Stock Purchase Agreement (Model Form)

STOCK PURCHASE AGREEMENT

Dated as of [DATE]
by and among
NEWCO, Inc.
(the "Company"), and
Each Investor (the "Investors") Listed in Exhibit 6.1

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AGREEMENT dated [DATE], between Newco, Inc., a Delaware corporation, and each of the Investors listed in Exhibit 2.1.

PREAMBLE

The Company wishes to obtain equity financing. The Investors are willing, on the terms contained in this Agreement, to purchase Series A Convertible Preferred Stock of the Company having the characteristics set forth in the Certificate of Designation, as amended, attached as Exhibit 1.1. Capitalized terms are defined in the first Article. Exhibits are incorporated by reference into this Agreement as though such exhibits were set forth at the point of such reference. The neuter gender shall include the masculine and feminine genders as appropriate.

ARTICLE I
DEFINED TERMS

The following terms, when used in this Agreement, have the following meanings, unless the context otherwise indicates:

"Acceptable Currency": cash and any other method of payment which will result in such payment being credited to the account of the Company at the bank previously designated to the Investor in time to earn interest for the day of the Closing [the day immediately following the day of the Closing].

"'33 Act": the Securities Act of 1933 [as amended, or any similar federal law then in force].

"'34 Act": the Securities Exchange Act of 1934.

"Affiliate": means, with respect to any specified Person, (1) any other Person who, directly or indirectly, owns or controls, is under common ownership or control with, or is owned or controlled by, such specified Person; (2) any other Person who is a director, officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, of the specified Person or a Person described in clause (1) of this paragraph, (3) another Person of whom the specified Person is a director, officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, (4) another Person in whom the specified Person has a substantial beneficial interest or as to whom the specified Person serves as trustee or in a similar capacity; or (5) any relative or spouse of the specified Person or any of the foregoing Persons, any relative of such spouse or any spouse of any such relative; provided, however, that at any time after the Closing Date, the Company and the Subsidiaries on the one hand and the Investor and its Affiliates (other than the Company and the Subsidiaries) shall not be deemed to be Affiliates of each other.

"Best Knowledge": includes (a) actual knowledge of the Person, including, the actual knowledge of any of the officers or directors of the Company and the administrators of any of the facilities operated by the Company or any of its subsidiaries and (b) that knowledge which a prudent businessperson could have obtained in the management of his business after making due inquiry, and after exercising due diligence, with respect thereto.

"Bylaws": the bylaws of Newco, Inc., as amended.

"Certificate of Incorporation": the certificate of incorporation of Newco, Inc., as originally filed with the Delaware Secretary of State together with all amendments thereto.

"Certificate of Designation": the certificate of designation adopted by the Newco board of directors establishing the rights, limitations, etc., of the Convertible Preferred Stock.

"Closing" and "Closing Date": the consummation of the Company's sale and the Investors' purchase of the Convertible Preferred Stock, and the date on which the same occurs or occurred.

"Commission": the United States Securities and Exchange Commission.

"Common Stock": the $.01 par value common stock of Newco, Inc.

"Convertible Preferred Stock": the $.01 par value cumulative convertible preferred stock, Series A of Newco, Inc. having the characteristics set forth in the Certificate of Designation.

"Employee Benefit Plan": any plan regulated under the Employees Retirement and Income Supplement Act ("ERISA").

"Financial Statements": includes all of the following:

(a) the audited financial statements of the Company as of [DATE] (including all schedules and notes thereto), consisting of the balance sheet at such date and the related statements of income and expenses, retained earnings, changes in financial position and cash flows for the twelve-month period then ended; and
(b) the audited financial statements of the Company as of [DATE] (including all schedules and notes thereto), consisting of the balance sheet at such date and the related statements of income and expenses, retained earnings, changes in financial position and cash flows for the twelve-month period then ended.

In addition to (a) and (b) above, after the date of this Agreement, the term "Financial Statements" shall include any and all interim financial statements thereafter issued.

"Financial Statement Date": the date of the most recent Financial Statements of the Company.

"Founders": the signatories to this Agreement under the heading of Founders.

"Holder": an Investor (or its successors or assigns) who continues to hold either Common Stock or Convertible Preferred Stock.

"Independent Public Accountants": that firm of independent certified public accountants selected by the Company's Board of Directors [with the approval of the Investor Board Members].

"Investor Board Members": that individual or individuals who sit on the Company's Board of Directors at the request or insistence (whether by written agreement or otherwise) of the Investors.

"Offering Memorandum": Newco, Inc.'s private offering memorandum dated [DATE].

"Public Offering": both (i) the date of the effectiveness of any registration statement relating to the underwritten distribution Company's Common Stock which is filed by the Company under the '33 Act with proposed maximum offering proceeds to the Company (calculated in accordance with Rule 457 under the '33 Act, as such rule may be amended from time to time) of $[_____] or more, and (ii) the process of distributing such common stock to the public.

"Qualified Holder": an Investor or a transferee of an Investor or another Qualified Holder (assuming all such transfers were made in accordance with this Agreement) who holds of record [10%] or more of the shares of the Company's Common Stock or enjoys rights to purchase or convert into [10%] or more of the same, provided that (i) a transferee of an Investor who, in the reasonable judgment of Company, is affiliated with an actual or potential competitor of the Company may be deemed by the Company not to be a

Qualified Holder; (ii) any Investor notifying the Company that it is a Venture Capital Operating Company within the meaning of the Department of Labor's Final Plan Asset Regulation, 29 C.F.R. Part 2510 (Mar. 13, 1987) shall be a Qualified Holder; and (iii) the general and limited partners, officers or Affiliates of an Investor.

"Shares": any shares of the Company's Convertible Preferred Stock or Common Stock, as the context requires.

"Subscription Agreement": the subscription agreement executed by each Investor, the terms of which are incorporated herein and made a part hereof.

"Subsidiary" or "Subsidiaries" of any Person: any corporation or other entity of which securities or other ownership interests having ordinary voting power to elect a majority of the board of directors or other Persons performing similar functions are at the time directly or indirectly owned or controlled by such Person or one or more Subsidiaries of such Person.

Additional defined Terms are found in the body of the following text:

> The masculine form of words includes the feminine and the neuter and vice versa, and, unless the context otherwise requires, the singular form of words includes the plural and vice versa. The words "herein," "hereof," "hereunder," and other words of similar import when used in this Agreement refer to this Agreement as a whole, and not to any particular section or subsection.

ARTICLE II
PURCHASE AND SALE TERMS

Section 2.1. Purchase and Sale. Subject to the terms of this Agreement, the Company shall issue and sell to the Investors and each Investor shall purchase from the Company at the Closing the number of shares of Convertible Preferred Stock at the aggregate purchase price set forth opposite its name in Exhibit 2.1. The obligation of each Investor to purchase is several and not joint.

Section 2.2. Payment. Each of the Investors shall pay the purchase price of the Convertible Preferred Stock purchased by it in full at the Closing in Acceptable Currency.

Section 2.3. Transfer Legends and Restrictions. The transfer of the Shares will be restricted in accordance with the terms hereof. Each certificate evidencing the Shares, including any certificate issued to any transferee thereof, shall be imprinted with legends in substantially the following form (unless otherwise permitted under this Section or unless such Shares shall have been effectively registered and sold under the '33 Act and the applicable state securities laws):

"THESE SHARES HAVE NOT BEEN REGISTERED UNDER THE '33 ACT. THEY MAY NOT BE OFFERED OR TRANSFERRED BY SALE, ASSIGNMENT, PLEDGE OR OTHERWISE UNLESS (I) A REGISTRATION STATEMENT FOR THE SHARES UNDER THE '33 ACT IS IN EFFECT OR (II) THE COMPANY HAS RECEIVED AN OPINION OF COUNSEL, WHICH OPINION IS SATISFACTORY TO THE COMPANY, TO THE EFFECT THAT SUCH REGISTRATION IS NOT REQUIRED UNDER THE '33 ACT. TRANSFER OF THESE SHARES IS FURTHER RESTRICTED AS PROVIDED IN THE CONVERTIBLE PREFERRED STOCK PURCHASE AGREEMENT DATED [DATE], A COPY OF WHICH IS AVAILABLE AT THE COMPANY'S OFFICES."

The Holder of any Shares by acceptance thereof agrees, so long as any legend described in this

Section shall remain on the certificates evidencing the Shares, prior to any transfer of any of the same (except for a transfer effected pursuant to an effective registration statement under the '33 Act or in compliance with Rule 144 or Rule 144A thereunder), to give written notice to the Company of such Holder's intention to effect such transfer and agrees to comply in all material respects with the provisions of this Section. Such notice, if required, shall describe the proposed method of transfer of the Shares in question. Upon receipt by the Company of such notice, if required, and if in the opinion of counsel to such Holder, which opinion shall be reasonably satisfactory to the Company, the proposed transfer may be effected without registration under the '33 Act in compliance with Section 4(2) or Rules 144 or 144A thereunder and under applicable state securities laws, then the proposed transfer may be effected; provided, however, that in the case of any Holder which is a partnership, no such opinion of counsel shall be necessary for a transfer by such partnership to a partner of such partnership, or a retired partner of such partnership who retires after the date such partnership became a Holder, or the estate of any such partner or retired partner, if the transferee agrees in writing to be subject to the terms of this Section to the same extent as if such transferee were originally a signatory to this Agreement. Upon receipt by the Company of such opinion and of such agreement by the transferee to be bound by this Section, the Holder of such Shares shall thereupon be entitled to transfer the same in accordance with the terms of the notice (if any) delivered by such Holder to the Company. Each certificate evidencing the Shares issued upon any such transfer shall bear the legend set forth in this Section. Upon the written request of a Holder of the Shares, the Company shall remove the foregoing legend from the certificates evidencing such Shares and issue to such Holder new certificates therefor, free of any transfer legend if, with such request, the Company shall have received an opinion of counsel selected by the Holder, such opinion to be reasonably satisfactory to the Company, to the effect that any transfers by said Holder of such Shares may be made to the public without compliance with either Section 5 of the '33 Act or Rule 144 thereunder and applicable state securities laws. In no event will such legend be removed if such opinion is based upon the "private offering" exemption of Section 4(2) of the '33 Act.

ARTICLE III
REPRESENTATIONS AND WARRANTIES OF THE COMPANY

Cross reference Note on Representations and Warranties.

Except as set forth in the Exhibits furnished pursuant to this Agreement, the Company [and certain Founders] represent[s] and warrant[s] [severally, or jointly and severally] to the Investors, at and as of the Closing that:

The specific representations and warranties deal with a series of concerns. First, the investors want basic assurance that the issuer has been validly organized and may legally issue the securities. This entails satisfying regulatory agencies, complying with the corporate charter and relevant contracts (e.g., bank loan agreements), holding the necessary meetings, avoiding prohibitions (if any) in court proceedings and so forth. Second, the investors want to know the facts about the issuer as a business concern: Is the count on the number of shares outstanding accurate are the financial statements complete? Are there any contingent liabilities, pending lawsuits, hidden violations of law, undisclosed encumbrances on listed assets, commissions payable to brokers, burdensome contracts, unnamed subsidiaries, infirmities in patents? Hypothetically, these representations could be covered in one paragraph, representing that the private placement memorandum or disclosure schedule is accurate and complete. However, some investors are nervous that a representation which talks in Rule 10b-5 language will inherit the Rule 10b-5 notion that scienter-guilty knowledge-is required to establish recovery, or at least that a judge will not be as severe if

considering only the maker's responsibility for the accuracy of a single, generic representation. Moreover, the belt and suspenders approach is customary; investors" counsel can and will insist on specific representations and a basket representation in 10b-5 terms. Therefore, specific representations are suggested to cover such significant matters as the existence of adequate policies of insurance, the validity of leases, the ownership of intellectual property. Sometimes, the list suggested by investors" counsel borders on the trivial, for example, compliance with ERISA requirements (laughable when the workforce totals two) and OSHA requirements (query the application to two programmers in a suburban office park). However, in a company with a relatively long operating history, a detailed section is, arguably, appropriate, particularly if an investor has an opportunity to recover from institutions with deep pockets who control the issuer and are liable, therefore, on one or more of the articulations of respondent superior.

It is important to keep in mind that the scheme of the entire representations and warranty section is to regulate by exception. Thus, a given representation in the Agreement proper will not ordinarily go into specifics. It will state, for example, there are "no leases of real property" except as listed on the Schedule of Exceptions; the job of complying with representations and warranties becomes one of preparing the Schedule of Exceptions in sufficient detail. It is worthwhile repeating that, if the Schedule of Exceptions show up just before closing, a fight is likely to break out.

When the representations become agonizingly specific, the issuer is entitled to nervousness at the possibility of an inadvertent violation. A representation that says all material contracts are listed on Exhibit X is perilous if the harried founder simply forgets about a relatively trivial agreement. Is the deal off if he is proven wrong prior to the closing? There are various palliatives. First a "basket" or minimum threshold can be established-if the amount involved is less than, say, $25,000, then nothing turns on the omission.[1]

Further, the agreement may provide that a given representation concerns "material" items or that items popping up "in the ordinary course of business" need not be considered; in addition, the representation may be a so-called "knowledge rep", as in, "We represent the following to the best of our knowledge."[2] Lastly, assuming a material contract omitted from the appropriate appendix is discovered after the closing, the issue is whether the investors are entitled to rescission under all circumstances or if (and only if) some damage results from the omission. The warranties are unconditional and rescission is the traditional equitable remedy for breach. But why, one might ask, should investors be able to rescind if the unmentioned contract is favorable or, at worst, neutral? A related question is whether the investors (if they do not elect rescission) are entitled to damages on a before-tax or after-tax basis; suppose the issuer covered up a contingent liability of $ 100,000 but the maximum cash "cost" of that liability to the issuer (and, therefore, to the investors) is the after-tax effect of the loss, approximately $60,000 after federal and state taxes.[3] See Model Schedule of Exceptions

Certain representations deserve passing special mention because they are often overlooked. Thus, for example, in any financing following the first round, investors should look carefully at the prior registration rights agreements and obtain a representation that there is no conflict between the earlier and current sets of provisions. Since there often is a conflict, the effect of this representation is to force issuer's counsel to examine the two sets of rights and resolve the differences.

If any of the investors is an SBIC, the issuer will be required to represent it is a "small business concern" within the scope of the Small Business Act; this will be mandated routinely by counsel for the SBIC. What investors sometimes overlook is that, even if no SBIC is investing, small business status may be critical to the issuer's ability to participate in other advantageous activities: that is, small business set-aside programs authorized by the federal government.

Section 3.1. Corporate Existence. The Company is a corporation duly incorporated, validly existing and in good standing under Delaware law and has unconditional power and authority to conduct its business and

own its properties as now conducted and owned. Exhibit 3.1 is a true copy of the Certificate of Incorporation, with all amendments. The Company is qualified as a foreign corporation to do business in all jurisdictions in which the nature of its properties and business requires such qualification [and in which noncompliance with such qualification would materially affect the Company's business.

Section 3.2. Power and Authority. The Company has unconditional power and authority, and has taken all required corporate and other action necessary (including stockholder approval, if necessary) to permit it to own and hold properties to carry on its current business, to execute and deliver this Agreement, to issue and sell the Convertible Preferred Stock as herein provided and otherwise to carry out the terms of this Agreement and all other documents, instruments, or transactions required by this Agreement, and none of such actions will violate any provision of the Company's Bylaws or Certificate of Incorporation, or result in the breach of or constitute a default under any agreement or instrument to which the Company is a party or by which it is bound or result in the creation or imposition of any material lien, claim or encumbrance on any Company asset. This Agreement has been duly executed and delivered by the Company and (assuming the due authorization, execution and delivery hereof by the Investors) constitutes the valid and binding obligation of the Company enforceable against the Company in accordance with its terms. No event has occurred and no condition exists which would constitute a violation of this Agreement. Neither this Agreement nor any other gives any person rights to terminate any agreements with the Company or otherwise to exercise rights against the Company.

Section 3.3. Financial Condition. The Company has previously furnished to the Investors its Financial Statements, which, together with the footnotes thereto, are complete and [substantially] correct, have been prepared in accordance with generally accepted accounting principles consistently applied, and fairly present the financial condition of the Company as of the dates specified. The Financial Statements are in accordance with the books and records of the Company as of the dates and for the periods indicated, present fairly the financial position, results of operations, shareholders' equity and changes in financial position of such corporations as of the respective dates and for the respective periods indicated, and have been prepared in accordance with generally accepted accounting principles ("GAAP") applied on a consistent basis (except as described in such statements, notes thereto and reports).

If capital assets, receivables and/or inventory are major elements of value one may want customized representations on each subject. Thus, the inventory figure can vary widely depending on how it is calculated; quite specific representations may be requested, going well beyond the usual assurance that the statement has been "prepared according to generally accepted accounting principles consistently applied." Thus, one may want to know all about the issuer's policy on adding to inventory various administrative costs, such as interest on debt and warehouse and handling charges. How does the issuer build obsolescence into the equation?[4] It may be significant not only to know the amount of the issuer's inventory but where it is located-in a public warehouse (subject to storage charges) or on a supplier's premises (and perhaps hard to release)? Does the issuer use FIFO (first in, first out), LIFO (last in, first out), or some other methods of valuing inventory-i.e., "average" or "retail" inventory? The statements may reveal an average inventory turnover of four times per year, but this may mean half the inventory turned over eight times and the other half not at all. Certain inventory may remain in the "raw material" category (indicating usefulness as collateral) even though some finishing work has been done-lumber cut into specific lengths, for example.[5]

Other questions routinely are (or should be) addressed specifically in the representations. Has the issuer classified as "current assets" any items which may not be sold or realized within one year? On what basis does the issuer value long-term investments? What depreciation methods does the issuer use - i.e., straight line, machine hours, units produced, sum-of-the-years digits, double declining balance, sinking fund? What amount of the payables and receivables represents contra accounts -- i.e., items involving the same vendor or customer? The financial statements do not separate out that information. And, delinquencies in the

payroll tax accounts may not show up in the statements- immaterial in amount, perhaps, but usually a solid indication of trouble ahead; there should be a solid and specific representation that none such exist, material or immaterial.

And, investors may require the issuer to warrant that all receivables arose in the ordinary course of business and are not subject to counterclaim or setoff. Often a warrant of collectability will be included which determines the risk allocation for nonpayment of receivables. If the transaction involves a buyout, to the extent it warrants collectability of receivables, the target will want to collect any accounts with which it will be charged-a potential source of disharmony to the extent the target's collection efforts threaten to disrupt customer relationships.

Section 3.3.1. Absence of Undisclosed Liabilities. As of the Financial Statement Date, the Company had (and on the date hereof the Company has) no material liabilities (matured or unmatured, fixed or contingent, which are not fully reflected or provided for on the balance sheet of the Company as at the Financial Statement Date), or any material loss contingency (as defined in Statement of Financial Accounting Standards No. 5) whether or not required by GAAP to be shown on the Balance Sheets, except (i) obligations to perform under commitments incurred in the ordinary course of business after the Financial Statement Date, (ii) tax and related liabilities due and specifically set forth in Exhibit 3.3.1, which liabilities shall be fully paid concurrently with the Closing as provided in Exhibit 3.3.1, and (iii) other liabilities as set forth in Exhibit 3.3.1.

Section 3.3.2. Taxes. For all periods ended on or prior to the Financial Statement Date, the Company has accurately completed and filed or will file within the time prescribed by law (including extensions of time approved by the appropriate taxing authority) all tax returns and reports required to be filed with the Internal Revenue Service, the State of Delaware, any other states or governmental subdivisions and all foreign countries and has paid, or made adequate provision in the Financial Statements dated the Financial Statement Date for the payment of, all taxes, interest, penalties, assessments or deficiencies shown to be due (or, to the knowledge of the Company [or any Founders], claimed by such authority or jurisdiction to be due) on or in respect of such tax returns and reports. The Company [and the Founders] know[s] of (a) no other federal, Delaware, state, county, municipal or foreign taxes which are due and payable by the Company which have not been so paid; (b) no other federal, Delaware, state, county, municipal or foreign tax returns or reports which are required to be filed which have not been so filed; and (c) no unpaid assessment for additional taxes for any fiscal period or any basis thereof; except for taxes which are due and are specifically set forth in Exhibit 3.3.2 hereto but which shall be paid in full concurrently with the Closing as provided in Exhibit 3.3.2. The Company's federal or state income tax returns have never been audited [have been audited through the Company's fiscal year ending in 20__]. Proper and accurate amounts have been withheld by the Company from its employees for all periods in compliance with the tax, social security and any employment withholding provisions of applicable federal and state law. Proper and accurate, in all material respects, federal and state returns have been filed by the Company for all periods for which returns were due with respect to employee income tax withholding, social security and unemployment taxes, and the amounts shown thereon to be due and payable have been paid in full or provision therefor included on the books of the Company in accordance with and to the extent required by GAAP. The Company has not made any election under Section 341(f) of the Internal Revenue Code of 1986, as amended (the "Code").

Taxes are not generally a major issue in venture finance. However, there may be special tax issues which require careful review by counsel. For example, post-closing behavior can render pre-closing assumptions as to the treatment of certain items no longer operative, meaning taxes

are due nunc pro tunc. And there may be special tax issues which deserve specific examination and mention.[6] Thus, for example, an issuer seized with substantial real estate may be subject to withholding obligations under §§ 1445 and 897 of the Code; the issuer may experience liabilities arising out of the transaction if excessive "golden parachutes" (as defined in § 280G of the Code) have been awarded; a transfer subject to a "tax benefit lease" can trigger a tax, absent certain consents;[7] and the issuer may have become a "consenting corporation" under the collapsible corporation provisions of § 341(f), affecting a subsequent sale. In fact, the issuer may be liable for tax claims asserted against members of the affiliated group from which it severed, meaning that the "affiliated tax liability" representation should cover all members of the group. See Glover 7, for the following additional thoughts:

"There are many reasons why it makes sense to treat indemnification for tax and environmental matters separately from other indemnification claims. For example, the parties may agree that the seller should be responsible for certain pre-closing taxes, even though the existence of these taxes has been fully disclosed. An indemnification provision tied solely to breaches of representations would not reflect this arrangement. Also, both the buyer and the seller may want to draft special procedures that apply to the management of tax and environmental disputes."

Section 3.3.3. Subsidiaries. The Company has no subsidiaries and owns no capital stock or other securities, or rights or obligations to acquire the same, of any other entity.

[OR]

Section 3.3.3. Subsidiaries. Exhibit 3.3.3 hereto sets forth a list of all Subsidiaries of the Company. Each Subsidiary is a corporation duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation as stated on the said Exhibit 3.3.3; has all requisite corporate power and authority to own, lease and operate its properties and to carry on its business as now being conducted, and is duly qualified as a foreign corporation in all jurisdictions in which it is required to be so qualified. Each Subsidiary is wholly owned by the Company and no Person has any right to participate in, or receive any payment based on any amount relating to, the revenue, income, value or net worth of the Subsidiaries or any component or portion thereof, or any increase or decrease in any of the foregoing.

Section 3.4. No Material Adverse Change. Since the Financial Statement Date there has been no material adverse change in the financial or other condition, properties or business operations of the Company.

***OR**, if the investor wants a "walk right" which avoids the interpretations specified in the cases cited in the Note on Material Adverse Change, consider the following:*

Section 3.5. Absence of Certain Changes. Except as set forth in Exhibit 3.4, since the Financial Statement Date there has not been:

(a) any material adverse change in the condition (financial or otherwise), assets, liabilities, business or business prospects of the Company from that shown by said Financial Statements as at the Financial Statement Date (other than normal operating losses incurred in the ordinary course of business);

(b) any damage, destruction or loss of any of the properties or assets of the Company (whether or not covered by insurance) materially adversely affecting the business or business prospects of the Company;

(c) any dividend, declaration, setting aside or payment or other distribution in respect of any of the Company's capital stock or any direct or indirect redemption, purchase or other acquisition of any of such stock by the Company;

(d) any labor dispute, or any other event, development, or condition, of any character, or threat of the same, materially adversely affecting the business or business prospects of the Company;

(e) any material asset or property of the Company made subject to a lien of any kind;

(f) any material liability or obligation of any nature whatsoever (contingent or otherwise) incurred by the Company, other than current material liabilities or obligations incurred in the ordinary course of business;

(g) any waiver of any valuable right of the Company, or the cancellation of any material debt or claim held by the Company;

(h) any issuance of any stock, bonds or other securities (including options, warrants or rights) of the Company or any agreements or commitments respecting the same;

(i) any sale, assignment or transfer of any material tangible or intangible assets of the Company except with respect to tangible assets in the ordinary course of business;

(j) any loan by the Company to any officer, director, employee or stockholder of the Company, or any agreement or commitment therefor; or

(k) any extraordinary increase, direct or indirect, in the compensation paid or payable to any officer, director, employee or agent of the Company.

(l) any cancellation or compromise of any debt or claim, except in the ordinary course of business and consistent with past practice;

(m) any waiver or release of any rights of material value;

(n) any transfer or grant of any material rights under any concessions, leases, licenses, agreements, patents, inventions, trademarks, trade names, servicemarks or copyrights or with respect to any know-how;

(o) any wage or salary increase applicable to any group or classification of employees generally (other than in connection with the general salary plan of the Company), any employment contract with any officer or employee or made any loan to, or any material transaction of any other nature with any officer or employee of the Company;

(p) any material transaction, contract or commitment, except contracts listed, or which pursuant to the terms hereof are not required to be listed, on Exhibit 3.4 hereto, and except this Agreement and the transactions contemplated hereby;

(q) any change in its accounting methods or practices.

See Note on Material Adverse Change, and the definitions of Company Material Adverse Effect.

Section 3.6. Litigation. There are no suits, proceedings or investigations pending or threatened against or affecting the Company or an officer of the Company which could have a material adverse effect on the

business, assets, or financial condition of the Company or the ability of any officer to participate in the affairs of the Company, or which concern [in any material way] the transactions contemplated by the Agreement. The foregoing includes, without limiting its generality, actions pending or threatened (or any basis therefor known to the Company) involving the prior employment of any employees or currently contemplated prospective employees of the Company or their use, in connection with the business of the Company, of any information or techniques which might be alleged to be proprietary to their former employer(s).

> **Section 3.6.1. Conflicts of Interest.** Neither the Company nor any officer, employee, agent or any other person acting on behalf of the Company has, directly or indirectly, given or agreed to give any money, gift or similar benefit (other than legal price concessions to customers in the ordinary course of business) to any customer, supplier, employee or agent of a customer or supplier, or official or employee of any governmental agency or instrumentality of any government (domestic or foreign) or other Person who was, is, or may be in of a position to help or hinder the business of the Company (or assist in connection with any actual or proposed transaction) which (a) might subject the Company to any damage or penalty in any civil, criminal or governmental litigation or proceeding, (b) if not given in the past, might have had a material adverse effect on the assets, business or operations of the Company as reflected in the Financial Statements, or (c) if not continued in the future, might materially adversely affect the assets, business, operations or prospects of the Company.

One of the vices this representation is designed to smoke out is a violation of the Foreign Corrupt Practices Act of 1977, which prohibits bribery by U.S. companies of foreign officials. The Act requires multinationals to reflect on their books and records all payments to foreign officials and agents. As one commentary suggested, "Basically FCTA exports U.S. business ethics into the business cultures of other countries." Forrester & Durkin, "Doing The Right Thing," Infrastructure Finance 85 (1995). The Act is no joke. Lockheed and two of its executives were indicted, the company pleaded guilty and agreed to pay a fine of close to $25 million. Id.

> **Section 3.6.2. Other Relationships.** Except as set forth in Exhibit 3.6.2, to the best knowledge of the Company, the officers of the Company have no interest (other than as noncontrolling holders of securities of a publicly traded company), either directly or indirectly, in any entity, including without limitation, any corporation, partnership, joint venture, proprietorship, firm, person, licensee, business or association (whether as an employee, officer, director, shareholder, agent, independent contractor, security holder, creditor, consultant, or otherwise) that presently (i) provides any services or designs, produces and/or sells any products or product lines, or engages in any activity which is the same, similar to or competitive with any activity or business in which the Company is now engaged; (ii) is a supplier of, customer of, creditor of, or has an existing contractual relationship with the Company; or (iii) has any direct or indirect interest in any asset or property used by the Company or any property, real or personal, tangible or intangible, that is necessary or desirable for the conduct of the business of the Company. Except as set forth in Exhibit 3.5.2 hereto, no current or former stockholder, director, officer or employee of the Company nor any Affiliate of any such person, is at present, or since the inception of the Company has been, directly or indirectly through his affiliation with any other person or entity, a party to any transaction (other than as an employee) with the Company providing for the furnishing of services by, or rental of real or personal property from, or otherwise requiring cash payments to any such person.

Section 3.7. Licenses; Compliance with Laws, Other Agreements, etc. The Company has all franchises, permits, licenses, and other rights which it currently deems necessary for the conduct of its business [and it knows of no basis for the denial of such rights in the future]. The Company is not in [material] violation of

any order or decree of any court, or of the provisions of any contract or agreement to which it is a party or by which it may be bound, or, to its knowledge, of any law, order, or regulation of any governmental authority, and neither this Agreement nor the transactions contemplated hereby will result in any such violation.

Section 3.7.1. Intellectual Property Rights and Government Approvals. Included in Exhibit 3.7.1 is a true and complete list and summary description of all patents, trademarks, service marks, trade names, copyrights (which have been filed with the federal copyright authorities) and rights or licenses to use the same, and any and all applications therefor, presently owned or held by the Company. To the Founders' knowledge (the Company making this representation and warranty without such qualification), such patents, trademarks, service marks, trade names, copyrights and rights or licenses to use the same, and any and all applications therefor, as well as all trade secrets and similar proprietary information owned or held by the Company, are all that are required to enable the Company to conduct its business as now conducted, and the Company believes that it either now owns, has the right to use, possesses or will be able to obtain possession of or develop, and (with respect to its trade secrets and similar proprietary information) has provided adequate safeguards and security for the protection of, all such rights which it will require to conduct its business as proposed to be conducted as described in the Offering Memorandum. Neither the Company nor any of the Founders has received any formal or informal notice of infringement or other complaint that the Company's operations traverse or infringe rights under patents, trademarks, service marks, trade names, trade secrets, copyrights or licenses or any other proprietary rights of others, nor do the Company or the Founders have any reason to believe that there has been any such infringement. No person affiliated with the Company has wrongfully employed any trade secrets or any confidential information or documentation proprietary to any former employer, and no person affiliated with the Company has violated any confidential relationship which such person may have had with any third party. The Company has and will have full right and authority to utilize the processes, systems and techniques presently employed by it in the design, development and manufacture of its present products and all of its other products contemplated by the Offering Memorandum and all rights to any processes, systems and techniques developed by any employee or consultant of the Company have been and will be duly and validly assigned to the Company. No royalties, honorariums or fees are or will be payable by the Company to other persons by reason of the ownership or use by the Company of said patents, trademarks, service marks, trade names, trade secrets, copyrights or rights or licenses to use the same or similar proprietary information, or any and all applications therefor. The Company has all material governmental approvals, authorizations, consents, licenses and permits necessary or required to conduct its business as described in the Offering Memorandum. Each Founder for himself (and the Company to its knowledge with respect to all Founders) represents and warrants that no Founder, no associate of any Founder nor any other employee of the Company owns nor holds, directly or indirectly, any interests in any patents, trademarks, service marks, trade names, trade secrets, copyrights, licenses, inventions, any and all applications therefor, or any other proprietary rights used or currently contemplated to be used by the Company.

Section 3.7.2. Government Approvals. Except as may be required by any state "blue sky" laws, no authorization, consent, approval, license, qualification or formal exemption from, nor any filing, declaration or registration with, any court, governmental agency, regulatory authority or political subdivision thereof, any securities exchange or any other Person is required in connection with the execution, delivery or performance by the Company of this Agreement or the business of the Company or any of its Subsidiaries in order to consummate the transactions contemplated in this Agreement. All such material authorizations, consents, approvals, licenses, qualifications, exemptions, filings, declarations and registrations have been obtained or made,

as the case may be, and are in full force and effect and are not the subject of any pending or, to the knowledge of the Company, threatened attack by appeal or direct proceeding or otherwise.

Section 3.7.3. Investment Company Act. The Company is not, and immediately after the Closing will not be, an "investment company" or a company "controlled" by an "investment company" within the meaning of the Investment Company Act.

If a startup with not a lot of assets obtains a significant amount of cash, it may be an inadvertent ""investment company" as that term is defined in the Investment Company Act of 1940, in which case resort must be had to the relief in '40 Act Rules 3a-1 or 3a-2.

Section 3.8. Ownership and Status of Stock. Exhibit 3.8 sets forth the number and par value of the shares of stock that the Company is currently authorized to issue, has issued, has outstanding and has reserved for issuance upon conversion of shares of Convertible Preferred Stock into Common Stock. All the outstanding Common Stock is, and upon issuance and payment therefor in accordance with the terms of this Agreement, all of the outstanding shares of the Convertible Preferred Stock will be, validly issued, fully paid and nonassessable. All the outstanding Common Stock has been issued in full compliance with applicable law. None of the shares of the Common Stock or the Convertible Preferred Stock are held in the Company's treasury. The Common Stock and the Convertible Preferred Stock are not entitled to cumulative voting rights, preemptive rights, antidilution rights and so-called registration rights under the '33 Act, except as otherwise provided in this Agreement or in the powers, designations, rights and preferences of the Convertible Preferred Stock contained in the Certificate of Designation. The Common Stock and the Convertible Preferred Stock have the preferences, voting powers, qualifications, and special or relative rights or privileges set forth in the Certificate of Incorporation. The Company has outstanding no option, warrant or other commitment to issue or to acquire any shares of its capital stock, or any securities or obligations convertible into or exchangeable for its capital stock, except for the conversion provisions of the Convertible Preferred Stock, nor, except as contemplated hereby, has it given any person any right to acquire from the Company or sell to the Company any shares of its capital stock. There is, and immediately upon consummation of the transactions contemplated hereby there will be, no agreement, restriction or encumbrance with respect to the sale or voting of any shares of capital stock of the Company (whether outstanding or issuable upon conversion or exercise of outstanding securities) except for the offering and sale of Convertible Preferred Stock pursuant to this Agreement. Except as set forth in this Agreement, the Company has no obligation to register any of its presently outstanding securities or any of its securities which may thereafter be issued under the Act of 1933, as amended (the "'33 Act").

Section 3.9. Brokers, etc. The Company has not dealt with any broker, finder, or other similar person in connection with the offer or sale of the Convertible Preferred Stock and the transactions contemplated by this Agreement, and the Company is not under any obligation to pay any broker's fee, finder's fee or commission in connection with such transactions.

Section 3.10. Private Sale. The Company has not, either directly or through any agent, offered any securities to or solicited any offers to acquire any securities from, or otherwise approached, negotiated, or communicated in respect of any securities with, any person in such a manner as to require that the offer or sale of such securities (including but not limited to the Convertible Preferred Stock) be registered pursuant to the provisions of Section 5 of the '33 Act and the rules and regulations of the Commission thereunder or the securities laws of any state and neither the Company nor anyone acting on its behalf will take any action prior to the Closing that would cause any such registration to be required (including, without limitation, any offer, issuance or sale of any security of the Company under circumstances which might require the integration of such security with the Convertible Preferred Stock under the '33 Act or the rules and regulations of the Securities and Exchange Commission (the "Commission") thereunder) which might subject the offering, issuance or sale of the Convertible Preferred Stock to the registration provisions of the

'33 Act. The issuance of Convertible Preferred Stock and the issuance of shares of Common Stock issuable upon the conversion of the Convertible Preferred Stock, are exempt from registration under the '33 Act. The Company has complied with all federal and state securities and blue sky laws in all issuances and purchases of its capital stock prior to the date hereof and has not violated any applicable law in making such issuances and purchases of its capital stock prior to the date hereof. Any notices required to be filed under federal and state securities and blue sky laws prior to or subsequent to the Closing shall be filed on a timely basis prior to or as so required. Neither the Company nor any person authorized or employed by the Company as agent, broker, dealer or otherwise in connection with the offering or sale of the Preferred Convertible Stock Company has offered the same or any such securities for sale to, or solicited any offers to buy the same from, or otherwise approached or negotiated with respect thereto with, any person or persons other than the Investors and not more than [ ] other financially sophisticated investors.

If there is a representation and warranty which early stage companies may have violated, it is the first sentence of this one. In fact, a nonexempt issuance within the 6 months preceding the instant placement raises questions under the SEC's "integration" doctrine. See § 3.4 of the Sample Schedule of Exceptions.

Section 3.11. Offering Memorandum. The Company has furnished the Investors with a copy of the Offering Memorandum which was prepared with reasonable care and sets forth a complete and accurate description of all plans, agreements and arrangements by which the Company may be bound and certain financial and other information concerning the Company. The Offering Memorandum read in connection with materials made available to the Investors by the Company (whether prepared by the Company or a third party) does not contain any untrue statement of a material fact nor does it omit to state any material fact necessary to make the statements therein not misleading. The information contained in the Offering Memorandum has been material to the Investors in their decision to invest.

> **Section 3.11.1. Projections; Material Facts.** In connection with the transactions contemplated by this Agreement, the Company has furnished to the Investors the Offering Memorandum including certain projected budgets, financial statements and forecasts. Except as limited by the next sentence, all statements contained in the Offering Memorandum are true, correct and complete in all material respects. The Company and the Founders do not represent or warrant that any occurrences, developments or facts including, without limitation, projections, which the Offering Memorandum says will occur or eventuate after its date (or which were otherwise furnished in writing to the Investors), will in fact occur or eventuate after such date, but the Company and the Founders represent and warrant that such occurrences, developments or facts, including such projections, presented therein were prepared by the Company in good faith based on its best knowledge, information and belief. No representation or warranty by the Company or the Founders contained in the Offering Memorandum (other than the projections), this Agreement or any other written statement, information, material or certificate furnished or to be furnished to the Investors pursuant hereto or in connection with the transactions contemplated hereby by the Company or the Founders contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained therein or herein not misleading, when all are taken together as a whole (it being understood that, in the event of any inconsistency between this Agreement and any other writings, this Agreement shall control). The Company knows of no information or fact which has or would have a material adverse effect on the financial condition, business or business prospects of the Company which has not been disclosed to the Investors. Since the respective dates as of which information is given in the Offering Memorandum, the Company knows of no material adverse change in the business, business prospects, property, condition or results of operations of the Company.

Section 3.12. Investigation. It shall be no defense to an action for breach of this Agreement that the

Investors or their agents have (or have not) made investigations into the affairs of the Company or that the Company [or the Founders] could not have known of the misrepresentation or breach of warranty. Damages for breach of a representation or warranty or other provision of this Agreement shall not be diminished by alleged tax savings resulting to the complaining party as a result of the loss complained of.

> **Section 3.12.1 Minute Books.** The minute books of the Company contain a complete summary of all meetings of directors and stockholders since the time of incorporation and reflect all transactions referred to in such minutes accurately in all material respects.

Section 3.13. Section 83(b) Elections. To the best of the Company's knowledge, all elections and notices required by Section 83(b) of the Internal Revenue Code and any analogous provisions of applicable state tax laws have been timely filed by all individuals who have purchased shares of the Company's Common Stock and the Company has been notified of the same.

Section 3.14. Employment Contracts, etc.; Certain Material Transactions. Except as set forth in Exhibit 3.14 hereto, (i) the Company is not a party to any employment or deferred compensation agreements, (ii) the Company does not have any bonus, incentive or profit-sharing plans, (iii) the Company does not have any pension, retirement or similar plans or obligations, whether funded or unfunded, of a legally binding nature or in the nature of informal understandings and (iv) there are no existing material arrangements or proposed material transactions between the Company and any officer or director or holder of more than 10% of the capital stock of the Company. The Company is not a party to any collective bargaining agreement and, to the best of its knowledge, no organizational efforts are currently being made with respect to any of their respective employees. To the knowledge of the Company, John Smith, Robert Brown, and William Green have no plans to terminate their respective relationships with the Company and/or any of its Subsidiaries. Exhibit 3.14 hereto sets forth the name (and, where applicable, the title) of each person employed by the Company as of [DATE], whose total compensation (inclusive of salary and bonuses) for the fiscal year then ended exceeded $75,000 as well as the specific amount paid during or accrued in respect of such fiscal year to or for the account of each such person (i) as basic salary and (ii) as bonus and other compensation.

It is routine to require the issuer to represent the existence (or nonexistence) of a collective bargaining representative and to require production of the relevant agreements. In today's changing world, the key officers of the company may enjoy unionlike benefits in the event of outright severance or constructive discharge triggered by a "change in control" of the issuer. The investors may require that those benefits be detailed and the maximum potential exposure outlined. Such collectivized benefits -"golden parachutes"- may occasion tax liability if too lush and, indeed, may be deemed to constitute a "plan" subject to ERISA. If the issuer has recently purchased assets from another firm, the "successorship" doctrine may mean the issuer has inherited the transferor's labor-related liabilities. And, in today's culture, labor-intensive operations are liable to generate consent decrees, adverse administrative and judicial decisions and arbitration awards.

Section 3.15. Contracts and Commitments, etc. Except as set forth in Exhibit 3.15 hereto, the Company is not a party to any contracts or commitments (or group of related contracts or commitments) other than contracts entered into in the ordinary course of business and which do not involve more than $_____ or have a term (including renewals or extensions optional with another party) of more than one year from the date thereof. The Company is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any agreement or instrument to which any of them is a party which may result in any material adverse change in the condition, financial or other, of the Company.

Alternative to Section 3.15

> Except as set forth in Exhibit 3.15, the Company is not a party to any written or oral contract or

commitment not made in the ordinary course of business and, whether or not made in the ordinary course of business, the Company is not a party to any written or oral (i) contract or commitment with any labor union, (ii) contract or commitment for the future purchase of fixed assets, materials, supplies, or equipment involving an amount in excess of $25,000, (iii) contract of commitment for the employment of any officer, individual employee or other person on a full-time basis or any contract with any individual on a consulting basis, (iv) bonus, pension, profit-sharing, retirement, stock purchase, stock option, or extraordinary hospitalization, medical insurance or similar plan, contract or understanding in effect with respect to employees or any of them or the employees of others, (v) agreements, indentures or commitments relating to the borrowing of money or to the mortgaging, pledging or otherwise placing of a lien on any assets of the Company, (vi) guaranty of any obligation for borrowed money or otherwise, (vii) lease or agreement under which the Company is lessor of or permits any third party to hold or operate any property, real or personal, owned or controlled by the Company, (viii) agreement or other commitment for capital expenditures in excess of $25,000 in the aggregate, (ix) contract or agreement under which the Company is obligated to pay any broker's fees, finder's fees or any such similar fees to any third party, (x) contract, agreement or commitment under which the Company has issued, or may become obligated to issue, any shares of capital stock of the Company, or any warrants, options, convertible securities or other commitments pursuant to which the Company is or may become obligated to issue any shares of its Common Stock, or (xi) any other contract, agreement, arrangement or understanding which is material to the business of the Company or which is material to a prudent investor's understanding of the business of the Company. The Company has furnished to counsel for the Investors true and correct copies of such agreements and other documents requested by the Investors or their authorized representatives.

Section 3.16. Employee Benefit Plans. Exhibit 3.16 hereto sets forth a list of each "employee pension benefit plan" (as defined in Section 3(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA")) maintained or contributed to by the Company (the "Retirement Plans"). Neither the Company nor any entity which is treated as a single employer along with the Company under Section 414(b), (c), (m) or (o) of the Code maintains or contributes to, or has ever maintained or contributed to, or been required to contribute to a multiemployer plan within the meaning of Section 3(37) of ERISA or any plan subject to Title IV of ERISA. Exhibit 3.16 hereto also sets forth a list of each "employee welfare benefit plan" (as defined in Section 3(1) of ERISA) and each other employee benefit plan, program, arrangement, practice or contract, whether formal or informal, maintained by the Company providing benefits or compensation to or on behalf of employees or former employees of the Company (the "Benefits Plans"). The Retirement Plans and Benefit Plans are in compliance in all material respects with the presently applicable provisions of ERISA and the Code, and the Retirement Plans are qualified under Section 401(a) of the Code. No contributions are required to be made by the Company to any Retirement Plan and all other liabilities with respect to any Retirement Plan or Benefit Plan shall have been satisfied prior to or on the Closing Date. The Company has filed or caused to be filed all reports required to be filed by it with the Internal Revenue Service or the Department of Labor under applicable provisions of ERISA and the Code with respect to each of the Retirement Plans and Benefit Plans. No liability to the Pension Benefit Guaranty Corporation has been incurred with respect to any Retirement Plan subject to Title IV of ERISA that has not been satisfied in full.

Section 3.16.1. Employee Benefit Plans and Employment Agreements. Except as listed on Exhibit 3.16 hereto, the Company is not a party to nor participates or has participated in (a) any profit-sharing, deferred compensation, bonus, stock option, stock purchase, pension, retainer, consulting, retirement, welfare or incentive plan or agreement whether legally binding or not, (b) any plan providing for "fringe benefits" to its employees, including but not limited to vacation, sick leave, medical, hospitalization, life insurance and other insurance plans, and

related benefits, (c) any employment agreement not terminable on 30 days (or less) written notice, or (d) any other "employee benefit plan" (within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA")). True, correct and complete copies of all documents with respect to the plans and agreements referred to in Exhibit 3.16 and all related summary plan descriptions have been delivered to counsel to the Investors. There are no negotiations, demands or proposals which are pending or have been made which concern matters now covered, or that would be covered, by the type of agreements or plans listed in this Section. Company is in full compliance with the applicable provisions of ERISA (as amended by the Omnibus Budget Reconciliation Act of 1987, the Tax Reform Act of 1986, Retirement Equity Act of 1984, the Deficit Reduction Act of 1984, and the Tax Equity and Fiscal Responsibility Act of 1982) and the regulations and published authorities thereunder with respect to all such employee benefit plans. The Company is in full compliance with all other statutes, orders or governmental rules and regulations applicable to such plans. The Company has performed all of its obligations under all such plans. There are no actions, suits or claims (other than routine claims for benefits) pending or threatened against such plans or the assets of such plans, and to the best knowledge of the Company, no facts exist which could give rise to any actions, suits or claims (other than routine claims for benefits) against such plans or the assets of such plans.

Section 3.16.2. Pension and Profit-Sharing Plans. The Employee Benefit Plans described on Exhibit 3.16.2 have been duly authorized by the Board of Directors of Company. Each such plan is qualified in form and operation under Sections 401(a) and 501(a) of the Internal Revenue Code of 1986 (the "Code") and no event has occurred which will or could give rise to disqualification of any such plan under said Sections. No event has occurred which will or could subject any such plans to tax under Section 511 of the Code. No prohibited transaction (within the meaning of Section 4975 of the Code) or party-in-interest transaction (within the meaning of Section 406 of ERISA) has occurred with respect to any of such Plans. All costs of Plans have been provided for on the basis of consistent methods in accordance with sound actuarial assumptions and practices. As of the last valuation date for each of the Plans listed which are pension plans ("Employee Benefit Pension Plans") within the meaning of Section 3(2) of ERISA, the assets of such plan exceeded (or were less than the benefit liability of such plan), computed on a plan termination basis, by at least the amount shown below (or, in the case of an underfunded plan, by no more than the amount shown below):

Plan	**Amounts by which assets exceed (or are less than) benefit liability on a plan termination basis**
	$_____
	$_____
	$_____
	$_____

Since the last valuation date for each Employee Pension Benefit Plan, there has been no amendment or change thereunder and, to the knowledge of Company, there has been no event or occurrence which would cause the excess of assets over benefit liabilities listed above to be reduced or the amount by which liabilities exceeded assets as listed above to be increased. Company has delivered to counsel for the Investors for each of the Employee Pension Benefit Plans (a) a copy of the Form 5500 which was filed in each of the most recent three plan years, including, without limitation, all schedules thereto and all financial statements with attached opinions of independent accountants, (b) a copy of the Form PBGC-1 which was filed in each

of the most recent three Plan years, and (c) the most recent determination letter from the Internal Revenue Service. Copies have been furnished to such counsel of (a) the consolidated statement of assets and liabilities of each of the Employee Pension Benefit Plans as of its most recent valuation date; (b) the statement of changes in fund balance and in financial position or the statement of changes in net assets available for benefits under each of said Plans for the most recently ended plan year, and, (c) with respect to any such Plan which is subject to Title IV of ERISA, the actuarial report as of the last valuation date. Such documents fairly present the financial condition of each of said Plans as at such dates and the results of operations of each of said Plans, all in accordance with generally accepted accounting principles applied on a consistent basis.

Section 3.16.3. Title IV Plans. With respect to each Employee Pension Benefit Plan (excluding plans not subject to the provisions of Title IV of ERISA) listed on Exhibit 3.16 or in which the Company (for purposes of this subsection 3.16.3 the "Company" shall include all trades or businesses whether or not incorporated, which are a member of a group of which Company is a member and which are under common control within the meaning of Section 414 of the Code and the regulations thereunder) participates or has participated, (a) the Company has not withdrawn from such a Plan during a plan year in which it was "substantial employer" (as defined in Section 4001(a)(2) of ERISA), (b) the Company has not filed a notice of intent to terminate any such Plan nor adopted any amendment to treat such Plan as terminated, (c) the PBGC has not instituted proceedings to terminate any such Plan, (d) no other event or condition has occurred which might constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any such Plan, (e) no accumulated funding deficiency, whether or not waived, exists with respect to any such Plan, no condition has occurred or exists which by the passage of time would be expected to result in an accumulated funding deficiency as of the last day of the current Plan year of any such Plan, and the Company has not failed to make full payment when due of all amounts which under the provisions of any such Plan are required to be made as contributions thereto, (f) all required premium payments to the Pension Benefit Guaranty Corporation have been paid when due, (g) no reportable event, as described in Section 4043 of ERISA and the regulations thereunder, has occurred with respect to said plans, and (h) no excise taxes are payable under the Code.

Section 3.16.4. Multiemployer Plans. With respect to each Employee Pension Benefit Plan which is a "multiemployer plan" (within the meaning of Section 3(37) of ERISA) listed on Exhibit 3.16.4 or in which the Company participates or has participated, (a) the Company has not withdrawn, partially withdrawn, or received any notice of any claim or demand for withdrawal liability or partial withdrawal liability against any of them, (b) the Company has not received any notice that any such Plan is in reorganization, that increased contributions may be required to avoid a reduction in plan benefits or the imposition of any excise tax, or that any such Plan is or may become insolvent, (c) the Company has not failed to make any required contributions to any such Plan, (d) no such Plan is a party to any pending merger of asset or liability transfer, (e) there are no Pension Benefit Guaranty Corporation proceedings against any such plan, and (f) the Company has not (or will have as a result of the transactions contemplated hereby) any contingent liability for withdrawal liability by reason of a sale of assets pursuant to Section 4204 of ERISA.

Section 3.16.5. Continuation Coverage Requirements of Health Plans. All group health plans of the Company (including any plans of affiliates of the Company which must be taken into account under Section 162(i) or (k) of the Code) have been operated in compliance with the group health plan continuation coverage requirements of Section 162(k) of the code to the extent such requirements are applicable.

Section 3.16.6. Fines and Penalties. There have been no acts or omissions by the Company which have given rise to or may give rise to fines, penalties, taxes, or related charges under §§ 502(c) or (k) or 4071 of ERISA or Chapter 43 of the Code.

There is a high degree of sensitivity to the adequacy of the issuer's employee benefit plans (although many plans nowadays are often overfunded, with companies switching to defined contribution plans to avoid quantified liabilities entirely). Among the potential disguised liabilities accompanying the issuer's retirement plans are a tax on accumulated funding deficiencies, an excise tax on prohibited transactions and/or a tax to the extent the issuer's deductions are disallowed in any open year. Moreover, an insidious (and sometimes hidden) liability relates to unfunded liabilities to pay medical insurance for retired employees.[8]

Section 3.17. Banks, Agents, etc. Exhibit 3.17 hereto contains a complete and correct list setting forth the name of (i) each bank in which the Company has an account, safe deposit box or borrowing privilege and the names of all persons authorized to draw thereon, to have access thereto or to borrow thereupon, as the case may be, and (ii) each agent to whom such corporation has granted a written power of attorney or similar authority to act on its behalf.

Section 3.18. Small Business Concern. The Company is a "small business concern" as defined in § 121.3-11 of Title 13 of the Code of Federal Regulations. The Company has heretofore furnished to each Investor that is an SBIC the following completed forms: Size Status Declaration on SBA Form 480, Assurance of Compliance on SBA Form 652D, and Portfolio Financing Report on SBA Form 1031. The Company represents and warrants the completeness and correctness of each of said forms.

Section 3.19. Environmental Liabilities. The Company has not caused or allowed, nor has it contracted with any party for, the generation, use, transportation, treatment, storage or disposal of any Hazardous Substance (as defined below) in connection with the operations of its business or otherwise. The Company, together with any real property that it owns, leases, or otherwise occupies or uses and the operations of its business (the "Premises") are in compliance with all applicable Environmental Laws (as defined below) and orders or directives or any governmental authorities having jurisdiction under such Environmental Laws, including, without limitation, any Environmental Laws or orders or directives with respect to any cleanup or remediation of any release or threat of release of Hazardous Substances. The Company has not received any citation, directive, letter or other communication, written or oral, or any notice of any proceedings, claims or lawsuits, from any person, entity or governmental authority arising out of the ownership or occupation of the Premises or the conduct of its operations, nor is it aware of any basis therefor. The Company has obtained and is maintaining in full force and effect all necessary permits, licenses and approvals required by any Environmental Laws applicable to the Premises and the business operations conducted thereon (including operations conducted by tenants on the Premises), and is in compliance with all such permits, licenses and approvals. The Company has not caused or allowed a release, or a threat of release, of any Hazardous Substance unto, at or near the Premises nor, to its best knowledge, has the Premises or any property at or near the Premises ever been subject to a release, or a threat of release, of any Hazardous Substance. For purposes of this Agreement, the term "Environmental Laws" shall mean any federal, state or local law, ordinance or regulation pertaining to the protection of human health or the environment, including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq., Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001 et seq., and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. For purposes of this Agreement, the term "Hazardous Substances" shall include oil and petroleum products, asbestos, polychlorinated biphenyls and urea formaldehyde, and any other materials classified as hazardous or toxic under any Environmental Laws.

ARTICLE IV
COVENANTS OF THE COMPANY

Section 4.1. Accounts and Reports. Until a Public Offering occurs, the Company shall furnish to each Qualified Holder copies of the following certificates, filings and reports:

(a) Annual Reports. As soon as available, and in any event within 90 days after the end of each fiscal year, Financial Statements of the Company.

Quarterly Reports. As soon as available, and in any event within 45 days after the end of each of the first three quarters of each fiscal year, unaudited Financial Statements of the Company. All such statements shall set forth in comparative form the figures for the corresponding periods of the preceding fiscal year, and shall be prepared in reasonable detail and in accordance with generally accepted accounting principles consistently applied. [Each of such quarterly financial statements shall be accompanied by a report of the president of the Company explaining business developments and problems occurring during the relevant quarter and a discussion of the figures presented in such financial statements.]

(b) Monthly Financial Statements. Within 15 days after the end of each month, copies of the Company's comparative statements of income and cash flow and unaudited, consolidated balance sheet as of the end of such month, which shall be prepared in accordance with generally accepted accounting principles consistently applied [and so certified by the Company's principal financial officer].

(c) Certifications. All financial statements referred to in section (a) above, if not certified by the Company's Independent Public Accountants, shall be certified as accurate and complete in all material respects (subject to normal year-end adjustments) by the chief executive and chief financial officers of the Company and shall be presented in form comparative to the similar period of the preceding year. If for any period the Company has any subsidiary or subsidiaries whose accounts are consolidated with those of the Company, then in respect of such period all such financial statements will be the consolidated and consolidating financial statements of the Company and all such consolidated subsidiaries. All such financial statements may be labelled "confidential" by the Company. In any event, without the Company's express consent, the recipient will make no use or disclosure of the financial statements except in connection with evaluating its investment in the Company.

(d) Forecasts. As soon as available, but in no event later than one month after the start of each fiscal year, monthly financial forecasts and, promptly after preparation, any revisions thereto, in a format approved by the Investor Board Members, for the current fiscal year, [unless, in the opinion of counsel to the Company, providing any such forecast will require inclusion of the same in a subsequent Public Offering].

(e) Other Information. Upon the reasonable request of a Qualified Holder, the Company will deliver to such Qualified Holder other information and data, not proprietary in nature (in the good-faith judgment of the Company), pertaining to its business, financial and corporate affairs to the extent that such delivery will not violate any then applicable laws and any contracts of the Company with third persons. The Company will permit any person designated by a Qualified Holder in writing, at the expense of such Qualified Holder, to visit and inspect any of the properties of the Company, including its books of account, and to discuss its affairs, finances, and accounts with the Company's officers or directors, all at such reasonable times and

as often as a Qualified Holder may reasonably request, all in a manner consistent with the reasonable security and confidentiality needs of the Company, provided that the Company shall be under no such obligation (i) with respect to information deemed in good faith by the Company to be proprietary or (ii) if the Company's board of directors reasonably believes such visit, inspection, or discussion would violate applicable laws or any contract with third persons.

(f) Confidentiality. All information furnished under this Section is confidential and each recipient shall (i) maintain the same in confidence and (ii) take all reasonable measures to prevent any officer or agent of such recipient from disclosing the same.

(g) Certificates. As soon as available, but not later than 90 days after the end of each fiscal year of the Company, a certificate of the Company's certified public accountants certifying to the Investors that, based upon their examination of the affairs of the Company performed in connection with the preparation of such financial statements in accordance with generally accepted auditing standards, they are not aware of the occurrence or existence during such fiscal year of any condition or event which constitutes or would, upon notice or lapse of time or both, constitute a default in any of the Company's obligations under this Agreement or any other agreement to which the Company is a party, or, if they are aware of such condition or event, specifying to the Investors the nature thereof;

Section 4.2. Use of Proceeds. The Company shall use the proceeds of the sale of the Convertible Preferred Stock for working capital, and otherwise as set forth in the Offering Memorandum.

Section 4.3. Exhibits. The Company will furnish all Exhibits and other attachments or enclosures to this Agreement at least two business days prior to the scheduled Closing Date.

[**Section 4.4. Financial Covenants.**]

Specific covenants (not typically seen in venture deals) contain the maintenance of certain ratios . . . debt to equity, minimum net worth, working capital levels, etc.]

Section 4.5. Compensation of Executive Officers. The salary and other compensation, including without limitation bonuses and fringe benefits, of the officers of the Company shall be as approved from time to time by the Board of Directors of the Company, including the Investor Board Members.

Section 4.6. Rule 144. The Investors recognize that the provisions of Rule 144 under the '33 Act are not presently applicable to securities of the Company. The Company covenants that (a) at all times after the Company first becomes subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, the Company will comply with the current public information requirements of Rule 144(c)(1) under the '33 Act; and (b) at all such times as Rule 144 is available for use by the Investors, the Company will furnish any Investor upon request with all information within the possession of the Company required for the preparation and filing of Form 144.

Section 4.7. Future Noncompetition and Proprietary Rights Agreements.

(a) Proprietary Information. The Company shall use its best efforts to (i) insure that no person employed by the Company will wrongfully employ any confidential information or documentation proprietary to any former employer, (ii) protect, by maintenance of secrecy to the extent appropriate, all technical and business information developed by and belonging to the Company which has not been patented, (iii) cause to be patented all technological information developed by and belonging to the Company, which, in the opinion of the Company and its counsel, is patentable and is best protected by patenting, and (iv) cause each person who

becomes an employee of the Company and who shall have access to confidential or proprietary information of the Company, to execute an agreement relating to matters of noncompetition and nondisclosure and assignment.

(b) Licenses and Trademarks. The Company shall use its best efforts to own, possess and maintain all patents, trademarks, service marks, trade names, copyrights and licenses necessary or useful in the conduct of its business, including, without limitation, such of the same as are listed in Exhibit 2.6 hereto.

Section 4.8. Stock Restriction Agreements For Future Employees. The Company and each future employee or consultant purchasing or otherwise receiving shares of Common Stock from the Company (other than persons receiving Common Stock upon declaration of dividends or by conversion of Preferred Stock) will enter into a stock restriction agreement (or, upon grant of a stock option, an option agreement) in the form approved by the Board of Directors of the Company and the Investor Board Members.

Section 4.8.1. Observer Rights. The Company will permit each Qualified Holder or any authorized representative thereof, to attend all meetings of the Board of Directors of the Company, and shall, upon the written request of such Qualified Holder, provide him or it with such notice of and other information with respect to such meetings as are delivered to the directors of the Company. Upon the written request of any such Qualified Holder, the Company shall notify such holder, within 10 days thereafter of the taking of any written action by the Board of Directors of the Company in lieu of a meeting thereof. Any Qualified Holder exercising his or its rights under this subsection, and his or its representatives, shall maintain the confidentiality of all financial, confidential and proprietary information of the Company acquired by them in exercising such rights.

Section 4.9. Key-Man Insurance. The Company shall purchase and maintain life and disability insurance policies on the persons and in the benefit amounts set forth on Exhibit 4.9 hereto. The Company shall be the beneficiary of all such policies and the proceeds payable to the Company shall be used by the Company to refinance the redemption of shares of Series A Preferred required by the Certificate of Designation or, if such redemption is either (i) unnecessary because of the prior conversion or redemption of such shares or (ii) illegal, to be used by the Company solely for product development purposes.

Section 4.10. Liability Insurance. The Company will maintain in full force and effect a policy or policies of standard comprehensive general liability insurance underwritten by a U.S. insurance company insuring its properties and business against such losses and risks, and in such amounts as are adequate for its business and as are customarily carried by entities of similar size engaged in the same or similar business. Such policies shall include property loss insurance policies, with extended coverage, sufficient in amount to allow the replacement of any of its tangible properties which might be damaged or destroyed by the risks or perils normally covered by such policies.

Section 4.11. Taxes and Assessments. The Company will pay and will cause each of its Subsidiaries to pay any taxes, assessments and governmental charges, and any liabilities thereon, outstanding as of the Closing Date. The Company will pay and discharge and will cause each of its Subsidiaries to pay and discharge, before the same become delinquent and before penalties accrue thereon, all taxes, assessments and governmental charges upon or against the Company or any of its Subsidiaries, or any of their respective properties, and all other material liabilities at any time existing, except to the extent and so long as (a) the same are being contested in good faith and by appropriate proceedings in such manner as not to cause any material adverse effect upon the financial condition of the Company or any of its Subsidiaries, or the loss of any right of redemption from any sale thereunder and (b) the Company or any of its Subsidiaries shall have set aside on its books adequate reserves with respect thereto.

Section 4.12. Maintenance of Corporate Existence. Unless otherwise determined by the Board of Directors of the Company, each of the Company and its Subsidiaries will preserve, renew and keep in full force and effect, its corporate existence, qualification in requisite jurisdictions and rights and privileges necessary or desirable in the normal conduct of its business.

Section 4.13. Governmental Consents. The Company will obtain all consents, approvals, licenses and permits required by federal, state, local and foreign law to carry on its business.

Section 4.14. Further Assurances. The Company will cure promptly any defects in the creation and issuance of the Shares, and in the execution and delivery of this Agreement. The Company, at its expense, will promptly execute and deliver promptly to each Investor upon request all such other and further documents, agreements and instruments in compliance with or pursuant to its covenants and agreements herein, and will make any recordings, file any notices, and obtain any consents as may be necessary or appropriate in connection therewith.

Section 4.15. Counsel Fees and Expenses. The Company agrees to reimburse the reasonable fees and expenses of a single special counsel for the Investors up to a maximum amount of $[_____].

Section 4.16. Compliance with Offering Memorandum. The Company agrees at all times to conduct its business in accordance with the Offering Memorandum, including the Use of Proceeds provisions, and to present to the Board of Directors for their prior approval (including the Investor Members) any proposed change in its operations which materially differs from said Offering Memorandum.

Section 4.17. Regulation D Filings. The Company will file on a timely basis all notices of sale required to be filed with the Securities and Exchange Commission (the "Commission") pursuant to Regulation D under the '33 Act with respect to the transactions contemplated by this Agreement and simultaneously furnish copies of each report of sale to each Investor.

Section 4.18. Preemptive Rights.

This provision is more usually found in the Stockholders Agreement.

(a) The Company hereby grants to each Qualified Holder a right of first refusal to purchase, on a pro rata basis, all or any part of New Securities (as defined below) which the Company may, from time to time, propose the sell and issue subject to the terms and conditions set forth below. A Qualified Holder's pro rata share, for purposes of this subsection 4.18, shall equal a fraction, the numerator of which is the number of shares of Common Stock then held by such Qualified Holder or issuable upon conversion or exercise of any Shares, convertible securities, options, rights, or warrants then held by such Qualified Holder, and the denominator of which is the total number of shares of Common Stock then outstanding plus the number of shares of Common Stock issuable upon conversion or exercise of then outstanding Shares, convertible securities, options, rights or warrants.

(b) "New Securities" shall mean any capital stock of the Company whether now authorized or not and rights, options or warrants to purchase capital stock, and securities of any type whatsoever which are, or may become, convertible into capital stock; provided, however, that the term "New Securities" does not include (i) the Shares issuable under this Agreement or the Shares of Common Stock issuable upon conversion of the Convertible Preferred Stock; (ii) securities offered to the public pursuant to a Public Offering; (iii) securities issued for the acquisition of another corporation by the Company by merger, purchase of substantially all the assets of such corporation or other reorganization resulting in the ownership by the Company of

not less than 51% of the voting power of such corporation; (iv) not more than shares of Common Stock issued to employees or consultants of the Company pursuant to a stock option plan, employee stock purchase plan, restricted stock plan or other employee stock plan or agreement; or (v) securities issued as a result of any stock split, stock dividend or reclassification of Common Stock, distributable on a pro rata basis to all holders of Common Stock.

(c) If the Company intends to issue New Securities, it shall give each Qualified Holder written notice of such intention, describing the type of New Securities to be issued, the price thereof and the general terms upon which the Company proposes to effect such issuance. Each Qualified Holder shall have twenty (20) days from the date of any such notice to agree to purchase all or part of its or his pro rata share of such New Securities for the price and upon the general terms and conditions specified in the Company's notice by giving written notice to the Company stating the quantity of New Securities to be so purchased. Each Qualified Holder shall have a right of overallotment such that if any Qualified Holder fails to exercise his or its right hereunder to purchase his or its total pro rata portion of New Securities, the other Qualified Holders may purchase such portion on a pro rata basis, by giving written notice to the Company within five days from the date that the Company provides written notice to the other Qualified Holders of the amount of New Securities with respect to which such nonpurchasing Qualified Holder has failed to exercise its or his right hereunder.

(d) If any Qualified Holder or Qualified Holders fail to exercise the foregoing right of first refusal with respect to any New Securities within such 20-day period (or the additional five-day period provided for overallotments), the Company may within 120 days thereafter sell any or all of such New Securities not agreed to be purchased by the Qualified Holders, at a price and upon general terms no more favorable to the purchasers thereof than specified in the notice given to each Qualified Holder pursuant to paragraph (c) above. In the event the Company has not sold such New Securities within such 120-day period, the Company shall not thereafter issue or sell any New Securities without first offering such New Securities to the Qualified Holders in the manner provided above.

Section 4.19. Limitation of Option Grants. The Company will not issue or sell more than an aggregate of _____ shares of Common Stock to employees, officers and/or directors of, and/or consultants to, the Company or any subsidiary of the Company pursuant to the exercise of options granted under the Company's stock option plans or pursuant to other stock incentive arrangements (including, but not limited to, so-called "restricted stock").

Section 4.20. Auditor. The Company shall retain a firm of certified public accountants of established national reputation to audit its books and records at least annually.

Section 4.21. Negative Covenants. The Company hereby agrees that it will not:

(a) authorize or issue shares of any class of stock having any preference or priority as to dividends or assets superior to or on a parity with any such preference or priority of the Convertible Preferred Stock; increase or decrease the number of directors constituting the Board of Directors of the Company; or reduce the percentage of shares of Preferred Stock required to consent to any of the above matters, or alter or negate the need for such consent;

(b) reclassify any shares of any class of stock into shares having any preference or priority as to dividends or assets superior to or on a parity with any such preference or priority of the Convertible Preferred Stock;

(c) make any amendment to its Certificate of Incorporation or Bylaws adversely affecting (directly or indirectly) the rights of holders of the Preferred Stock;

(d) engage in any business other than businesses engaged in or proposed to be engaged in by the Company on the date hereof or businesses similar thereto;

(e) merge or consolidate with any person or entity (other than mergers of wholly owned subsidiaries into the Company), or sell, lease or otherwise dispose of its assets other than in the ordinary course of business involving an aggregate consideration of more than ten percent (10%) of the book value of its assets on a consolidated basis in any 12-month period, or liquidate, dissolve, recapitalize or reorganize;

(f) repurchase any shares of its Common Stock from any of its existing stockholders;

(g) pay dividends or make any other distribution on, or redeem, any shares of any class or series of its equity securities other than the Convertible Preferred Stock, unless (a) all dividends accrued on shares of the Convertible Preferred Stock shall have been declared and paid, (b) all redemptions of Convertible Preferred Stock have occurred in accordance with the schedule set forth in the Certificate of Designation, and (c) the Company's consolidated net worth (determined in accordance with generally accepted accounting principles consistently applied) will be in excess of $[_____] immediately after such payment, distribution or redemption;

(h) enter into any new agreement or make any amendment to any existing agreement, which by its terms would restrict the Company's performance of its obligations to holders of Convertible Preferred Stock pursuant to this Agreement or any agreement contemplated hereby;

(i) enter into any agreement with any holder or prospective holder of any securities of the Company providing for the granting to such holder of registration rights[, preemptive rights, special voting rights or protection against dilution]; or

(j) incur any indebtedness for borrowed money or become a guarantor or otherwise contingently liable for any such indebtedness except for trade payables or purchase money obligations incurred in the ordinary course of business.

Status of Dividends. The Company shall not take any action voluntarily which would require or permit, or could reasonably be expected to require or permit, the Company to treat the dividends on the Shares or any part thereof as deductible interest payments on its books or its federal, state or local income tax returns and shall take no such action which would require or permit, or could reasonably be expected to require or permit, the Company to treat the dividends on the Shares or any part thereof as deductible under any provision of the Code, whether now in effect or hereafter enacted or adopted, unless, in either case, such action would not result in denial of the dividends received deduction presently provided by Section 243(a)(1) of the Code (the "Dividends Received Deduction") or any successor dividends received deduction provided by a similar successor provision of the Code (a "Successor Dividends Received Deduction") to any Holder who would otherwise be eligible to claim such deduction. In addition, the Company shall not take any action voluntarily which could reasonably be expected to cause the Dividends Received Deduction or a Successor Dividends Received Deduction to be eliminated or reduced with respect to dividends on the Shares. The agreements contained in this Section shall be inapplicable if the Code shall be amended after delivery of the Shares in such a manner as to provide that dividends on the Shares may not be treated as dividends for federal income tax purposes or to permit all or a portion of the dividends on the

Shares to be deducted by the Company without causing the Dividends Received Deduction or a Successor Dividends Received Deduction to be unavailable to any holder of Shares. This Section shall not be deemed a representation or warranty by the Company that any holder of Shares shall be entitled to the Dividends Received Deduction or any Successor Dividends Received Deduction.

Section 4.22. Waiver. Any violation of an affirmative or negative covenant of the Company may be waived prospectively or retrospectively in a given instance by a vote of the Investor Board Members, but such waiver shall operate only with respect to the particular violation specified in the waiver. The Investor Board Members, and the Investors on whose behalf they act, disclaim any intent or purpose to control the Company or to manage its affairs for the benefit of the Investors or otherwise. If deemed advisable, the Investor Board Members may elect to delegate the authority to determine the issue of waiver under this Section to a majority of the Investors.

Section 4.23. Termination of Covenants. The covenants of the Company contained in this Section shall terminate, and be of no further force or effect, upon the effective date of a Public Offering.

ARTICLE V
REPRESENTATIONS AND WARRANTIES OF THE INVESTORS

In many Stock Purchase Agreements, the leverage is one-sided, resulting in a litany of representations and warranties by the issuer and only a select few by the investors, limited to the power and authority of each investor to purchase the securities subscribed for. However, there are a host of representations that the issuer can legitimately request of the investor (the term "legitimately" is used in this context to be synonymous with the jargon lawyers use to inquire whether a request they make of the other side is reasonable; does it pass the 'smell test" or the "red face test"?).

For example, some types of investor can be asked for special representations concerning their authority to invest. SBICs are limited to making noncontrolling investments in 'small business concerns"; bank loan covenants may inhibit even the largest company's ability, absent approval, to establish subsidiaries.

Given appropriate assurances of authority, the remaining investors" representations ordinarily have to do with language designed to choke off subsequent allegations that the offering has violated the securities laws. A general reaction against promiscuous abuse of the court system by unscrupulous plaintiffs and their counsel has encouraged lawyers to start building the case against spurious strike suits in the Stock Purchase Agreement and/or the Subscription Agreement.

Each of the Investors severally represents and warrants to the Company, at and as of the Closing that:

Section 5.1. Power and Authority. Such Investor has full power and authority and, if not an individual Investor, has taken all required corporate (or trust or partnership, as the case may be) and other action necessary to permit it to execute and deliver this Agreement, and all other documents or instruments required by this Agreement, and to carry out the terms of this Agreement and of all such other documents or instruments.

Section 5.2. Purchase for Investment. Such Investor is purchasing the Convertible Preferred Stock and any Common Stock into which such Convertible Preferred Stock may be converted for investment, for its own account and not for the account of any Employee Benefit Plan (or if such Convertible Preferred Stock is being acquired for the account of any such Plan, such acquisition does not involve a nonexempt prohibited

transaction within the meaning of Section 406 of ERISA or Section 4975 of the Code) and not with a view to distribution thereof, except for transfers permitted hereunder. Such Investor understands that the Convertible Preferred Stock and any Common Stock received upon conversion of the Convertible Preferred Stock must be held indefinitely unless it is registered under the '33 Act or an exemption from such registration becomes available, and that the Convertible Preferred Stock and any Common Stock received upon conversion thereof may only be transferred as provided in this Agreement.

Section 5.3. Financial Matters. Such Investor represents and warrants to the Company that it understands that the purchase of the Shares involves substantial risk and that its financial condition and investments are such that it is in a financial position to hold the Shares for an indefinite period of time and to bear the economic risk of, and withstand a complete loss of, such Shares. In addition, by virtue of its expertise, the advice available to it and previous investment experience, such Investor has extensive knowledge and experience in financial and business matters, investments, securities and private placements and the capability to evaluate the merits and risks of the transactions contemplated by this Agreement. Such Investor represents that it is an "accredited investor" as that term is defined in Regulation D promulgated under the '33 Act.

During the negotiation of the transactions contemplated herein, the Investor and its representatives have been afforded full and free access to corporate books, financial statements, records, contracts, documents, and other information concerning the Company and to its offices and facilities, have been afforded an opportunity to ask such questions of the Company's officers and employees concerning the Company's business, operations, financial condition, assets, liabilities and other relevant matters as they have deemed necessary or desirable, and have been given all such information as has been requested, in order to evaluate the merits and risks of the prospective investment contemplated herein.

Section 5.4. Brokers, etc. Such Investor has dealt with no broker, finder, commission agent, or other similar person in connection with the offer or sale of the Convertible Preferred Stock and the transactions contemplated by this Agreement, and is under no obligation to pay any broker's fee, finder's fee, or commission in connection with such transactions.

Section 5.5. Subscription Agreements. Such Investor has entered into a subscription agreement [substantially in the form accompanying the Offering Memorandum] and all representations made by such Investor in such agreement are true.

ARTICLE VI
THE CLOSING AND CLOSING CONDITIONS

Section 6.1. The Closing. The purchase and sale of the Convertible Preferred Stock shall take place at the Closing to be held at the offices of [COMPANY], [ADDRESS]. The Closing shall occur on [DATE], or, at the Company's option, such other date not later than [DATE], as the Company and a majority in interest of the Investors may designate.

The obligation of each Investor to purchase the Convertible Preferred Stock at the Closing shall be subject to satisfaction of the following conditions at and as of the Closing:

Section 6.2. Issuance of Convertible Preferred Stock. The Company shall have duly issued and delivered certificates to each of the Investors for the number shares of the Convertible Preferred Stock purchased by such Investor as provided in Exhibit 2.1.

Section 6.3. Legal Opinion from Counsel for the Company. There shall be made available to each of the

Investors the written opinion of Smith & Jones, counsel for the Company, in substantially the form attached as Exhibit 6.3,

or

The Investors shall have received from [name of Company's counsel] counsel for the Company, a favorable opinion satisfactory to the Investors and your special counsel, dated the date of closing, as to the matters specified in Sections 3.1, 3.2, 3.3.3, 3.5, and 3.6.3, inclusive, and as to: (i) the corporate power of the Company to carry on its business as conducted and as proposed to be conducted; (ii) the due qualification of the Company as a foreign corporation to transact business in, and the good standing of the Company in [City]; (iii) the execution and delivery of this Agreement and the offering and issuance of the Convertible Preferred Stock issued at the Closing, the issuance of Common Stock upon conversion of the Convertible Preferred Stock, and the fulfillment of and compliance with the respective terms and provisions hereof and thereof, not conflicting with or resulting in a breach of the terms, conditions or provisions of, or constituting a default under, or resulting in any violation of, or requiring any authorization, consent, approval, exemption or other action by or notice to any court or administrative or governmental body pursuant to the certificate of incorporation or bylaws of the Company, any applicable law (except with respect to securities laws vis-à-vis Common Stock issuable upon conversion of the Convertible Preferred Stock, as to which such counsel need express no opinion), statute, rule or regulation or (insofar as is known to such counsel after having made due inquiry with respect thereto) any agreement, instrument, order, judgment or decree to which the Company is subject; (iv) the absence of any requirement to register the Convertible Preferred Stock being purchased or acquired under the '33 Act, as amended; (v) the authorized and issued capital stock of the Company, including the due and valid issuance, full payment and nonassessability of all issued shares of its capital stock and the compliance of each such issuance with the '33 Act, as amended, and the rules and regulations thereunder; (vi) the due authorization, execution and delivery by each party thereto and the validity of the Agreement; and (vii) such other matters incident to the matters herein contemplated as counsel to the Investors may reasonably request.

The opinion of counsel,[9] particularly the issuer's counsel, is often a rigorously negotiated document since, as mentioned, counsel may be the only deep pocket to which the investors may resort. Counsel's opinion on the status of the issuer as a "corporation," "duly organized," "in good standing," and "qualified to do business" in various jurisdictions is often viewed as boilerplate- sometimes, indeed, by the opining firm. A number of questions, some potentially serious, are overlooked when and as that attitude is adopted. For example, is counsel entitled to entirely (absent knowledge of facts to the contrary) on a copy of the certificate of incorporation? In Delaware, that certificate is prima facie evidence of incorporation,[10] but not in all jurisdictions. If a certified copy of a board resolution recites a given resolution, must counsel independently verify that each director was duly elected?

If counsel opines that the entity is "duly organized," does that mean the stock which the founders think they own has in fact been legally issued in accordance with the statute? In many start-ups, such is not the case. How about adopting the form of the corporate seal and/or stock certificate? Often that has not been accomplished formally. If counsel opines as to "valid existence," how does the law firm know as a fact that administrative proceedings have not been initiated to revoke the charter because the issuer has failed to pay various fees or penalties.[11] Can counsel rely on "good standing" certificates only as to tax matters or does the certificate cover corporate filings as well? The practice varies from state to state. An opinion concerning "corporate power" to enter into the transaction speaks to the ultra vireos issue; query whether all necessary licenses and permits are in hand. Some believe the question hangs on whether the opinion recites "full power and authority" versus "corporate power and authority." The opinion on qualification to do business in all states in which the company is required to qualify is often given by inexperienced counsel but almost never should be, because the inquiry necessary to support the opinion would be prohibitively

expensive in almost every case. The compromise caveat in the opinion -qualified "in all jurisdictions in which failure to qualify would have a materially adverse impact"-is tied to the notion that failure to qualify can be cured ex post facto. Such is not, however, universally true.[12]

Section 6.3.1. Opinion of Patent Counsel. Each Investor shall have received from the Company, patent counsel to the Company, an opinion addressed to it, dated the Closing Date, in the form and substance satisfactory to counsel to the Investors regarding the results of a patent search performed by such counsel and regarding the status of the Company's pending patent applications.

Section 6.4. Certificate of Officer of the Company. The Company shall have delivered to the Investors a certificate of its chief executive and chief financial officers, or alternatives therefor satisfactory to counsel for the Investors, dated the date of the Closing, to the effect that the representations and warranties of the Company are true at and as of the Closing as if made at and as of the Closing, and that each of the conditions in this Article 6 has been satisfied.

There are differing points of view amongst practitioners whether the execution of a certificate of this nature may involve personal liability, particularly if the charge is that the CEO and/or CFO knew or should have known of the inaccuracy. Some counsel, therefore, specify that the officers disclaim any personal responsibility.

Section 6.5. Execution of Related Documents. The Company and the Investors shall have duly authorized and executed a Registration Rights Agreement in the form set forth as Exhibit 6.5 hereof. [Add here any other agreements to be contemporaneously executed.]

Section 6.6. Insurance on Certain Key Employees. The Company shall deliver certificates evidencing the policies of life insurance that the Company is required to maintain in force.

Section 6.7. Stockholders Agreement. The Company and the Investors shall have duly authorized and executed a Stockholders Agreement in the form set forth as Exhibit 6.7 hereof.

Section 6.8. Employee Documents. Prior to the Closing, each employee of and consultant to the Company shall have executed an Employee Confidentiality and Noncompetition Agreement.

Section 6.9. Investor Review. Prior to the Closing, the Investors shall have completed their review of, and shall be satisfied with their conclusions regarding, the Company's markets, business and projected operations.

Section 6.10. Restated Articles of Incorporation. The Restated Articles shall have been filed with the Secretary of State of Delaware in accordance with Delaware law.

Section 6.11. Comfort Letter. Each Investor shall have received from the Company, certified public accountants, a letter addressed to it dated the Closing date, in form and substance satisfactory to such Investor, with respect to the Company's results of operations from [DATE] to [DATE], and its backlog as of [_____].

This document is generally not required in Series A Rounds.

Section 6.12. Representations and Warranties to be True and Correct. The representations and warranties contained in Article III shall be true and correct on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of such date (except to the extent that any representations and warranties of the Company specifically apply to conditions existing at a particular date), and the Company shall have certified to such effect to the Investors in writing.

Section 6.13. Performance. The Company shall have performed and complied with all agreements and conditions contained herein required to be performed or complied with by it prior to or at the Closing Date, and the Company shall have certified to such effect to the Investors in writing.

Section 6.14. All Proceedings to Be Satisfactory. All corporate and other proceedings to be taken by the Company in connection with the transactions contemplated hereby and all documents incident thereto shall be satisfactory in form and substance to the Investors and their special counsel, and the Investors and said counsel shall have received all such counterpart originals or certified or other copies of such documents as they may reasonably request.

Section 6.15. Investment by Other Investors. On the Closing Date, concurrently with the purchase by such Investor, each other Investor shall have purchased and paid for the Preferred Shares being purchased by it hereunder.

Section 6.16. Supporting Documents. On or prior to the Closing Date the Investors and their special counsel shall have received copies of the following supporting documents:

(a) copies of the Certificate of Incorporation of the Company, and all amendments thereto, certified as of a recent date by the Secretary of State of the State of Delaware

(b) a certificate of said Secretary dated as of a recent date as to the due incorporation and good standing of the Company and listing all documents of the Company on file with said Secretary

(c) a telegram or telex from said Secretary as of the close of business on the next business day preceding the Closing Date as to the continued good standing of the Company

(d) a certificate of the Secretary or an Assistant Secretary of the Company, dated the Closing Date and certifying:

(1) that attached thereto is a true and complete copy of the Bylaws of the Company as in effect on the date of such certification;

(2) that attached thereto is a true and complete copy of resolutions adopted by the Board of Directors of the Company authorizing the execution, delivery and performance of this Agreement and the Registration Rights Agreement, the issuance, sale, and delivery of the Convertible Preferred Shares, and that all such resolutions are still in full force and effect and are all the resolutions adopted in connection with the transactions contemplated by this Agreement;

(3) that the Certificate of Incorporation of the Company has not been amended since the date of the last amendment referred to in the certificate delivered pursuant to clause (b) above; and

(4) the incumbency and specimen signature of each officer of the Company executing this Agreement and the Registration Rights Agreement, the stock certificate or certificates representing the Preferred Shares and any certificate or instrument furnished pursuant hereto, and a certification by another officer of the Company as to the incumbency and signature of the officer signing the certificate referred to in this paragraph (d); and

(e) such additional supporting documents and other information with respect to the operations

and affairs of the Company as the Investors or their special counsel may reasonably request.

All such documents shall be satisfactory in form and substance to the Investors and their counsel.

Section 6.17. Reasonable Satisfaction of Investors and Counsel. All instruments applicable to the issuance and sale of the Convertible Preferred Stock and all proceedings taken in connection with the transactions contemplated by this Agreement shall be reasonably satisfactory to the Investors.

Section 6.18. Exon-Florio. Any of the following shall have occurred: (a) the review period under Section 721 of Title VII of the Defense Production Act of 1950, as amended (the "Exon-Florio Act"), during which the President of the United States (the "President") or his designee may commence an investigation of the transactions contemplated by this Agreement, shall have expired without such investigation having been commenced; or (b) such investigation shall have been commenced and (i) the period under the Exon-Florio Act during which such investigation must be completed shall have expired or Purchaser shall have received notice that such investigation has been completed and (ii) the period under the Exon-Florio Act during which the President may announce his decision to take action to suspend, prohibit or place any limitations on the transactions contemplated by this Agreement shall have expired without any such action being threatened, announced, or taken or (c) the President shall have announced a decision not to take any such action.

Section 6.19. Expiration of HSR Waiting Period. The applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements of 1976 shall have expired or have been earlier terminated without action by the Justice Department or the Federal Trade Commission to prevent consummation of this Agreement.

ARTICLE VII
INDEMNIFICATION

Survival of Representations And Warranties, Damages; Indemnification. General Survival. The parties hereto agree that all representations and warranties contained in this Agreement, or any certificate, document or other instrument delivered in connection herewith, shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby, regardless of any investigation made by the parties hereto or their independent accountants or legal representatives, for a period ending on the later of (a) March 1, 2002 or (b) six months following the date on which the independent auditors of the Company shall have completed their audit of the consolidated financial statements of the Company for the fiscal year ending on October 31, 2001 and made their audit report thereon available to the Investor, except that representations and warranties relating to any liability for Taxes or for breach of the representations and warranties in Section 3. and 3.2, shall survive without limit (in each case the "Survival Period"); provided, however, that no claim for breach of a representation or warranty (including, without limitation, a claim for indemnification pursuant to Section 7.2(a) in respect of a breach of a representation or warranty) may be brought under this Agreement by any person unless written notice of such claim (stating the date of discovery thereof and basis therefor) shall have been given on or prior to the last day of the applicable Survival Period (in which event each such representation and warranty shall survive the applicable Survival Period until such claim is finally resolved and all obligations with respect thereto are fully satisfied).

Section 7.1. Indemnification.

(a) The Company agrees to indemnify, defend and hold harmless the Purchaser and each of its officers, directors and stockholders from and against and in respect of any and all demands,

claims, actions or causes of action, assessments, losses, damages, liabilities, interest and penalties, costs and expenses (including, without limitation, reasonable legal fees and disbursements incurred in connection therewith and in seeking indemnification therefor, and any amounts or expenses required to be paid or incurred in connection with any action, suit, proceeding, claim, appeal, demand, assessment or judgment), resulting from, arising out of, or imposed upon or incurred by any person to be indemnified hereunder by reason of any breach of any representation, warranty, covenant or agreement of the Company contained in this Agreement or any agreement, certificate or document executed and delivered by the Company pursuant hereto or in connection with any of the transactions contemplated by this Agreement. The demands, claims, actions or causes of action, assessments, losses, damages, liabilities, interest and penalties and costs and expenses described above and in subsection (b) below are hereinafter collectively referred to as "Losses".

See Glover, 6 for the following comment:

"Another issue that provokes vigorous debate is the extent to which an indemnifying party gets credit if the indemnified party receives insurance proceeds in connection with a loss. Some lawyers argue that providing specifically for insurance payments is not necessary, since any reasonable measure of losses would take insurance proceeds into account. In fact, only about 25% of the agreements provide that the indemnifiable loss should be reduced by the amount of any insurance recovery."

See Note on Credit for Tax Benefits

(b) The Investors agree to indemnify, defend and hold harmless the Company from and against and in respect of any and all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, interest and penalties, costs and expenses (including, without limitation, reasonable legal fees and disbursements incurred in connection therewith and in seeking indemnification therefor, and any amounts or expenses required to be paid or incurred in connection with any action, suit, proceeding, claim, appeal, demand, assessment or judgment), resulting from, arising out of, or imposed upon or incurred by any person to be indemnified hereunder by reason of any breach of any representation, warranty, covenant or agreement of the Investor contained in this Agreement or any agreement, certificate or document executed and delivered by the Purchaser pursuant hereto or in connection with the transactions contemplated by this Agreement.

(c) Whenever a claim shall arise for indemnification under this Article VII, with the exception of claims for litigation expenses to be funded on an ongoing basis, the party entitled to indemnification (the "Indemnified Party") shall promptly notify the party from whom indemnification is sought (the "Indemnifying Party") of such claim and, when known, the facts constituting the basis for such claim. In the event of any such claim for indemnification resulting from or in connection with a claim or legal proceeding by a third party, the Indemnifying Party may, at its sole cost and expense, assume the defense thereof; provided, however, that the Indemnifying Party agrees in writing to pay the full amount of such indemnification to the Indemnified Party. If an Indemnifying Party assumes the defense of any such claim or legal proceeding, the Indemnifying Party shall be entitled to select counsel and take all steps necessary in the settlement or defense thereof; provided, however, that no settlement shall be made without the prior written consent of the Indemnified Party (except that if the Indemnified Party shall withhold its consent to any settlement proposed by the Indemnifying Party and agreed to by the other party to the action and which involves only the payment of damages to such other party, the Indemnified Party (i) shall in no event be deemed for purposes of this Article VII to have suffered losses, liabilities or damages in connection

with such claim or proceeding in excess of the proposed amount of such settlement and (ii) shall be responsible for all legal fees and disbursements incurred subsequent to such time in connection with the defense of such claim or legal proceeding); and *provided further, however*, that the Indemnified Party may, at its own expense, participate in any such proceeding with the counsel of its choice. So long as the Indemnifying Party is in good faith defending such claim or proceeding, the Indemnified Party shall not compromise or settle such claim without the prior written consent of the Indemnifying Party. If the Indemnifying Party does not assume the defense of any such claim or litigation in accordance with the terms hereof, the Indemnified Party may defend against such claim or litigation in such manner as it may deem appropriate, including, but not limited to, settling such claim or litigation (after giving notice of the same to the Indemnifying Party) on such terms as the Indemnified Party may deem appropriate, and the Indemnifying Party will promptly indemnify the Indemnified Party in accordance with the provisions of this Section 7.2.

Non-Waiver. Failure of an Indemnified Party to give reasonably prompt notice of any claim or claims shall not release, waive or otherwise affect an Indemnifying Party's obligations with respect thereto except to the extent that the Indemnifying Party can demonstrate actual loss and prejudice as a result of such failure.

According to Glover:

"[m]ost agreements provide that the indemnified party must provide notice to the indemnifying party of any indemnifiable claim. About half of these agreements [the ones sampled] go on to provide that the failure to provide notice will bare indemnification only to the extent the indemnifying party is prejudiced."[13]

Limitation on Indemnification. Notwithstanding anything contained herein to the contrary, the Investors shall not be entitled to indemnification for Losses under the provisions hereof, (i) unless and until the aggregate amount of all Losses shall have exceeded $250,000, in which event the Investor shall be entitled to such indemnification only for all Losses in excess of that amount, (ii) to the extent that the aggregate of all Losses for which the Company would, but for this clause, be liable exceeds on a cumulative basis $0,000,000.00.

ARTICLE VIII
MISCELLANEOUS

Section 8.1. Expenses. The Company and the Investors will each bear their own expenses, including legal fees, in connection with this Agreement. Legal fees incurred by the Investors will be payable by the Company but not in an amount to exceed $[_____].

Section 8.2. General Indemnity. Unless the Founders are to make and/or stand behind the Company's representations, warranties and covenants, there is usually not much point in an elaborate indemnification section.

Section 8.3. Remedies Cumulative. Except as herein provided, the remedies provided herein shall be cumulative and shall not preclude assertion by any party hereto of any other rights or the seeking of any other remedies against the other party hereto.

Section 8.4. Certain Fees and Expenses. If the Investors shall employ counsel for advice or other representation or shall incur legal or other costs and expenses in connection with (i) any amendment or modification proposed by the Company of this Agreement, the Certificate of Incorporation of the Company or the Registration Rights Agreement, or (ii) any litigation, contest, dispute, suit, proceeding or action

instituted by the Investors or any of them, in respect to the enforcement of the Investors' rights under this Agreement, the Convertible Preferred Shares or the Registration Rights Agreement, then, and in any such event, the attorneys' fees arising from such services and all expenses, costs, charges and other fees of such counsel incurred in connection with or related to any of the events or actions described above shall be payable by the Company [The Founders].

Section 8.5. Brokerage. Each party hereto will indemnify and hold harmless the others against and in respect of any claim for brokerage or other commission relative to this Agreement or to the transaction contemplated hereby, based in any way on agreements, arrangements or understandings made or claimed to have been made by such party with any third party.

Section 8.6. Severability. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provisions shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

Section 8.7. Parties in Interest. All covenants and agreements contained in this Agreement by or on behalf of any of the parties hereto shall bind and inure to the benefit of the respective legal representatives, successors and assigns of the parties hereto whether so expressed or not.

Section 8.8. Notices. Notices required under this Agreement shall be deemed to have been adequately given if delivered in person or sent by certified mail, return receipt requested, to the recipient at its address set forth in Exhibit 6.2 or such other address as such party may from time to time designate in writing.

Section 8.9. No Waiver. No failure to exercise and no delay in exercising any right, power or privilege granted under this Agreement shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under this Agreement shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided in this Agreement are cumulative and are not exclusive of any rights or remedies provided by law.

Section 8.10. Amendments and Waivers. Except as herein provided, this Agreement may be modified or amended only by a writing signed by the Company and by the Holders of [51%] [all] of the Convertible Preferred Stock (the "Required Majority"). Each Investor acknowledges that by the operation of Section 7.10 hereof the holders of fifty-one percent [51%] of the outstanding Convertible Preferred Stock (and Common Stock issued upon conversion thereof) will have the right and power to diminish or eliminate all rights of such Investor under this Agreement.

Section 8.11. Rights of Investors. Each holder of Convertible Preferred Stock (and Common Stock issued upon conversion thereof) shall have the absolute right to exercise or refrain from exercising any right or rights that such holder may have by reason of this Agreement or any Convertible Preferred Stock, including without limitation the right to consent to the waiver of any obligation of the Company under this Agreement and to enter into an agreement with the Company for the purpose of modifying this Agreement or any agreement effecting any such modification, and such holder shall not incur any liability to any other holder or holders of Convertible Preferred Stock with respect to exercising or refraining from exercising any such right or rights.

Section 8.12. Survival of Agreements, etc. All agreements, representations and warranties contained in this Agreement or made in writing by or on behalf of the Company [and Founders] or the Investors in connection with the transactions contemplated by this Agreement shall survive the execution and delivery of this Agreement, the Closing, and any investigation at any time made by or on behalf of any Investor.

Notwithstanding the preceding sentence, however, all such representations (other than intentional misrepresentations) and warranties, but no such agreements, shall expire three years after the date of this Agreement.

Section 8.13. Construction. This Agreement shall be governed by and construed in accordance with the procedural and substantive laws of [the State of New York] without regard for its conflicts-of-laws rules. The Company agrees that it may be served with process in the State of New York and any action for breach of this Agreement prosecuted against it in the courts of that State.

Section 8.14. Entire Understanding. This Agreement expresses the entire understanding of the parties and supersedes all prior and contemporaneous agreements and undertakings of the parties with respect to the subject matter of this Agreement.

Section 8.15. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which taken together shall constitute one agreement.

Section 8.16. Remedies. The Investors will not initiate or join in any action claiming against the Company or any of its officers or directors, in whole or in part, pursuant to the Racketeers Influence Concept Organization Act or alleging a violation of any such director's or officer's duty of loyalty under Delaware law unless an actual (versus construed or imputed) criminal act or violation is alleged in good faith to have been made by the defendant directly and personally.

Section 8.17. Assignment; No Third-Party Beneficiaries.

(a) This Agreement and the rights hereunder shall not be assignable or transferable by the Investors or the Company except in the case of an Investor, in accordance with the restrictions on transfer set out in [identify location of restrictions if any] or in the case of the Company by operation of law in connection with a merger, consolidation or sale of substantially all the assets of the Company without the prior written consent of the other parties hereto. Subject to the preceding sentence, this Agreement shall be binding upon, inure to the benefit of and be enforceable by the parties hereto and their respective successors and assigns. The assignment by either Investor on a nonexclusive basis of any rights under this Agreement to any such transferee shall not affect or diminish the rights or obligations of such Buyer under this Agreement and in no event shall any assignment relieve either Investor of its obligations hereunder.

(b) Except as provided in Section 7.1(a), this Agreement is for the sole benefit of the parties hereto and their permitted assigns and nothing herein expressed or implied shall give or be construed to give to any Person, other than the parties hereto and such assigns, any legal or equitable rights hereunder.

ARTICLE VIII
TERMINATION

Section 9.1. Termination. This Agreement may be terminated at any time prior to the Closing:

(a) by mutual consent of the Required Majority and the Company;

(b) by either the Company or the Required Majority if the Closing shall not have occurred by [DATE], provided that the failure to consummate the transactions contemplated hereby is not a

result of the failure by the party so electing to terminate this Agreement to perform any of its obligations hereunder.

Section 9.2. Effect of Termination. Except for the obligations of Section 4.1(f) hereof, if this Agreement shall be terminated pursuant to Section 9.1, all obligations, representations and warranties of the parties hereto under the Agreement shall terminate and there shall be no liability, except for any breach of this Agreement prior to such termination, of any party to another party.

ARTICLE IX
ARBITRATION

If at any time there shall be a dispute arising out of or relating to any provision of this Agreement or any agreement contemplated hereby, such dispute shall be submitted for binding and final determination by arbitration in accordance with the regulations then obtaining of the American Arbitration Association. Judgment upon the award rendered by the arbitrator(s) resulting from such arbitration shall be in writing, and shall be final and binding upon all involved parties. The site of any arbitration shall be within [CITY], [STATE].

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

NEWCO, INC.

By: _____ (sign) Date: _____

Name: [NAME]

Title: [TITLE]

Investors:

By: _____ (sign) Date: _____

Name: [NAME]

Title: [TITLE]

Founders:

By: _____ (sign) Date: _____

Name: [NAME]

Title: [TITLE]

The Founders sign with respect to the section pertinent to them personally, i.e., the representations and warranties, or some of them.

FOOTNOTES

[1] A drafting point: a minimum threshold can either be a "go/no go" trigger and nothing else, or a deductible. Thus, if there is a $25,000 minimum and a representation is violated to the tune of $150,000, the language should make it clear whether the investors are owed $150,000 or $125,000.

[2] "Knowledge" is sometimes defined as "actual knowledge" or, alternatively, the act of having inquired of a list of officers and, based on their responses, representing one's knowledge. There are subtle but significant differences in the way the definition is conjugated. See the definition in the Report of the State Bar of Texas, Business Law Section, Report of Legal Opinions Committee (June 1, 1992):
Actual Knowledge: the conscious awareness of information about either fact or law (depending on the context) by an Primary Lawyer, without the Opinion Giver undertaking any other investigation within the Opinion Giver's organization (i.e., without any canvass of all lawyers in the Opinion Giver's organization or a search of the Opinion Giver's files).

[3] A recent case construing a federal statute as applied to tax shelter offerings held that the investors could recover the gross amount of their loss on the investment even though the losses had been useful to them. Western Fed. Corp. v. Erickson, 739 E2d 1439 (9th Cir. 1984).

[4] The questions are suggested by (1) a list prepared by Deloitte, Haskins, & Sells and set out in Wallner & Greve, Leveraged Buyouts: A Review of the State of the Art, app. F1 (1983), and (2) *What Financial Statements Don"t Tell You,* Corn. Loan Monitor, Winter 1989-1990, at 7, a publication of Trien, Rosenberg, Felix, Rosenberg, Barr & Weinberg.

[5] If Newco sells goods manufactured for specific clients, the investors will sometimes ask for a warranty that all such work in progress will return a specified profit margin. Further, the investors may ask the issuer to warrant that all finished goods in inventory conform to the reasonable expectations of the issuer's customers in the ordinary course.

[6] For a general discussion of tax issues associated with transactions of this nature, see Gilson, A *Review of Federal Income Tax Treatment of Corporate Acquisitions and Reorganization Transactions,* The Law and Finance of Corporate Acquisitions 450-60 (1986) [hereinafter Gilson].

[7] Treas. Reg. § 5c.168(f)(8)-2(a)(3).

[8] In December 1991, the Financial Accounting Standards Board adopted new rules requiring companies to recognize the future cost of retiree health benefits as they accrue annually rather than when they are paid out. Companies were to adopt the new rule by January 1, 1993, which obligated many to take large charges against earnings resulting in full-year losses. *Chrysler Projects Loss from Benefits Charge, N.Y.* Times, Apr. 6, 1993, at D4. The total anticipated obligation is now reported in a footnote to the balance sheet. The calculation assumes that an employee retires on a date that he or she is eligible rather than allowing employers the ability to estimate actual retirement dates.

[9] The issues involved in counsel's opinion to third parties (i.e. to the other side, lenders, etc.) have been exhaustively debated, culminating in an ABA Business Law Section sponsored conference in 1989 in Silverado, California. The discussions resulted in a consensus Legal Opinion Report and Legal Opinion Accord. *See* 47 Bus. Law. 167 (1991). The various commentaries on this "consensus" are collected in the Appendixes in Fitzgibbon & Glazer Legal Opinions (1992) [hereinafter Fitzgibbon & Glazer], including reports and commentaries by the Tri Bar Opinion Committee (a committee composed of representatives from the city, county, and state bar associations in New York) and committees in California, Arizona, Florida, Georgia, Maryland, and Massachusetts.

[10] Del. Code Ann. tit. 8, § 106 (1983 & Supp. 1986).

[11] The "good standing" certificate can mean different things in different states. *See* Pennsylvania Third-Party Legal Opinion Supplement, *quoted in* FitzGibbon & Glazer § 35, at App. 3A: 16 (1994 App.)

[12] *See generally* FitzGibbon & Glazer, (1994 App.) to the effect that the Pennsylvania Department of State

will certify only that a corporation is "presently subsisting."
[13] Glover at 7.

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