each collective bargaining agreement and any other Contract to or with any labor union or other employee representative of a group of employees of the Company;

3.19.5 each joint venture, partnership or similar contract involving a sharing of profits, losses, costs or liabilities by the Company with any other Person;

3.19.6 each Contract containing covenants that in any way purport to restrict the business activity of the Company or limit the freedom of the Company to engage in any line of business or to compete with any Person;

3.19.7 each Contract providing for payments to or by any Person based on sales, purchases, or profits, other than direct payments for goods;

3.19.8 each power of attorney that is currently effective and outstanding granted by and relating to the Company;

3.19.9 each Contract that is executory in whole or in part and involves capital expenditures in excess of \$50,000;

3.19.10 each written warranty, guaranty, and/or other similar undertaking with respect to contractual performance extended by the Company other than in the Ordinary Course of Business;

3.19.11 each Contract with any employee, director or officer of the Company;

3.19.12 each Contract relating to indebtedness of the Company for borrowed money in excess of \$50,000 and each contract relating to the guarantee by the Company of indebtedness of any Person for borrowed money in excess of \$50,000;

3.19.13 each Contract for the purchase or sale of real property;

3.19.14 each Contract for the sale of products or services by the Company that involves expenditures or receipts of the Parent in excess of \$50,000;

3.19.15 each Contract imposing a Lien on any asset of the Company;

3.19.16 each Contract relating to any loans or advances to, or investment in, any Person;

3.19.17 each Contract providing for the payment of cash or other compensation upon consummation of the Merger;

3.19.18 each non-disclosure and non-compete agreement Contract;

3.19.19 each Contract or group of related Contracts not terminable on 30 days' Notice and that involves expenditures or receipts of the Parent in excess of \$50,000;

3.19.20 each sales distribution Contract, franchise Contract and advertising Contract that involves expenditures or receipts of the Parent in excess of \$50,000; and

3.19.21 any other Contract which is material to the Company and that involves expenditures or receipts of the Parent in excess of \$50,000.

3.19.22 Each of the Material Contracts is in full force and effect and constitutes a valid and binding obligation of the Company and, to the Knowledge of the Company, the other party thereto. Except (i) with respect to the Contracts that relate to shareholder indebtedness and (ii) as set forth on Schedule 3.19.1, the Company is not in breach or default under a material provision of any Material Contract, and no event has occurred and no condition or state of facts exists which, with the passage of time or the giving of notice or both, would constitute such a default or breach by the Company or, to the Knowledge of the Company, by any such other party. The Company has not received written notice of such a breach or default or event or condition.

3.20 ... CERTAIN AGREEMENTS AFFECTED BY THE MERGER. Neither the execution and delivery of this Agreement nor the consummation of the transaction contemplated hereby will (i) result in any entitlement, payment or benefit (including, without limitation, severance, unemployment compensation, golden parachute, bonus or benefit under any Company plan or policy or otherwise) becoming due to any current or former directors or Company Employees (defined in Section 2.19 below) of the Company, (ii) increase the amount of any entitlements, payments or benefits otherwise payable by the Company, or (iii) result in the acceleration of the time of payment or vesting of any such entitlements, payments or benefits.

### 3.21 EMPLOYEE MATTERS.

3.21.1 Schedule 3.21.1 contains a true, complete and accurate list (and, as indicated below, description) of (i) the names and titles of all consultants, independent contractors, full-time, part-time, temporary, contract, leased or casual employees employed by or who provided services for Company (collectively, "Company Employees"), together with their status and location of their employment; (ii) the date each Company Employee was hired or retained; (iii) a list of all written employment, consulting or service contracts or offer letters between Company and the Company Employees; (iv) the rate of annual remuneration of each Company Employee at the date hereof, any bonuses paid since the end of the last completed financial year and all other bonuses, incentive schemes and benefits to which such Company Employee is or may be entitled; (v) the annual accrual rate and the total current accrued and unused amount of vacation or paid time off for each Company Employee as of the date hereof; (vi) the names of all inactive Company Employees, the reason they are inactive Company Employees, whether they are expected to return to work, and if so when, and the nature of any benefits to which such inactive Company Employees are entitled from the Company; (vii) any employee handbook or personnel policies or procedures manual in effect that governs the terms and conditions or privileges of employment of the Company Employees; and (viii) particulars of all other material terms and conditions of employment or engagement of the Company Employees and the positions, title or classification held by them (collectively, "Company Employee Matters").

3.21.2 The Company has provided or made available to Company correct and complete copies of all documents including but not limited to all agreements, correspondence, files and policies, relating to the Company Employee Matters.

3.21.3 The Company is in compliance in all respects with all currently applicable laws and regulations respecting terms and conditions of employment, including without limitation applicant and employee background checking, immigration laws, verification of employment eligibility, document retention and record keeping, discrimination in employment, wages and hours, leaves of absence (including, as legally applicable, the Family and Medical Leave Act), classification of workers as employees and independent contractors, classification of workers as exempt or nonexempt employees, and occupational safety and health and employment practices, and are not engaged in any unfair labor practice. The Company has in all material respects withheld all amounts required by law or by agreement to be withheld from the wages, salaries, and other payments to employees; and is not liable for any arrears of wages or any taxes or any penalty for failure to comply with any of the foregoing. The Company is not liable for any payment to any trust or other fund or to any governmental or administrative authority, with respect to unemployment compensation benefits, social security or other benefits or obligations for Company Employees (other than routine payments to be made in the normal course of business and consistent with past practice). There are no pending claims, or claims reasonably expected or, to Company's knowledge, threatened, against Company under any workers compensation plan or policy or long-term or short-term disability plan or policy. To the knowledge of Company, there are no controversies, including claims, complaints, charges, investigations, or proceedings pending or, to Company's knowledge, reasonably expected or

threatened between Company, on the one hand, and any of its respective Company Employees, on the other hand, including without limitation any claims for actual or alleged harassment or discrimination based on race, national origin, age, sex, sexual orientation, religion, disability, or similar tortuous conduct, breach of contract, wrongful termination, defamation, intentional or negligent infliction of emotional distress, interference with contract or interference with actual or prospective economic disadvantage, which controversies have or would reasonably be expected to result in an action, suit, proceeding, claim, arbitration, audit or investigation before any agency, court or tribunal, foreign or domestic.

3.21.4 The Company is not a party to any collective bargaining agreement or other labor union contract nor does the Company know of any activities or proceedings of any labor union to organize any such Company Employees.

3.21.5 No labor dispute, walk out, strike, slowdown, hand billing, picketing, work stoppage (sympathetic or otherwise), or other "concerted action" involving the Company Employees has occurred, is in progress or has been, to the knowledge of Company, threatened.

3.21.6 The Company has each provided all current and former Company Employees with all wages, benefits, relocation benefits, stock options, bonuses and incentives, and all other compensation, remuneration and benefits that became due and payable through the date hereof and has reimbursed all current and former Company Employees for all expenses incurred and due such individual.

3.21.7 In the last five (5) years, no citation has been issued by the Occupational Safety and Health Administration ("OSHA") or by a state or provincial occupational safety and health board or agency against the Company and no notice of contest, claim, complaint, charge, investigation or other administrative enforcement proceeding involving the Company has been filed or is pending or, to the Knowledge of the Company, threatened against the Company under OSHA or any provincial occupational safety and health board or any other applicable law relating to occupational safety and health.

3.21.8 To Company's knowledge, no Company Employees are in violation of any term of any employment contract, confidentiality agreement, patent disclosure agreement, noncompetition agreement, or any restrictive covenant to a former employer relating to the right of any such Company Employee to be employed by the Company because of the nature of the business conducted or presently proposed to be conducted by Company or to the use of trade secrets or proprietary information of others. No Company Employees have given notice to the Parent, nor is the Company otherwise aware, that any such Company Employee intends to terminate his or her employment with the Company.

3.21.9 The Company has maintained and currently maintains adequate insurance as required by applicable law with respect to workers' compensation claims and unemployment benefits claims. The Company has paid or accrued all current assessments under workers' compensation and unemployment legislation, and has not been subject to any special or penalty

assessment under such legislation which has not been paid.

3.22 INSURANCE. The Company has policies of insurance and bonds of the type and in amounts customarily carried by persons conducting businesses or owning assets similar to those of the Company. There is no claim pending under any of such policies or bonds as to which coverage has been questioned, denied or disputed by the underwriters of such policies or bonds. All premiums due and payable under all such policies and bonds have been paid and the Company is otherwise in compliance in all material respects with the terms of such policies and bonds. The Company has no knowledge of any threatened termination of, or material premium increase with respect to, any of such policies.

3.23 BROKERS' AND FINDERS' FEES. Company has not incurred, nor will it incur, directly or indirectly, any liability for brokerage or finders' fees or agents' commissions or investment bankers' fees or any similar charges in connection with this Agreement or any transaction contemplated hereby.

3.24 BOARD APPROVAL. The Board of Directors of Company has (i) approved this Agreement and the Merger, and (ii) approved the issuance of the shares of Company Common Stock pursuant to this Agreement. The affirmative vote of the Company's stockholders is not required to approve the Merger of any of Company's capital stock necessary to approve this Agreement and the transactions contemplated hereby.

3.25 STATE TAKEOVER STATUTES. The Board of Directors of Company has taken all actions necessary so that the restrictions contained in Florida Law applicable to a "business combination" shall not apply to the execution, delivery or performance of this Agreement or the consummation of the Merger or the other transactions contemplated by this Agreement. To Company's Knowledge, no other "fair practice," "moratorium," "control share acquisition," "business combination," or other state takeover statute or similar statute or regulation applies to Company, Merging Company, the Merger, or this Agreement.

3.26 REPRESENTATIONS COMPLETE. None of the representations or warranties made by Company herein or in any Schedule hereto, including the Company Disclosure Schedule, or certificate furnished by Company pursuant to this Agreement, or the Company SEC Documents, when all such documents are read together in their entirety, contains or will contain at the Effective Time any untrue statement of a material fact, or omits or will omit at the Effective Time to state any material fact necessary in order to make the statements contained herein or therein, in the light of the circumstances under which made, not misleading. All projected, forecasted or prospective financial information provided by Company to the Merging Company has been prepared in good faith on the basis of assumptions Company believes are reasonable and supportable.

## ARTICLE IV

### CONDUCT PRIOR TO THE EFFECTIVE TIME



4.1 CONDUCT OF BUSINESS. During the period from the date of this Agreement and continuing until the earlier of the termination of this Agreement or the Effective Time, each of Company and Merging Company agrees (except to the extent expressly contemplated by this Agreement or as consented to in writing by the other party), to carry on its business in the ordinary course in substantially the same manner as heretofore conducted, to pay and to cause its subsidiaries to pay debts and Taxes when due subject to good faith disputes over such debts or taxes, to pay or perform other obligations when due, and to use all reasonable efforts consistent with past practice and policies to preserve intact its and its subsidiaries' present business organizations, use its reasonable best efforts consistent with past practice to keep available the services of its present officers and key employees and use its reasonable best efforts consistent with past practice to preserve its relationships with customers, suppliers, distributors, licensors, licensees, and others having business dealings with it or its subsidiaries, to the end that its and its subsidiaries' goodwill and ongoing businesses shall be unimpaired at the Effective Time. The Company and Merging Company agree to promptly notify the other of any material event or occurrence not in the ordinary course of its or its subsidiaries' business, and of any event that would have a Material Adverse Effect on Company or Merging Company.

4.2 RESTRICTIONS ON CONDUCT OF BUSINESS. During the period from the date of this Agreement and continuing until the earlier of the termination of this Agreement or the Effective Time, except as expressly contemplated by this Agreement, each of Company and Merging Company shall not do, cause or permit any of the following, or allow, without the prior written consent of the other:

4.2.1 CHARTER DOCUMENTS. Cause or permit any amendments to its Certificate of Incorporation or Bylaws;

4.2.2 DIVIDENDS; CHANGES IN CAPITAL STOCK. Declare or pay any dividends on or make any other distributions (whether in cash, stock or property) in respect of any of its capital stock, or split, combine or reclassify any of its capital stock or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for shares of its capital stock, or repurchase or otherwise acquire, directly or indirectly, any shares of its capital stock except from former employees, directors and consultants in accordance with agreements providing for the repurchase of shares in connection with any termination of service to it or its subsidiaries;

4.2.3 STOCK OPTION PLANS, ETC. Take any action to accelerate, amend or change the period of exercisability or vesting of options or other rights granted under its stock plans or authorize cash payments in exchange for any options or other rights granted under any of such plans;

4.2.4 MATERIAL CONTRACTS. Enter into any contract or commitment, or violate, amend or otherwise modify or waive any of the terms of any of its contracts, other than in the ordinary course of business consistent with past practice and in no event shall such contract, commitment, amendment, modification or waiver (other than those relating to sales of

products or purchases of supplies in the ordinary course) involve the payment by Company or Merging Company, as applicable, or their respective subsidiaries in excess of \$150,000;

4.2.5 ISSUANCE OF SECURITIES. Issue, deliver or sell or authorize or propose the issuance, delivery or sale of, or purchase or propose the purchase of, any shares of its capital stock or securities convertible into, or subscriptions, rights, warrants or options to acquire, or other agreements or commitments of any character obligating it to issue any such shares or other convertible securities, other than the issuance of shares of its common stock pursuant to the conversion of preferred stock, or exercise of stock options, warrants or other rights therefor outstanding as of the date of this Agreement;

4.2.6 INTELLECTUAL PROPERTY. Transfer or license to any person or entity any rights to any Intellectual Property other than the license of non-exclusive rights to Intellectual Property in the ordinary course of business consistent with past practice, place any Intellectual Property into a source-code escrow, or grant any source-code license of any kind;

4.2.7 EXCLUSIVE RIGHTS. Enter into or amend any agreements pursuant to which any other party is granted exclusive marketing or other exclusive rights of any type or scope with respect to any of its products or technology;

4.2.8 DISPOSITIONS. Sell, lease, license or otherwise dispose of or encumber any of its properties or assets which are material, individually or in the aggregate, to its and its subsidiaries' business, taken as a whole, except in the ordinary course of business consistent with past practice;

4.2.9 INDEBTEDNESS. Incur any indebtedness for borrowed money or guarantee any such indebtedness or issue or sell any debt securities or guarantee any debt securities of others;

4.2.10 LEASES. Enter into any operating lease in excess of \$50,000;

4.2.11 PAYMENT OF OBLIGATIONS. Pay, discharge or satisfy in an amount in excess of \$200,000 in any one case, any claim, liability or obligation (absolute, accrued, asserted or unasserted, contingent or otherwise) arising other than in the ordinary course of business, other than the payment, discharge or satisfaction of liabilities reflected or reserved against in the Company Financial Statements or the Merging Company Financial Statements, as applicable;

4.2.12 CAPITAL EXPENDITURES. Make any capital expenditures, capital additions or capital improvements except in the ordinary course of business and consistent with past practice that do not exceed \$25,000 individually or \$100,000 in the aggregate;

4.2.13 INSURANCE. Materially reduce the amount of any material insurance coverage provided by existing insurance policies;

4.2.14 TERMINATION OR WAIVER. Terminate or waive any right of substantial value;

4.2.15 EMPLOYEE BENEFIT PLANS; NEW HIRES; PAY INCREASES. Adopt or amend any employee benefit or stock purchase or option plan or hire any new director level or officer level employee, pay any special bonus or special remuneration to any employee or director, or increase the salaries or wage rates of its employees other than pursuant to scheduled annual performance reviews, provided that any resulting modifications are in the ordinary course of business and consistent with Company's and Merging Company's past practices;

4.2.16 SEVERANCE ARRANGEMENTS. Grant any severance, termination pay or payments or benefits payable as a result of the Merger (i) to any director or officer, or (ii) to any other employee except payments made pursuant to written agreements outstanding on the date hereof;

4.2.17 LAWSUITS. Commence a lawsuit other than (i) for the routine collection of bills, (ii) in such cases where such party in good faith determines that failure to commence suit would result in the material impairment of a valuable aspect of its business, provided that it consults with the other party prior to the filing of such a suit, (iii) for a breach of this Agreement, or (iv) to clarify such party's obligations under this Agreement;

4.2.18 ACQUISITIONS. Acquire or agree to acquire by merging or consolidating with, or by purchasing a substantial portion of the assets of, or by any other manner, any business or any corporation, partnership, association or other business organization or division thereof, or otherwise acquire or agree to acquire any assets which are material, individually or in the aggregate, to its business, taken as a whole, or acquire or agree to acquire any equity securities of any corporation, partnership, association or business organization;

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

4.2.20 REVALUATION. Revalue any of its assets, including without limitation writing down the value of inventory or writing off notes or accounts receivable other than in the ordinary course of business;

4.2.21 ACCOUNTING POLICIES AND PROCEDURES. Make any change to its accounting methods, principles, policies, procedures or practices, except as may be required by GAAP, Regulation S-X promulgated by the SEC or applicable statutory accounting principles;

4.2.22 OTHER. Take or agree in writing or otherwise to take, any of the actions described in Sections 4.2, or any action which would make any of its representations or warranties contained in this Agreement untrue or incorrect or prevent it from performing or cause it not to perform its covenants hereunder.

4.3 NO SOLICITATION BY MERGING COMPANY. Merging Company and the officers, directors, employees or other agents of Merging Company (collectively, "Merging Company Representatives") will not, directly or indirectly, (i) take any action to solicit, initiate or encourage or agree to any Merging Company Takeover Proposal ("Merging Company Takeover Proposal" means any offer or proposal for, or any indication of interest in, a merger or other business combination involving Merging Company or the acquisition of 15% or more of the outstanding shares of capital stock of Merging Company, or a significant portion of the assets of Merging Company, other than the transactions contemplated by this Agreement, or (ii) subject to the terms of the immediately following sentence, engage in any discussions or negotiations with, or disclose any nonpublic information relating to the Merging Company to, or afford access to the properties, books or records of the Merging Company, to any person that has advised Merging Company that it may be considering making, or that has made, a Merging Company Takeover Proposal. Notwithstanding the immediately preceding sentence, if, prior to adoption of this Agreement by Merging Company stockholders, an unsolicited written Merging Company Takeover Proposal shall be received by the Board of Directors of Merging Company, then, to the extent the Board of Directors of Merging Company believes in good faith (after advice from its financial advisor and after considering all terms and conditions of such written Merging Company Takeover Proposal, including the likelihood and timing of its consummation) that such Merging Company Takeover Proposal would result in a transaction more favorable to Merging Company's stockholders from a financial point of view than the transaction contemplated by this Agreement (any such more favorable Merging Company Takeover Proposal being referred to in this Agreement as a "Superior Company Proposal") and the Board of Directors of Merging Company determines in good faith after advice from outside legal counsel that it is necessary to do so in order for the Board of Directors of Merging Company to comply with its fiduciary duties to stockholders under applicable law, then Merging Company Representatives may furnish in connection therewith information to the party making such Superior Company Proposal and, subject to the provisions hereof, engage in negotiations with such party, and such actions shall not be considered a breach of this Section 4.3 or any other provisions of this Agreement; provided that in each such event the Merging Company notifies Company of such determination by the Merging Company Board of Directors and provides Company with a true and complete copy of the Superior Company Proposal received from such third party, and provides (or has provided) Company with all documents containing or referring to non-public information of Merging Company that are supplied to such third party; provided, however, that Merging Company provides such non-public information only pursuant to a non-disclosure agreement; and provided further that Merging Company Representatives shall not agree to or endorse any Merging Company Takeover Proposal and the Merging Company Board of Directors shall not withdraw its recommendation of the Merger and adoption of this Agreement unless Merging Company has provided Company at least three (3) days prior notice of any such intent to agree or endorse such Merging Company Takeover Proposal or to withdraw such recommendation.

Merging Company will promptly (and in any event within 24 hours) notify Company after receipt of any Merging Company Takeover Proposal or any notice that any person is considering making a Merging Company Takeover Proposal or any request for non-public information relating to Merging Company or for access to the properties, books or records of Merging Company by any person that has advised Merging Company that it may be considering making, or that has made, a Merging Company Takeover Proposal, or whose efforts to formulate a Merging Company Takeover Proposal would be assisted thereby (such notice to include the identity of such person or persons), and will keep Company fully informed of the status and details of any such Merging Company Takeover Proposal notice, request or correspondence or communications related thereto, and shall provide Company with a true and complete copy of such Merging Company Takeover Proposal notice or any amendment thereto, if it is in writing, or a complete written summary thereof, if it is not in writing. Merging Company shall immediately cease and cause to be terminated all existing discussions or negotiations with any persons conducted heretofore with respect to a Merging Company Takeover Proposal.

## ARTICLE V

### ADDITIONAL AGREEMENTS

5.1 MEETING OF STOCKHOLDERS. The Merging Company shall promptly after the date hereof take all action necessary in accordance with Florida Law and its respective Certificate of Incorporation and Bylaws to convene the Merging Company Stockholders Meeting. The Merging Company shall use its reasonable best efforts to solicit from its stockholders proxies in favor of the adoption of this Agreement and the Merger and shall take all other action necessary or advisable to secure the vote or consent of stockholders required to effect the Merger. The Merging Company shall use reasonable efforts to obtain from its stockholders holding in the aggregate 95% of the issued and outstanding shares of Merging Company Common Stock (i) a waiver of such stockholders' appraisal rights with respect to the transactions contemplated by this Agreement; and (ii) the written consent of the Merging Company stockholders to the transactions contemplated by this Agreement.

5.2 ACCESS TO INFORMATION.

5.2.1 Except as prohibited by applicable law, each of Company and Merging shall afford the other and its accountants, counsel and other representatives, reasonable access during normal business hours during the period prior to the Effective Time to (i) all of such party's and its subsidiaries' properties, books, contracts, commitments and records, and (ii) all other information concerning the business, properties and personnel of such party and its subsidiaries as the other party may reasonably request. The Company and Merging Company agree to provide to the other and its accountants, counsel and other representatives copies of internal financial statements promptly upon request.

5.2.2 Subject to compliance with applicable law, from the date hereof until the Effective Time, each of Company and Merging Company shall confer on a regular and frequent

basis with one or more representatives of the other party to report operational matters of materiality and the general status of ongoing operations.

5.2.3 No information or knowledge obtained in any investigation pursuant to this Section 5.2 shall affect or be deemed to modify any representation or warranty contained herein or the conditions to the obligations of the parties to consummate the Merger.

5.2.4 Each of Company and Merging Company shall provide the other and its accountants, counsel and other representatives reasonable access, during normal business hours during the period prior to the Effective Time, to all of such party's and its subsidiaries' Tax Returns and other records and work papers relating to Taxes, and shall also provide the following information upon the request of the other party or its subsidiaries: (i) a schedule of the types of Tax Returns being filed by Company or Merging Company, as applicable, and each of its subsidiaries in each taxing jurisdiction, (ii) a schedule of the year of the commencement of the filing of each such type of Tax Return, (iii) a schedule of all closed years with respect to each such type of Tax Return filed in each jurisdiction, (iv) a schedule of all material Tax elections filed in each jurisdiction by Company or Merging Company, as applicable, and each of its subsidiaries, (v) a schedule of any deferred intercompany gain with respect to transactions to which Company or Merging Company, as applicable, has been a party, and (vi) receipts for any Taxes paid to foreign Tax authorities.

5.7 CONFIDENTIALITY. The parties acknowledge that each of Company and Merging Company have previously executed a non-disclosure agreement, which agreement shall continue in full force and effect in accordance with its terms.

5.8 PUBLIC DISCLOSURE. Unless otherwise permitted by this Agreement, Company and Merging Company shall consult with each other before issuing any press release or otherwise making any public statement or making any other public (or non-confidential) disclosure (whether or not in response to an inquiry) regarding the terms of this Agreement and the transactions contemplated hereby, and neither shall issue any such press release or make any such statement or disclosure without the prior approval of the other (which approval shall not be unreasonably withheld), except as may be required by law, in which case the party proposing to issue such press release or make such public statement or disclosure shall use its commercially reasonable efforts to consult with the other party before issuing such press release or making such public statement or disclosure.

5.9 CONSENTS; COOPERATION.

5.9.1 The Company and Merging Company shall promptly apply for or otherwise seek, and use its reasonable best efforts to obtain, all consents and approvals required to be obtained by it for the consummation of the Merger, including those required under the Florida Corporate Law. The Company shall use its reasonable best efforts to obtain all necessary consents, waivers and approvals under any of its material contracts in connection with the Merger for the assignment thereof or otherwise. The parties hereto will consult and cooperate

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with one another, and consider in good faith the views of one another, in connection with any analyses, appearances, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of any party hereto in connection with proceedings under or relating to the Florida Corporate Law or any other federal or state antitrust or fair trade law.

5.9.2 Each of Company and Merging Company shall use its reasonable best efforts to resolve such objections, if any, as may be asserted by any Governmental Entity with respect to the transactions contemplated by this Agreement under the Florida Corporate Law, the Sherman Act, as amended, the Clayton Act, as amended, the Federal Trade Commission Act, as amended, and any other Federal, state or foreign statutes, rules, regulations, orders or decrees that are designed to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade (collectively, "Antitrust Laws").

5.9.3 Notwithstanding anything to the contrary in Section 5, (i) neither Company nor the Merging Company shall be required to divest any of their respective businesses, product lines or assets, or to take or agree to take any other action or agree to any limitation that would reasonably be expected to have a Material Adverse Effect on Parent or of Parent combined with the Surviving Corporation after the Effective Time.

5.10 LEGAL REQUIREMENTS. Each of Company and Merging Company will cause their respective subsidiaries to, take all reasonable actions necessary to comply promptly with all legal requirements which may be imposed on them with respect to the consummation of the transactions contemplated by this Agreement and will promptly cooperate with and furnish information to any party hereto necessary in connection with any such requirements imposed upon such other party in connection with the consummation of the transactions contemplated by this Agreement and will take all reasonable actions necessary to obtain (and will cooperate with the other parties hereto in obtaining) any consent, approval, order or authorization of, or any registration, declaration or filing with, any Governmental Entity or other person, required to be obtained or made in connection with the taking of any action contemplated by this Agreement.

5.11 BLUE SKY LAWS. Company shall take such steps as may be necessary to comply with the securities and blue sky laws of all jurisdictions which are applicable to the issuance of the Company Common Stock in connection with the Merger. Merging Company shall use its reasonable best efforts to assist Company as may be necessary to comply with the securities and blue sky laws of all jurisdictions which are applicable in connection with the issuance of Company Common Stock in connection with the Merger.

5.12 INDEMNIFICATION.

5.12.1 After the Effective Time, Parent will fulfill and honor in all respects the obligations of the Merging Company pursuant to the indemnification provisions of Merging Company's Certificate of Incorporation and Bylaws or any indemnification agreement with the Merging Company officers and directors to which Merging Company is a party, in each case in effect on the date hereof; provided that such indemnification shall be subject to any limitation

imposed from time to time under applicable law. Without limitation of the foregoing, in the event any person so indemnified (an "Indemnified Party") is or becomes involved in any capacity in any action, proceeding or investigation in connection with any matter relating to this Agreement or the transactions contemplated hereby occurring on or prior to the Effective Time, Company shall, or shall cause the Surviving Corporation to, pay as incurred such Indemnified Party's reasonable legal and other expenses (including the cost of any investigation and preparation) incurred in connection therewith to the fullest extent permitted by the Florida Law upon receipt of any undertaking contemplated by the appropriate Section(s) of the Florida Law. Any Indemnified Party wishing to claim indemnification under this Section 5.12.1, upon learning of any such claim, action, suit, proceeding or investigation, shall promptly notify Company and the Surviving Corporation, and shall deliver to Company and the Surviving Corporation the undertaking contemplated by the appropriate Section(s) of the Florida Law.

5.12.2 To the extent there is any claim, action, suit, proceeding or investigation (whether arising before or after the Effective Time) against an Indemnified Party that arises out of or pertains to any action or omission in his or her capacity as director, officer, employee, fiduciary or agent of the Merging Company occurring prior to the Effective Time, or arises out of or pertains to the transactions contemplated by this Agreement for a period lasting until the expiration of two years after the Effective Time (whether arising before or after the Effective Time), in each case for which such Indemnified Party is indemnified under this Section 5.12.2, such Indemnified Party shall be entitled to be represented by counsel, which counsel shall be counsel of Company (provided that if use of counsel of Company would be expected under applicable standards of professional conduct to give rise to a conflict between the position of the Indemnified Person and of Company, the Indemnified Party shall be entitled instead to be represented by counsel selected by the Indemnified Party and reasonably acceptable to Company) and following the Effective Time the Surviving Corporation and Company shall pay the reasonable fees and expenses of such counsel, promptly after statements therefor are received and the Surviving Corporation and Company will cooperate in the defense of any such matter; provided, however, that neither the Surviving Corporation nor Company shall be liable for any settlement effected without its written consent (which consent shall not be unreasonably withheld); and provided, further, that, in the event that any claim or claims for indemnification are asserted or made prior to the expiration of such two year period, all rights to indemnification in respect to any such claim or claims shall continue until the disposition of any and all such claims. The Indemnified Parties as a group may retain only one law firm (in addition to local counsel) to represent them with respect to any single action unless there is, under applicable standards of professional conduct, a conflict on any significant issue between the position of any two or more Indemnified Parties.

5.12.3 The provisions of this Section 5.12 are intended to be for the benefit of, and shall be enforceable by, each Indemnified Party, his or her heirs and representatives.

5.12.4 From and after the Time of Closing, the Merging Company agrees to defend, indemnify and hold harmless the Company from and against all indemnifiable damages of the Merging Company. For this purpose, "indemnifiable damages" of the Merging Company



means the aggregate of all expenses, losses, costs, deficiencies, liabilities and damages (including, without limitation, reasonable attorneys' fees and court costs) incurred or suffered by the Merging Company, as a result of or in connection with: (1) any inaccurate representation or warranty made by the Company in or pursuant to this Agreement, (2) any default in the performance of any of the covenants or agreements made by the Company in this Agreement, or (3) any failure of the Company to pay, discharge or perform any of its liabilities, or any asserted liability to the extent resulting from any dispute or claim against Merging Company concerning any of the Excluded Liabilities.

5.12.5 After the Effective Date, the Company agrees to defend, indemnify and hold the Merging Company and their shareholders harmless from and against all indemnifiable damages of the Company. For this purpose, "indemnifiable damages" of the Company means the aggregate of all expenses, losses, costs, deficiencies, liabilities and damages (including, without limitation, reasonable attorneys' fees and court costs) incurred or suffered by the Company or their respective shareholders as a result of or in connection with: (1) any inaccurate representation or warranty made by the Merging Company in or pursuant to this Agreement, (2) any default in the performance of any of the covenants or agreements made by the Merging Company in this Agreement, (3) the operation of Merging Company's business after the Effective Date, or any occurrence, act or omission of the Merging Company or of any shareholder, director, officer, employee, consultant or agent of the Merging Company or Company which occurs subsequent to the Effective Date, and causes damage to the Company or its shareholders. The prevailing party in any claim for indemnification shall be entitled to receive reasonable attorneys' fees and expenses from the non prevailing party.

5.12.6 If any party hereto (the "Indemnitee" or "Indemnified Party") receives notice of any claim or the commencement of any action or proceeding with respect to which the other party or parties is or may be obligated to provide indemnification (the "Indemnifying Party" or "Indemnitor"), the Indemnitee shall promptly give the Indemnifying Party notice thereof. Such notice shall state the basis for the claim, action or proceeding and the amount thereof (to the extent such amount is determinable at the time when such notice is given) and shall permit the Indemnifying Party to assume the defense of such claim, action or proceeding (including any action or proceeding resulting from any such claim). Failure to give such notice shall not affect the Indemnitee's right to indemnification unless the Indemnifying Party can demonstrate that such failure has materially prejudiced the Indemnifying Party's ability to defend the same and then only to such extent. The Indemnifying Party may compromise, to the extent provided below or, at its election, defend, at such Indemnifying Party's own expense and by such Indemnifying Party's own counsel, any such matter involving the asserted liability of the Indemnitee. In any event, the Indemnitee, the Indemnifying Party and the Indemnifying Party's counsel shall cooperate in the compromise of, or defense against, any such asserted liability. So long as the Indemnitor is defending in good faith any such third party claim, the Indemnitee shall not settle or compromise such third party claim. Both the Indemnitee and the Indemnifying Party may participate in the defense of such asserted liability but any Indemnitee participation shall be at its own expense and the Indemnifying Party shall control and make all decisions regarding said defense. Indemnifying Party may settle or compromise any claim without the

consent of the Indemnified Party only if no monetary obligation is imposed on the Indemnified Party (which is not reimbursed or paid for by the Indemnitor) and the Indemnified Party by reason thereof is not determined to be in violation of any rule, regulation or law and the Indemnified Party is not thereby subjected to injunctive or other equitable relief. If the Indemnifying Party chooses to defend any claim, the Indemnitor shall make available to the Indemnifying Party such books, records or other documents within its control.

5.12.7 In case any event shall occur which would otherwise entitle either party to assert a claim for indemnification hereunder, no loss, damage or expense shall be deemed to have been sustained by such party to the extent (1) of any tax savings realized by such party with respect thereto, or (2) of any proceeds received or which should have been received by such party from any insurance policies with respect thereto.

5.13 TAX TREATMENT. For U.S. federal income tax purposes, it is intended that the Merger qualify as a reorganization within the meaning of the Code, and the parties hereto intend that the transactions contemplated by this Agreement shall constitute a "plan of reorganization" within the meaning of Section 368 of the Code and Treasury Regulations Sections 1.368-2(g) and 1.368-3(a). Company will report the Merger on its income tax returns in a manner consistent with treatment of the Merger as a Code Section 368(a) reorganization. Neither Company, the Merging Company nor any of their respective affiliates has taken any action, nor will they take any action, that would prevent or impede the Merger from qualifying as a reorganization under Section 368 of the Code.

5.14 COOPERATION TO SATISFY GOVERNMENT AUTHORITIES. Company and the Merging Company shall cooperate to promptly address and, to the extent commercially reasonable or practicable, resolve any concerns of any Government Authority in connection with the Merger.

5.15 STOCKHOLDER LITIGATION. Unless and until the Board of Directors of Merging Company has withdrawn its recommendation of the Merger, the Merging Company shall give Company the opportunity to participate at its own expense in the defense of any stockholder litigation against Merging Company and/or its directors relating to the transactions contemplated by this Agreement. Unless and until the Board of Directors of Company has withdrawn its approval of the Merger, Company shall give Merging Company the opportunity to participate at its own expense in the defense of any stockholder litigation against Company and/or its directors relating to the transactions contemplated by this Agreement.

5.16 BOARD OF DIRECTORS. The Board of Directors of Company will take all actions within its power to cause the Board of Directors of the Surviving Corporation, effective upon the Effective Time, to consist of the current Directors of the Merging Company. The Board of Directors of the Company shall appoint one director to the Board of Directors of the Surviving Corporation, effective upon the Effective Time, and will be permitted to have one observer to the meetings of the Board of Directors of the Surviving Corporation, effective upon the Effective Time.

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5.17 BEST EFFORTS AND FURTHER ASSURANCES. Each of the parties to this Agreement shall use its best efforts to effectuate the transactions contemplated hereby and to fulfill and cause to be fulfilled the conditions to closing under this Agreement. Each party hereto, at the reasonable request of another party hereto, shall execute and deliver such other instruments and do and perform such other acts and things as may be necessary or desirable for effecting completely the consummation of this Agreement and the transactions contemplated hereby.

## ARTICLE VI

### CONDITIONS PRECEDENT TO OBLIGATIONS OF THE COMPANY

The Company's obligation to enter into and complete the Closing is conditioned upon the satisfaction or waiver in writing by the Company, on or before the Closing Date, of all of the following conditions:

6.1 REPRESENTATIONS AND WARRANTIES. The representations and warranties made by Company contained in this Merger Agreement, the schedules or exhibits hereto or in any certificate or document delivered to the Company by Merging Company in connection with the transactions contemplated by this Merger Agreement shall be true in all respects (without giving effect to any materiality qualifications or limitations therein) on and as of the Closing Date with the same effect as though such representations and warranties were made on such date except for such failures to be true and correct which in the aggregate would not reasonably be expected to result in a Material Adverse Effect on Company and Merging Company.

6.2 PERFORMANCE OF COVENANTS. Company and Merging Company shall have performed and complied in all material respects with all of the agreements and covenants required by this Merger Agreement to be performed and complied with by it prior to or on the Closing Date.

6.3 LITIGATION. No injunction shall have been issued by any court or Governmental Authority which restrains or prohibits this Merger Agreement or the consummation of the transactions contemplated hereby.

6.4 ANTITRUST LAWS COMPLIANCE. There is an applicable exemption to rules and regulations of the Antitrust Laws applicable to the transactions contemplated by this Merger Agreement.

6.5 SHAREHOLDER APPROVAL. The Merging Company Shareholder Approval required in connection with the consummation of the Merger shall have been obtained.

6.6 DELIVERY OF DOCUMENTS. There shall have been delivered to the Company the following:

6.6.1 A certificate of Company, dated the Closing Date, signed by the Chief Executive Officer of Company to the effect that the conditions specified in Sections 6.1 and 6.2 have been fulfilled;

6.6.2 A certificate of Merging Company dated the Closing Date, signed by the Chief Executive Officer of Merging Company to the effect that the conditions specified in Sections 6.1 and 6.2 have been fulfilled;

6.6.3 A certificate of the Secretary or Assistant Secretary of Company certifying copies of all requisite corporate resolutions of Company approving the execution and delivery of this Merger Agreement and the consummation of the transactions contemplated herein and the identification and signature of each officer of Parent executing this Merger Agreement; and

6.6.4 A certificate of the Secretary of the Merging Company certifying copies of (a) the Certificate of Incorporation and by-laws of the Merging Company; (b) all requisite corporate resolutions of SAC approving the execution and delivery of this Merger Agreement and the consummation of the transactions contemplated herein; and (c) the identification and signature of each officer of the Merging Company executing this Merger Agreement.

6.7 MATERIAL CHANGES. There shall not have been any change that has had or could reasonably be expected to have a Material Adverse Effect on the assets, properties, condition (financial or otherwise), prospects or results of operations of the Company from the date hereof to the Closing Date, nor shall there exist any condition which could reasonably be expected to result in such a Material Adverse Effect, and there shall have been delivered to Company a certificate, dated the Closing Date, to such effect signed by an authorized officer of the Company.

6.8 CERTIFICATE OF MERGER. Prior to the Effective Time, the Certificate of Merger shall be accepted for filing with the Secretary of State of the State of Florida.

## ARTICLE VII

### CONDITIONS PRECEDENT TO THE OBLIGATIONS OF MERGING COMPANY

The obligations of Merging Company to enter into and complete the Closing are conditioned upon the satisfaction or waiver by Company on behalf of itself and Merging Company, on or before the Closing Date, of the following conditions:

7.1 REPRESENTATIONS AND WARRANTIES. The representations and warranties made by the Company contained in this Merger Agreement, the schedules or exhibits hereto or in any certificate or document delivered to Merging Company by the Company in connection with the transactions contemplated by this Merger Agreement shall be true in all respects (without giving effect to any materiality qualifications or limitations therein) on and as

of the Closing Date with the same effect as though such representations and warranties were made on such date, except (i) as otherwise contemplated by this Merger Agreement and (ii) for such failures to be true and correct which in the aggregate would not reasonably be expected to result in a Material Adverse Effect on the Company.

7.2 PERFORMANCE OF COVENANTS. The Company shall have performed and complied in all material respects with all of the agreements and covenants required by this Merger Agreement to be performed and complied with by it prior to or on the Closing Date, except as otherwise contemplated by this Merger Agreement.

7.3 LITIGATION. No injunction shall have been issued by any court or Governmental Authority which restrains or prohibits this Merger Agreement or the consummation of the transactions contemplated hereby.

7.4 ANTITRUST LAWS ACT COMPLIANCE. There is an applicable exemption to rules and regulations of the Antitrust Laws Act applicable to the transactions contemplated by this Merger Agreement.

7.5 CONSENTS AND APPROVALS. The consents and approvals specified herein shall have been obtained in form and substance satisfactory to Company in its reasonable discretion.

7.6 MATERIAL CHANGES. There shall not have been any change that has had or could reasonably be expected to have a Material Adverse Effect on the assets, properties, condition (financial or otherwise), prospects or results of operations of the Company from the date hereof to the Closing Date, nor shall there exist any condition which could reasonably be expected to result in such a Material Adverse Effect, and there shall have been delivered to Parent a certificate, dated the Closing Date, to such effect signed by an authorized officer of the Company.

7.7 SHAREHOLDER APPROVAL. The Company Shareholder Approval required in connection with the consummation of the Merger shall have been obtained.

7.8 DELIVERY OF DOCUMENTS. There shall have been delivered to Parent the following:

7.8.1 a certificate of the Company, dated the Closing Date, signed by its Chief Executive Officer, to the effect that the conditions specified in Sections 7.1 and 7.2 have been fulfilled; and

7.8.2 a certificate of the Secretary of the Company certifying copies of (x) the Certificate of Incorporation and by-laws of the Company; (y) all requisite corporate resolutions of the Company approving the execution and delivery of this Merger Agreement and the consummation of the transactions contemplated herein; and (z) the identification and signature of each officer of the Company executing this Merger Agreement.

## ARTICLE VIII

### TERMINATION

8.1 TERMINATION EVENTS. This Merger Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time without prejudice to any other rights or remedies either party may have:

8.1.1 by written agreement, duly authorized by the Boards of Directors of Company and Merging Company;

8.1.2 by Company or the Merging Company if any Governmental Authority shall have issued an order, decree, injunction or judgment or taken any other action permanently restraining, enjoining or otherwise prohibiting the Merger and such order or other action shall have become final and nonappealable;

8.1.3 subject to the provisions below, by Company or the Merging Company if the Effective Time shall not have occurred on or before the 90<sup>th</sup> day following the date of this Agreement; *provided* that the right to terminate this Merger Agreement under this Section 8.1.3 shall not be available to any party whose failure to fulfill any obligation under this Merger Agreement has been the cause of, or results in, the failure of the Effective Time to have occurred within such period;

8.1.4 by Company or the Merging Company by notice to the other if the satisfaction of any condition to the obligations of the terminating party has been rendered impossible;

8.2 EFFECT OF TERMINATION. In the event this Merger Agreement is terminated pursuant to Section 8.1, all further obligations of the parties hereunder shall terminate. Each party's right of termination hereunder is in addition to any other rights it may have hereunder or otherwise and the exercise of a right of termination shall not be an election of remedies.

8.3 AMENDMENT. To the extent permitted by applicable law, this Merger Agreement may be amended by action taken by or on behalf of the respective Boards of Directors of the Company and Merging Company at any time; *provided, however*, that, following approval by the Stockholders of the Merging Company, no amendment shall be made which under the Florida Corporate Law would require the further approval of the Stockholders of the Merging Company without obtaining such approval. This Merger Agreement may not be amended except by an instrument in writing signed on behalf of all of the parties hereto.

8.4 WAIVER. At any time prior to the Effective Time any party hereto may, to the extent legally allowed, (i) extend the time for the performance of any of the obligations or other acts of the other parties hereto, (ii) waive any inaccuracies in the representations and warranties made to such party contained herein or in any document delivered pursuant hereto and (iii) waive compliance with any of the agreements or conditions for the benefit of such party contained herein. Any agreement on the part of a party hereto to any such extension or waiver shall be valid only if set forth in an instrument in writing signed on behalf of such party.

## ARTICLE IX

### MISCELLANEOUS

9.1 CAPTIONS AND HEADINGS. The Article and paragraph headings throughout this Agreement are for convenience and reference only, and shall in no way be deemed to define, limit, or add to the meaning of any provision of this Agreement.

9.2 NO ORAL CHANGE. This Agreement and any provision hereof, may not be waived, changed, modified, or discharged orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, or discharge is sought.

9.3 GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida, without regard to the laws that might otherwise govern under applicable principles of conflicts of law. Each of the parties hereto irrevocably consents to the exclusive jurisdiction of any court located within the State of New York in connection with any matter based upon or arising out of this Agreement or the matters contemplated herein, agrees that process may be served upon them in any manner authorized by the laws of the State of Florida for such persons and waives and covenants not to assert or plead any objection which they might otherwise have to such jurisdiction and such process.

9.4 PUBLIC ANNOUNCEMENTS. Subject to any requirement of applicable law or stock exchange listing agreement, all public announcements or similar publicity with respect to this Merger Agreement or the transactions contemplated hereby shall be issued only with the consent of Company and the Merging Company. Unless consented to by each party hereto in advance prior to the Closing, all parties hereto shall keep the provisions of this Merger Agreement strictly confidential and make no disclosure thereof to any Person, other than such party's respective legal and financial advisors, subject to the requirements of applicable law or securities exchange regulations.

9.5 SUCCESSORS. This Merger Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

9.6 FURTHER ASSURANCES. Each of the parties hereto agrees that it will, from time to time after the date of this Merger Agreement, execute and deliver such other certificates,

documents and instruments and take such other action as may be reasonably requested by the other party to carry out the actions and transactions contemplated by this Merger Agreement.

9.7 CONFIDENTIALITY. The Confidentiality Agreement between Company and the Merging Company is incorporated by reference herein and shall continue in full force and effect in accordance with the terms thereof. In the event of termination or abandonment of the transactions contemplated by this Agreement pursuant to Section 9.7, the Confidentiality Agreement shall continue in full force and effect. The definition of "Confidential Information" contained in the Confidentiality Agreement is hereby amended to include this Agreement, all Schedules and Exhibits to this Agreement, and all information obtained pursuant to of this Agreement.

9.8 NOTICES. All notices requests, demands, and other communications under this Agreement shall be in writing and shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the third day after mailing if mailed to the party to whom notice is to be given, by first class mail, registered or certified, postage prepaid, and properly addressed, and by fax, as follows:

If to Merging Company:

Excelsior Health Clinic, Inc.  
Attention: Nancy Horne  
President  
3738 S. Lake Orlando Parkway  
Orlando, Florida 32808-3014  
Telephone: 407-291-3303

With a copy to:

Joseph I. Emas  
Attorney at Law  
1224 Washington Avenue  
Miami Beach, Florida 33139  
Telephone: (305) 531-1174

If to the Company:

My Medical, Inc.  
Attention: Jim Pugh  
1830 S. Ocean Blvd.  
Suite #3903  
Hallandale, Florida 33009



Telephone: 480-203-1462

Facsimile: 866-328-7774

9.9 NON-WAIVER. Except as otherwise expressly provided herein, no waiver of any covenant, condition, or provision of this Agreement shall be deemed to have been made unless expressly in writing and signed by the party against whom such waiver is charged; and (i) the failure of any party to insist in any one or more cases upon the performance of any of the provisions, covenants, or conditions of this Agreement or to exercise any option herein contained shall not be construed as a waiver or relinquishment for the future of any such provisions, covenants, or conditions, (ii) the acceptance of performance of anything required by this Agreement to be performed with knowledge of the breach or failure of a covenant, condition, or provision hereof shall not be deemed a waiver of such breach or failure, and (iii) no waiver by any party of one breach by another party shall be construed as a waiver with respect to any other or subsequent breach.

9.10 TIME OF ESSENCE. Time is of the essence of this Agreement and of each and every provision hereof.

9.11 REMEDIES CUMULATIVE. Except as otherwise provided herein, any and all remedies herein expressly conferred upon a party will be deemed cumulative with and not exclusive of any other remedy conferred hereby, or by law or equity upon such party, and the exercise by a party of any one remedy will not preclude the exercise of any other remedy.

9.12 SEVERABILITY. If any provision of this Agreement, or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void or unenforceable, the remainder of this Agreement will continue in full force and effect and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto. The parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision.

9.13 ENTIRE AGREEMENT. This Agreement contains the entire Agreement and understanding between the parties hereto, and supersedes all prior agreements and understandings.

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

9.15 EXPENSES. Except as expressly otherwise provided herein, each party shall bear its own expenses incurred in connection with the preparation, execution and performance of

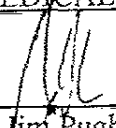
this Merger Agreement and the transactions contemplated hereby, including all fees and expenses of agents, representatives, counsel and accountants. All such expenses incurred by the Company ("Company Transaction Expenses") shall be repaid in full at the Closing.

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

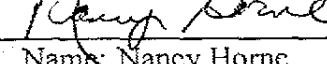
[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties have executed this Merger Agreement as of the date first above written.

MY MEDICAL, INC.

By:   
Name: Jim Pugh  
Title: Chief Executive Officer

EXCELSIOR HEALTH CLINIC, INC.

By:   
Name: Nancy Horne  
Title: President

## **COMPANY SCHEDULES**

**MERGING COMPANY SCHEDULES**