



Series A Convertible Preferred Stock
Purchase Agreement
(Pro-Investor)

Document 1585A

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SERIES A CONVERTIBLE PREFERRED STOCK

PURCHASE AGREEMENT

OF

[NAME OF COMPANY]

DATED AS OF [DATE]

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THIS SERIES A CONVERTIBLE PREFERRED STOCK PURCHASE AGREEMENT (this “**Agreement**”) is entered into by and among [NAME OF COMPANY], a [JURISDICTION] corporation (the “**Company**”), and the purchasers named in Schedule 1 attached hereto (individually a “**Purchaser**” and collectively the “**Purchasers**”) as of [DATE].

WHEREAS, the Company wishes to issue and sell to the Purchasers an aggregate of [NUMBER] shares (the “**Preferred Shares**”) of its Series A Convertible Preferred Stock, \$ _____ par value per share (the “**Series A Convertible Preferred Stock**”); and

WHEREAS, the Purchasers, severally, wish to purchase the Preferred Shares on the terms and subject to the conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained in this Agreement, the parties agree as follows:

1. Definitions.

“**Balance Sheet**” is defined in Section 3.4(a)(iii).

“**Benefit Arrangement**” is defined in Section 3.17(l).

“**Business Plan**” is defined in Section 3.13(a).

“**Capitalization Table**” is defined in Section 3.3(b).

“**Charter**” is defined in Section 3.2(a).

“**Closing**” is defined in Section 2.2.

“**Closing Date**” is defined in Section 2.2.

“**Code**” is defined in Section 3.10(e).

“**Common Stock**” is defined in Section 3.1(b)(iv).

“**Company**” is defined in the Preamble.

“**Conversion Shares**” is defined in Section 3.1(b)(iv).

“**Disclosure Schedule**” is defined in Section 3.

“**Employee Plan**” is defined in Section 3.17(l).

“**Environmental Laws**” is defined in Section 3.16(e).

“**ERISA**” is defined in Section 3.17(b).

“**ERISA Affiliate**” is defined in Section 3.17(l).

“**ERISA Schedule**” is defined in Section 3.17(a).

“**Financial Statements**” is defined in Section 3.4(a).

“**Hazardous Substances**” is defined in Section 3.16(e).

“**Intellectual Property**” is defined in Section 3.7(b).

“**Investor Rights Agreement**” is defined in Section 3.1(b).

“**Management Rights Agreements**” is defined in Section 3.1(b).

“**person**” shall mean an individual, corporation, trust, partnership, joint venture, unincorporated organization, government agency or any agency or political subdivision thereof, or other entity.

“**Purchase Price**” is defined in Section 2.1.

“**Premises**” is defined in Section 3.16(a).

“**Preferred Shares**” is defined in the Preamble.

“**Preferred Stock**” is defined in Section 3.3(a).

“**SEC**” is defined in Section 3.2(e)(i).

“**Securities Act**” is defined in Section 3.14(a).

“**Series A Convertible Preferred Stock**” is defined in the Preamble.

“**Stock Restriction Agreement**” is defined in Section 3.1(b).

“**subsidiary**” shall mean, as to the Company, any corporation of which more than 50% of the outstanding stock having ordinary voting power to elect a majority of the board of directors of such corporation (irrespective of whether or not at the time stock of any other class or classes of such corporation shall have or might have voting power by reason of the happening of any contingency) is at the time directly or indirectly owned by the Company, or by one or more of its subsidiaries, or by the Company and one or more of its subsidiaries.

“**Transaction Documents**” is defined in Section 3.1(b).

2. The Transaction.

2.1 Purchase and Sale of the Preferred Shares. The Company agrees to issue and sell to each Purchaser, and each Purchaser hereby agrees to purchase from the Company, the number of Preferred Shares set forth opposite the name of such Purchaser under the heading “Number of Preferred Shares to be Purchased” on Schedule 1, at the aggregate purchase price (the “**Purchase Price**”) set forth opposite the name of such Purchaser under the heading “Aggregate Purchase Price for Preferred Shares” on Schedule 1.

[2.2 Minimum Investment at Closing. The Stock is offered on a “best efforts, minimum-maximum” basis. If at least the Minimum Offering has not been sold by [DATE], unless extended by the Corporation but not beyond [DATE] (the “**Expiration Date**”), none will be sold and all funds collected from Purchasers will be refunded promptly without any deductions. Pending the sale of the Minimum Offering prior to the Expiration Date, all funds will be held in an escrow account by [NAME OF LAW FIRM], counsel to the Corporation. Once at least [MINIMUM NUMBER] (___) are sold, a closing and subsequent closings will be held. The Corporation may sell more than the Minimum Offering.]

[2.3/2.2] Closing. The closing (the “**Closing**”) shall take place at the offices of [NAME OF LAW FIRM/COMPANY] [ADDRESS OF CLOSING SITE], at [TIME OF CLOSING], local time, on [DATE], (the “**Closing Date**”), or at such other location, date and time as may be agreed upon between the Purchasers and the Company. At the Closing, the Company shall issue and deliver to each Purchaser a stock certificate or certificates, registered in the name of such Purchaser, representing such Purchaser’s Preferred Shares, and each Purchaser shall deliver the Purchase Price for its Preferred Shares to the Company by a check payable to the order of the Company, a wire transfer, a promissory notes issued by the Company for cancellation, or any combination of such methods.

3. Representations and Warranties of the Company.

The Company represents and warrants to the Purchasers that, except as set forth in the disclosure schedule (the “**Disclosure Schedule**”) attached as Schedule 2 hereto (which Disclosure Schedule makes explicit reference to the particular representation or warranty as to which exception is taken, which in each case shall constitute the sole representation and warranty as to which such exception shall apply):

3.1 Corporate Organization, Qualifications and Power; Subsidiaries.

(a) The Company is a corporation duly incorporated, validly existing and in good standing under the laws of the [JURISDICTION] and is duly licensed or qualified to transact business as a foreign corporation and is in good standing in each jurisdiction in which the nature of its business or the character of its properties or leased premises requires such licensing or qualification.

(b) The Company has the corporate power and authority to:

- (i) own and hold its properties and to carry on its business as now conducted and as proposed to be conducted,
- (ii) execute, deliver and perform this Agreement, the Investor Rights Agreement with the Purchasers in the form attached as Exhibit A (the “**Investor Rights Agreement**”), the Stock Restriction Agreement with the Purchasers and the other parties thereto named in Section 5.8 of this Agreement in the form attached as Exhibit B (the “**Stock Restriction Agreement**”) [and the several Management Rights letter agreements between the Company and certain of the Purchasers in the form attached as Exhibit C (the “**Management Rights Agreements**”)] and, together

with this Agreement, the Investor Rights Agreement and the Stock Restriction Agreement, the “**Transaction Documents**”),

- (iii) issue, sell and deliver the Preferred Shares, and
- (iv) issue and deliver the shares of Common Stock, \$[] par value per share, of the Company (“**Common Stock**”) issuable upon conversion of the Preferred Shares (the “**Conversion Shares**”).

(c) [Section 3.1(c) of the Disclosure Schedule contains a list of all subsidiaries of the Company.] [The Company has no subsidiaries.] [Other than its ownership of the subsidiaries listed in the Disclosure Schedule, t][T]he Company does not (i) own of record or beneficially, directly or indirectly, (A) any shares of capital stock or securities convertible into capital stock of any other corporation or (B) any participating interest in any partnership, joint venture or other non-corporate business enterprise or (ii) control, directly or indirectly, any other entity. [Each of the subsidiaries is a corporation duly incorporated, validly existing and in good standing under the laws of its respective jurisdiction of incorporation and is duly licensed or qualified to transact business as a foreign corporation and is in good standing in each jurisdiction in which the nature of its business transacted by it or the character of its properties or leased premises requires such licensing or qualification. Each of the subsidiaries has the corporate power and authority to own and hold its properties and to carry on its business as now conducted and as proposed to be conducted. All of the outstanding shares of capital stock of each of the subsidiaries are owned beneficially and of record by the Company or one of its other subsidiaries, in each case free and clear of any security interests of any nature whatsoever; and there are no outstanding subscriptions, warrants, options, convertible securities, or other rights (contingent or other) pursuant to which any of the subsidiaries is or may become obligated to issue any shares of its capital stock to any person other than the Company or one of its other subsidiaries. As used in Section 3.4(d) through Section 3.[20], the term “Company” shall mean the Company and each of its subsidiaries.]

3.2 Authorization of Transaction; Validity; Approvals.

(a) The execution and delivery by the Company of the Transaction Documents, the performance by the Company of its obligations thereunder, the issuance, sale and delivery of the Preferred Shares and the issuance and delivery of the Conversion Shares have been duly authorized by all requisite corporate action and will not violate or constitute a breach or default under:

- (i) any provision of law,
- (ii) any order of any court or other agency of government,
- (iii) the [CHARTER] of the Company, as proposed to be amended in connection with the transactions contemplated herein (the “**Charter**”),
- (iv) the bylaws of the Company, as amended, or

- (v) any provision of any indenture, agreement or other instrument to which the Company, [any of its subsidiaries] or any of [its] [their respective] properties or assets is bound,

or result in the creation or imposition of any security interest of any nature whatsoever upon any of the properties or assets of the Company [or any of its subsidiaries].

(b) To the best of the Company's knowledge, no provision of the Stock Restriction Agreement violates, conflicts with, or constitutes a breach or default by any other party thereto under any other indenture, agreement or instrument.

(c) The Preferred Shares and the Conversion Shares have been duly authorized and the Conversion Shares have been duly reserved for issuance upon conversion of the Preferred Shares. When issued in accordance with this Agreement or the Charter, as the case may be, the Preferred Shares and the Conversion Shares will be validly issued, fully paid and nonassessable with no personal liability attaching to the ownership thereof and will be free and clear of all security interests imposed by or through the Company except as set forth in the Investor Rights Agreement.

(d) Each Transaction Document has been duly executed and delivered by the Company and constitutes the legal, valid and binding obligation of the Company, enforceable in accordance with its terms.

(e) Subject to the accuracy of the representations and warranties of the Purchasers set forth in Section 4, no registration or filing with, or consent or approval of or other action by, any federal, state or other governmental agency or instrumentality is or will be necessary for the valid execution, delivery and performance by the Company of the Transaction Documents, the issuance, sale and delivery of the Preferred Shares or, upon conversion thereof, the issuance and delivery of the Conversion Shares, other than:

- (i) the filing of Form D with the Securities and Exchange Commission (the "SEC") after the Closing, which will be duly made on a timely basis,
- (ii) filings pursuant to state securities laws (all of which filings have been made by the Company, other than those which are required to be made after the Closing and which will be duly made on a timely basis), and
- (iii) with respect to the Investor Rights Agreement, the registration of the shares covered thereby with the SEC and filings pursuant to state securities laws.

3.3 Capitalization.

(a) The authorized capital stock of the Company consists of (i) [] shares of Preferred Stock, \$[] par value per share (the "**Preferred Stock**"), of which [] shares have been designated Series A Convertible Preferred Stock, and (ii) [] shares of Common Stock. Immediately prior to the Closing, [] shares of Common Stock will be validly issued and

outstanding, fully paid and nonassessable with no personal liability attaching to the ownership thereof, and no shares of Preferred Stock will have been issued.

(b) The stockholders of record and all holders of subscriptions, warrants, options, convertible securities, and other rights (contingent or other) to purchase or otherwise acquire equity securities of the Company, and the number of shares of Common Stock and the number of such subscriptions, warrants, options, convertible securities, and other such rights held by each, are as set forth in the Section 3.3(b) of the Disclosure Schedule (the “**Capitalization Table**”).

(c) The designations, powers, preferences, rights, qualifications, limitations and restrictions in respect of each class and series of authorized capital stock of the Company as set forth in the proposed Charter, a copy of which is attached as Exhibit D, are valid, binding and enforceable and in accordance with all applicable laws.

(d) Except as provided for in the Charter or as set forth in the Capitalization Table, the Company has no obligation (contingent or other) to purchase, redeem or otherwise acquire any of its equity securities or any interest therein or to pay any dividend or make any other distribution in respect thereof.

(e) Except for the Stock Restriction Agreement [and the Management Rights Agreements], to the best of the Company’s knowledge there are no voting trusts or agreements, stockholders’ agreements, pledge agreements, buy-sell agreements, rights of first refusal, preemptive rights or proxies relating to any securities of the Company or any of its subsidiaries (whether or not the Company or any of its subsidiaries is a party thereto).

(f) All of the outstanding securities of the Company were issued in compliance with all applicable federal and state securities laws.

3.4 Financial Statements.

(a) The Company has furnished to the Purchasers:

- (i) the audited [consolidated] balance sheet of the Company [and its subsidiaries] as of [DATE];
- (ii) the related audited [consolidated] statements of income, stockholders’ equity and cash flows of the Company [and its subsidiaries] for the year ended [DATE];
- (iii) the unaudited [consolidated] balance sheet of the Company [and its subsidiaries] as of [DATE]; (the “**Balance Sheet**”); and
- (iv) the related unaudited [consolidated] statements of income, stockholders’ equity and cash flows of the Company [and its subsidiaries] for the [NUMBER] months ended [DATE]

(together, the “**Financial Statements**”).

(b) All of the Financial Statements have been prepared in accordance with generally accepted accounting principles consistently applied (except that the unaudited financial statements do not contain all of the required footnotes) and fairly present the consolidated financial position of the Company and its subsidiaries as of [DATE] and [DATE], respectively, and the [consolidated] results of their operations and cash flows for the year ended [DATE] and the [NUMBER] months ended [DATE], respectively.

(c) Since the date of the Balance Sheet, (i) there has been no change in the assets, liabilities or financial condition of the Company [and its subsidiaries (on a consolidated basis)] from that reflected in the Balance Sheet except for changes in the ordinary course of business which, in the aggregate, have not been materially adverse and (ii) none of the business, prospects, financial condition, operations, property or affairs of the Company [and its subsidiaries (on a consolidated basis)] has been materially adversely affected by any occurrence or development, individually or in the aggregate, whether or not insured against.

(d) Since the date of the Balance Sheet, the Company has not:

- (i) issued any stock, bond or other corporate security,
- (ii) borrowed any amount or incurred or become subject to any liability (absolute, accrued or contingent), except in the ordinary course of business,
- (iii) discharged or satisfied any security interest or incurred or paid any obligation or liability (absolute, accrued or contingent) other than current liabilities shown on the Balance Sheet and current liabilities incurred since the date of the Balance Sheet in the ordinary course of business,
- (iv) declared a dividend, made any payment or distribution to stockholders or purchased or redeemed any shares of its capital stock or other securities,
- (v) mortgaged, pledged, encumbered or subjected to lien any of its assets, tangible or intangible, other than liens of current real property taxes not yet due and payable,
- (vi) sold, assigned or transferred any of its tangible assets except in the ordinary course of business, or cancelled any debt or claim,
- (vii) sold, assigned, transferred or granted any exclusive license with respect to any patent, trademark, trade name, service mark, copyright, trade secret or other intangible asset,
- (viii) suffered any loss of property or waived any right of substantial value whether or not in the ordinary course of business,
- (ix) made any change in officer compensation except in the ordinary course of business and consistent with past practice,

- (x) made any material change in the manner of business or operations of the Company,
- (xi) entered into any transaction except in the ordinary course of business or as otherwise contemplated hereby, or
- (xii) entered into any commitment (contingent or otherwise) to do any of the foregoing.

3.5 Litigation; Compliance with Law.

(a) There is no:

- (i) action, suit, claim, proceeding or investigation pending or, to the best of the Company's knowledge, threatened against or affecting the Company, at law or in equity, or before or by any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign,
- (ii) arbitration proceeding relating to the Company pending under collective bargaining agreements or otherwise, or
- (iii) governmental inquiry pending or, to the best of the Company's knowledge, threatened against or affecting the Company (including without limitation any inquiry as to the qualification of the Company to hold or receive any license or permit),

and there is no basis for any of the foregoing.

(b) The Company has not received any opinion or memorandum or legal advice from legal counsel to the effect that it is exposed, from a legal standpoint, to any liability or disadvantage which may be material to its business, prospects, financial condition, operations, property or affairs.

(c) The Company is not in default with respect to any order, writ, injunction or decree known to or served upon the Company of any court or of any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign.

(d) There is no action or suit by the Company pending, threatened or contemplated against others.

(e) The Company (i) has complied with all laws, rules, regulations and orders applicable to its business, operations, properties, assets, products and services, including all applicable laws relating to the employment of labor, wages, hours, equal opportunity, collective bargaining and the payment of Social Security and other taxes, (ii) has all necessary permits, licenses and other authorizations required to conduct its business as conducted and as proposed

to be conducted, and (iii) has been operating its business pursuant to and in compliance with the terms of all such permits, licenses and other authorizations.

(f) There is no existing or, to the Company's knowledge after due inquiry, proposed law, rule, regulation or order, whether federal, state, county or local, which would prohibit or restrict the Company from, or otherwise materially adversely affect the Company in, conducting its business in any jurisdiction in which it is now conducting business or in which it proposes to conduct business.

3.6 Proprietary Information of Third Parties

(a) To the best of the Company's knowledge, no third party has claimed or has reason to claim that any person employed by or affiliated with the Company has (i) violated or may be violating any of the terms or conditions of his employment, non-competition or non-disclosure agreement with such third party, (ii) disclosed or may be disclosing or utilized or may be utilizing any trade secret or proprietary information or documentation of such third party or (iii) interfered or may be interfering in the employment relationship between such third party and any of its present or former employees. No third party has requested information from the Company which suggests that such a claim might be contemplated.

(b) To the best of the Company's knowledge, no person employed by or affiliated with the Company (i) has employed or proposes to employ any trade secret or other confidential information of any former employer, or (ii) has violated or plans to violate any confidential relationship which such person may have had with any third party, in connection with the development, manufacture or sale of any product or proposed product or the development or sale of any service or proposed service of the Company.

(c) To the best of the Company's knowledge, neither the execution or delivery of this Agreement, the carrying on of the business of the Company as officers, employees or agents by any officer, director or key employee of the Company, nor the conduct or proposed conduct of the business of the Company, will conflict with, result in a breach of the terms, conditions or provisions of, or constitute a default under, any contract, covenant or instrument under which any such person is obligated.

3.7 Intellectual Property.

(a) Set forth in Section 3.7 of the Disclosure Schedule is a list and brief description of all domestic and foreign patents, patent rights, patent applications, trademarks, trademark applications, service marks, service mark applications, trade names and copyrights, and all applications for such which are in the process of being prepared, (i) owned by or registered in the name of the Company, (ii) of which the Company is a licensor or licensee, or (iii) in which the Company has any right, and in each case a brief description of the nature of such right.

(b) The Company owns or possesses adequate licenses or other rights to use all patents, patent applications, trademarks, trademark applications, service marks, service mark applications, trade names, copyrights, manufacturing processes, computer software, domain names, formulae, trade secrets, customer lists and know how (collectively, "**Intellectual**

Property”) necessary or desirable to the conduct of its business as conducted and as proposed to be conducted.

(c) No claim is pending or, to the best of the Company’s knowledge, threatened to the effect that (i) the operations of the Company infringe upon or conflict with the asserted rights of any other person to any Intellectual Property, or (ii) any Intellectual Property owned or licensed by the Company, or which the Company otherwise has the right to use, is invalid or unenforceable by the Company, and there is no basis for any such claim (whether or not pending or threatened).

(d) All prior art known to the Company which may be or may have been pertinent to the examination of any United States patent or patent application listed in Section 3.7 of the Disclosure Schedule has been cited to the United States Patent and Trademark Office.

(e) To the best of the Company’s knowledge, all technical information developed by and belonging to the Company which has not been patented has been kept confidential to the extent necessary in order to retain status as a trade secret.

3.8 Title to Properties.

(a) The Company has good, clear and marketable title to all of its properties and assets, free and clear of mortgages, pledges, security interests, liens, charges, claims, restrictions and other encumbrances (including without limitation, easements and licenses), except for liens for current taxes not yet due and payable and minor imperfections of title, not material in nature or amount and not materially detracting from the value or impairing the use of the property subject thereto or impairing the operations or proposed operations of the Company, including, without limitation, the ability of the Company to use such properties and assets as collateral.

(b) To the best of the Company’s knowledge after due inquiry, there are no condemnation, environmental, zoning or other land use regulation proceedings, either instituted or planned to be instituted, which would adversely affect the use or operation of the Company’s properties and assets for their respective intended uses and purposes, or the value of such properties, and the Company has not received notice of any special assessment proceedings which would affect such properties and assets.

3.9 Insurance. The Company holds valid policies providing all of the insurance required to be maintained by it under Section ___ of the Investor Rights Agreement.

3.10 Taxes.

(a) The Company has filed all required federal, state, county and local tax returns and has paid all taxes shown to be due by such returns as well as all other taxes, assessments and governmental charges which have become due or payable, including without limitation all taxes which the Company is obligated to withhold from amounts owing to employees, creditors and third parties.

(b) The Company has established adequate reserves for all taxes accrued but not yet payable.

(c) Except as set forth in Section 3.10 of the Disclosure Schedule, all material tax elections of any type which the Company has made as of the date hereof are set forth in the Financial Statements.

(d) The federal income tax returns of the Company have never been audited by the Internal Revenue Service. No deficiency assessment with respect to or proposed adjustment of the Company's federal, state, county or local taxes is pending or, to the best of the Company's knowledge, threatened. There is no tax lien (other than for current taxes not yet due and payable), whether imposed by any federal, state, county or local taxing authority, outstanding against the assets, properties or business of the Company.

(e) Neither the Company nor any of its present or former stockholders has ever filed an election pursuant to Section 1362 of the Internal Revenue Code of 1986 (the "Code"), that the Company be taxed as an S corporation. The Company's net operating losses for federal income tax purposes, as set forth in the Financial Statements, are not subject to any limitations imposed by Section 382 of the Code, and the full amount of such net operating losses are available to offset the taxable income of the Company for the current fiscal year and, to the extent not so used, succeeding fiscal years. Consummation of the transactions contemplated by this Agreement or by any other agreement, understanding or commitment (contingent or otherwise) to which the Company is a party or by which it is otherwise bound will not have the effect of limiting the Company's ability to use such net operating losses in full to offset such taxable income.

3.11 Agreements.

(a) Except as set forth in Section 3.11 of the Disclosure Schedule, the Company is not a party to or otherwise bound by any written or oral:

- (i) distributor, dealer, manufacturer's representative or sales agency agreement which is not terminable on less than 90 days' notice without cost or other liability to the Company (except for agreements which, in the aggregate, are not material to the business of the Company);
- (ii) sales agreement which entitles any customer to a rebate or right of set-off, to return any product to the Company after acceptance thereof or to delay the acceptance thereof, or which varies in any material respect from the Company's standard form agreements;
- (iii) lease;
- (iv) agreement with any labor union (and, to the knowledge of the Company, no organizational effort is being made with respect to any of its employees);
- (v) agreement with any supplier containing any provision permitting any party other than the Company to renegotiate the price or other terms, or containing any pay-back or other similar provision, upon the occurrence of

a failure by the Company to meet its obligations under the agreement when due or the occurrence of any other event;

- (vi) agreement for the future purchase of fixed assets, or for the future purchase of materials, supplies or equipment in excess of its normal operating requirements;
- (vii) agreement for the employment of any officer, employee, consultant or other person (whether formal or informal) which is not terminable on notice without cost or other liability to the Company (other than accrued vacation pay);
- (viii) bonus, pension, profit-sharing, retirement, hospitalization, insurance, stock purchase, stock option or other plan, agreement or understanding pursuant to which benefits are provided to any employee of the Company (other than group insurance plans which are not self-insured and are applicable to employees generally);
- (ix) agreement relating to the borrowing of money or to the mortgaging or pledging of, or otherwise placing a security interest on, any asset of the Company;
- (x) agreement under which it has granted any person any registration rights, other than the Investor Rights Agreement;
- (xi) agreement under which it has limited or restricted its right to compete with any person in any respect;
- (xii) agreement under which it has made any outstanding loans or advances to any person or incurred an obligation to make any such loans or advances, except to employees of the Company in respect of reimbursable business expenses anticipated to be incurred by them in connection with their performance of services for the Company;
- (xiii) agreement under which the Company has assumed, guaranteed, endorsed or otherwise become directly or contingently liable on any indebtedness of any other person (including, without limitation, liability by way of agreement, contingent or otherwise, to purchase, to provide funds for payment, to supply funds to or otherwise invest in the debtor, or otherwise to assure the creditor against loss), except for guaranties by endorsement of negotiable instruments for deposit or collection in the ordinary course of business;
- (xiv) agreement with any director, officer, employee or stockholder of the Company, or member of the family of any such person, or any corporation, partnership, trust or other entity in which any such person, or any member of the family of any such person, has a substantial interest or is an officer, director, trustee, partner or holder of more than 5% of the

outstanding capital stock thereof, including any contract, agreement or other arrangement providing for the employment of, furnishing of services by, rental of real or personal property from or otherwise requiring payments to any such person or firm, other than employment-at-will arrangements in the ordinary course of business;

- (xv) other agreement or group of related agreements with the same party involving more than \$ _____ or continuing over a period of more than six months from the date or dates thereof (including renewals or extensions optional with another party), which agreement or group of agreements is not terminable by the Company without penalty upon notice of 30 days or less, but excluding any agreement or group of agreements for the sale, lease or rental of the Company's products or services entered into by the Company in the ordinary course of business; or
- (xvi) any other written or oral agreement, instrument, commitment or restriction which individually or in the aggregate could materially adversely affect the business, prospects, financial condition, operations, property or affairs of the Company.

(b) The Company, and to the best of the Company's knowledge after due inquiry, each other party thereto have in all material respects performed all the obligations required to be performed by them to date (or each non-performing party has received a valid, enforceable and irrevocable written waiver with respect to its non-performance), have received no notice of default and are not in default (with due notice or lapse of time or both) under any agreement, instrument, commitment, plan or arrangement to which the Company is a party or by which it or its property may be bound. The Company has no present expectation or intention of not fully performing all its obligations under each such agreement, instrument, commitment, plan or arrangement, and the Company has no knowledge of any breach or anticipated breach by the other party to any agreement, instrument, commitment, plan or arrangement to which the Company is a party. The Company is in full compliance with all of the terms and provisions of its Charter and bylaws, as amended.

3.12 Significant Customers and Suppliers. No customer or supplier which was significant to the Company during the period covered by the Financial Statements or which has been significant to the Company thereafter, has terminated, materially reduced or threatened to terminate or materially reduce its purchases from or provision of products or services to the Company, as the case may be.

3.13 Full Disclosure.

(a) Neither this Agreement, nor any Schedule or Exhibit to this Agreement, nor the Business Plan of the Company dated [DATE] (the "**Business Plan**"), contains an untrue statement of a material fact or omits a material fact necessary to make the statements contained herein or therein not misleading.

(b) None of the statements, documents, certificates or other items prepared or supplied by the Company with respect to the transactions contemplated hereby contains an untrue statement of a material fact or omits a material fact necessary to make the statements contained therein not misleading.

(c) There is no fact which the Company has not disclosed to the Purchasers and their counsel in writing and of which the Company is aware which materially and adversely affects or could reasonably be expected to materially and adversely affect the business, prospects, financial condition, operations, property or affairs of the Company or any of its subsidiaries.

(d) The Purchasers acknowledge with respect to Section 3.13(a) that the financial projections and other estimates contained in the Business Plan were prepared by the Company based on the Company's experience in the industry and on assumptions of fact and opinion as to future events which the Company, at the date of the issuance of the Business Plan, believed to be reasonable, but which the Company cannot and does not assure or guarantee the attainment of in any manner. As of the date hereof, no facts have come to the attention of the Company which would, in its opinion, require the Company to revise or amplify the assumptions underlying such projections and other estimates or the conclusions derived therefrom.

3.14 Securities Law Matters.

(a) The Company has not offered the Preferred Shares or any similar security for sale to, or solicited any offer to buy the Preferred Shares or any such similar security from, or otherwise approached or negotiated with respect thereto with, any person or persons, and neither the Company nor any person acting on its behalf has taken or will take any other action (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 Preferred Shares under the Securities Act of 1933 (the "**Securities Act**") or the rules and regulations of the SEC thereunder), in either case so as to subject the offering, issuance or sale of the Preferred Shares to the registration provisions of the Securities Act.

(b) The Company has no contract, arrangement or understanding with any broker, finder or similar agent with respect to the transactions contemplated by this Agreement.

3.15 Officers; Key Employees.

(a) Section 3.15(a) of the Disclosure Schedule lists the name of each officer of the Company, together with the title or job classification of such person and the total compensation anticipated to be paid to such person by the Company and its subsidiaries in [YEAR].

(b) No officer or key employee of the Company has advised the Company (orally or in writing) that he intends to terminate employment with the Company.

3.16 Environmental Compliance.

(a) The Company has not caused or allowed, or contracted with any party for, the generation, use, transportation, treatment, storage or disposal of any Hazardous Substances (as defined below) in connection with the operation of its business or otherwise. The Company, the

operation of its business, and any real property that the Company owns, leases or otherwise occupies or uses (the “**Premises**”) are in compliance with all applicable Environmental Laws (as defined below) and orders or directives of any governmental authorities having jurisdiction under such Environmental Laws, including any Environmental Laws or orders or directives with respect to any cleanup or remediation of any release or threat of release of Hazardous Substances.

(b) The Company has not received any citation, directive, letter or other communication, written or oral, or any notice of any proceeding, claim or lawsuit, from any person arising out of the ownership or occupation of the Premises, or the conduct of its operations, and the Company is not aware of any basis therefor.

(c) The Company has obtained and is maintaining in full force and effect all necessary permits, licenses and approvals required by all 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.

(d) The Company has not caused or allowed a release, or a threat of release, of any Hazardous Substance onto, at or near the Premises, and, to the best of the Company’s knowledge, neither the Premises nor any property at or near the Premises has ever been subject to a release, or a threat of release, of any Hazardous Substance.

(e) For purposes of this Section 3.16,

- (i) “**Environmental Laws**” means any federal, state or local law or 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. Sections 9601, et seq., the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. Sections 11001, et seq., and the Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901, et seq.
- (ii) “**Hazardous Substances**” shall include oil and petroleum products, asbestos, polychlorinated biphenyls, urea formaldehyde and any other materials classified as hazardous or toxic under any Environmental Laws.

3.17 Employee Benefits; ERISA Compliance.

(a) Section 3.17 of the Disclosure Schedule (the “**ERISA Schedule**”) lists each Employee Plan and Benefit Arrangement (as defined below) that covers any employee of the Company, copies or descriptions of all of which have previously been made available or furnished to the Purchasers. The Company has provided the Purchasers with (i) the most recently filed Form 5500 covering each Employee Plan, (ii) an accurate summary description thereof and (iii) complete age, salary, service and related data as of the most recent practicable date for all employees of the Company.

(b) No Employee Plan is a “multiemployer plan”, as defined in Section 3(37) of the Employee Retirement Income Security Act of 1974 (“**ERISA**”), and no Employee Plan is subject

to Title IV of ERISA. The Company has not incurred, nor does it expect to incur, any liability under Title IV of ERISA arising in connection with the termination of any plan covered or previously covered by Title IV of ERISA.

(c) None of the Employee Plans or Benefit Arrangements covers any non-United States employee or former employee of the Company.

(d) No “prohibited transaction,” as defined in Section 406 of ERISA or Section 4975 of the Code, has occurred with respect to any Employee Plan.

(e) Each Employee Plan which is intended to be qualified under Section 401(a) of the Code is so qualified and has been so qualified during the period from its adoption to date, and each trust forming a part thereof is exempt from tax pursuant to Section 501(a) of the Code. The Company has furnished to the Purchasers copies of the most recent Internal Revenue Service determination letters with respect to each such plan. Each Employee Plan has been maintained in compliance with its terms and with the requirements prescribed by any and all statutes, orders, rules and regulations, including but not limited to ERISA and the Code, which are applicable to such plan.

[ALTERNATE FORM - no retirement plans:] [(e) No Employee Plan is an “employee pension benefit plan” as defined in Section 3(2) of ERISA.]

(f) Each Employee Plan and Benefit Arrangement has been maintained in substantial compliance with its terms and with the requirements prescribed by any and all applicable statutes, orders, rules and regulations.

(g) All contributions and payments accrued under each Employee Plan and Benefit Arrangement, determined in accordance with prior funding and accrual practices, as adjusted to include proportional accruals for the period ending on the Closing Date, will be discharged and paid on or prior to the Closing Date except to the extent reflected on the Balance Sheet. Except as disclosed in writing to the Purchasers prior to the date hereof, there has been no amendment to, written interpretation of or announcement (whether or not written) by the Company or any of its ERISA Affiliates (as defined below) relating to, or change in employee participation or coverage under, any Employee Plan or Benefit Arrangement that would increase materially the expense of maintaining such Employee Plan or Benefit Arrangement above the level of the expense incurred in respect thereof for the fiscal year ended prior to the date hereof.

(h) There is no contract, agreement, plan or arrangement covering any employee or former employee of the Company that, individually or collectively, could give rise to the payment of any amount that would not be deductible pursuant to the terms of Section 280G of the Code.

(i) No tax under Section 4980B or 4980D of the Code has been incurred in respect of any Employee Plan that is a “group health plan”, as defined in Section 5000(b)(1) of the Code.

(j) The Company has no post-retirement medical or health plans in effect for any current or former employees, except as required by Section 4980B of the Code.

(k) No employee of the Company will become entitled to any bonus, retirement, severance or similar benefit or enhanced benefit solely as a result of the transactions contemplated hereby.

(l) For purposes of this Section 3.17,

- (i) The term “**Benefit Arrangement**” means each employment, severance or other similar contract, arrangement or policy (written or oral) and each plan or arrangement (written or oral) providing for severance benefits, insurance coverage (including any self-insured arrangements), workers’ compensation, disability benefits, supplemental unemployment benefits, vacation benefits, retirement benefits or for deferred compensation, profit-sharing, bonuses, stock options, stock appreciation rights or other forms of incentive compensation or post-retirement insurance, compensation or benefits which (A) is not an Employee Plan and (B) covers any employee or former employee of the Company.
- (ii) An “**ERISA Affiliate**” of any entity means any other entity that, together with such entity, would be treated as a single employer under Section 414 of the Code.
- (iii) The term “**Employee Plan**” means each “employee benefit plan,” as such term is defined in Section 3(3) of ERISA, that (A)(1) is subject to any provision of ERISA and (2) is maintained or contributed to by the Company, or (B)(1) is subject to any provision of Title IV of ERISA and (2) is maintained or contributed to by any of the Company’s ERISA Affiliates.

[3.18 US Real Property Holding Corporation The Company is not now and has never been a “United States real property holding corporation”, as defined in Section 897(c)(2) of the Code and Section 1.897-2(b) of the Regulations promulgated by the Internal Revenue Service, and the Company has filed with the Internal Revenue Service all statements, if any, with its United States income tax returns which are required under Section 1.897-2(h) of such Regulations.]

[3.19 Small Business Concern. The Company with its “affiliates” (as that term is defined in Section 121.401 of Title 13 of the Code of Federal Regulations) is a “small business concern” within the meaning of the Small Business Act and Section 121.802 of such Regulations. The information pertaining to the Company set forth in Small Business Administration Forms 480, 652 and 1031 is accurate and complete.]

[3.20 Qualified Small Business Stock. The Preferred Shares constitute “qualified small business stock” as defined in Section 1202(c) of the Code.]

4. Representations and Warranties of the Purchasers.

Each Purchaser severally represents and warrants to the Company that:

(a) it is an “accredited investor” within the meaning of Rule 501 promulgated under the Securities Act and was not organized for the specific purpose of acquiring the Preferred Shares;

(b) it has sufficient knowledge and experience in investing in companies in a similar stage of development to that of the Company so as to be able to evaluate the risks and merits of its investment in the Company, and it is able financially to bear the risks thereof;

(c) it has had an opportunity to discuss the Company’s business, management and financial affairs with the Company’s management;

(d) its Preferred Shares are being acquired for its own account for the purpose of investment and not with a view to or for sale in connection with any distribution thereof;

(e) it understands that:

(i) the Preferred Shares and the Conversion Shares have not been registered under the Securities Act by reason of their issuance in a transaction exempt from the registration requirements of the Securities Act pursuant to Section 4(2) thereof or Rule 505 or 506 promulgated under the Securities Act,

(ii) the Preferred Shares and, upon conversion thereof, the Conversion Shares must be held indefinitely unless a subsequent disposition thereof is registered under the Securities Act or is exempt from such registration,

(iii) the Preferred Shares and the Conversion Shares will bear a legend to such effect, and

(iv) the Company will make a notation on its transfer books to such effect; and

(f) if it sells any Conversion Shares pursuant to Rule 144A promulgated under the Securities Act, it will take all necessary steps in order to perfect the exemption from registration provided thereby, including (i) obtaining on behalf of the Company information to enable the Company to establish a reasonable belief that the purchaser is a qualified institutional buyer and (ii) advising such purchaser that Rule 144A is being relied upon with respect to such resale.

5. Conditions to the Obligations of the Purchasers.

The obligation of each Purchaser to purchase and pay for its Preferred Shares on the Closing Date is, at its option, subject to the satisfaction, on or before the Closing Date, of the following conditions:

5.1 Opinion of Company’s Counsel. The Purchasers shall have received from [NAME OF COUNSEL], counsel for the Company, an opinion dated the Closing Date, in form and scope satisfactory to the Purchasers and their counsel, substantially in the form set forth in Exhibit E hereto.

5.2 Representations and Warranties to be True and Correct. The representations and warranties contained in Section 3 of this Agreement shall be true, complete 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, and the President and Treasurer of the Company shall have certified to such effect to the Purchasers in writing.

5.3 Performance. The Company shall have performed and complied with all agreements contained herein that it is required to perform or comply with prior to or at the Closing Date, and the President and Treasurer of the Company shall have certified to the Purchasers in writing to such effect and to the further effect that all of the conditions set forth in this Section 5 have been satisfied.

5.4 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 Purchasers and their counsel, and the Purchasers or their counsel shall have received all counterpart originals or certified or other copies of such documents as they reasonably may request.

5.5 Purchase by Other Purchasers. The aggregate purchase price paid or committed to be paid by all of the Purchasers for the Preferred Shares shall be at least \$_____.

5.6 Supporting Documents. The Purchasers or their counsel shall have received copies of the following documents:

- (a) the Charter, certified as of a recent date by the Secretary of State of the [STATE];
- (b) a certificate of the Secretary of State of the [STATE], dated as of a recent date, as to the due incorporation and good standing of the Company, the payment of all excise taxes by the Company and listing all documents of the Company on file with the Secretary of State of the [STATE];
- [(c) a certificate of the Secretary of State of the jurisdiction of incorporation of each of the Company's subsidiaries dated as of a recent date as to the due incorporation and good standing of such subsidiary;]
- (d) a certificate of the Secretary or an Assistant Secretary of the Company dated the Closing Date and certifying:
 - (i) that attached thereto is a true and complete copy of the bylaws of the Company as in effect on the date thereof;
 - (ii) that attached thereto is a true and complete copy of all resolutions adopted by the board of directors or the stockholders of the Company authorizing the execution, delivery and performance of the Transaction Documents, the issuance, sale and delivery of the Preferred Shares and the reservation, issuance and delivery of the Conversion Shares, and that all such resolutions are in full force and effect and are all the resolutions adopted

in connection with the transactions contemplated by the Transaction Documents;

- (iii) that the Charter has not been amended since the date of the last amendment referred to in the certificate delivered pursuant to Section 5.6(a) above;
- (iv) to the incumbency and specimen signature of each officer of the Company executing any of the Transaction Documents, the stock 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 Section 5.6(d); and

(e) such additional supporting documents and other information with respect to the operations and affairs of the Company as the Purchasers or their counsel reasonably may request.

5.7 Investor Rights Agreement. The Company shall have executed and delivered the Investor Rights Agreement.

5.8 Stock Restriction Agreement. The Stock Restriction Agreement shall have been executed and delivered by the Company and each of the following persons: [____].

[5.9 Management Rights Agreements. The Company shall have executed and delivered the Management Rights Agreements to those Purchasers who have made a request to the Company therefor and are subject in any manner to ERISA with respect to their investment in the Company.]

5.10 Employee Agreements.

(a) Each of the following persons shall have entered into a Non-Competition Agreement with the Company in the form attached as Exhibit F, and copies thereof shall have been delivered to the Purchasers or their counsel: [____].

(b) Each of the officers of the Company, each key employee and each other employee who has access to confidential information of the Company shall have executed and delivered to the company an Employee Nondisclosure and Developments Agreement substantially in the form of Exhibit G, and copies of each such agreement shall have been delivered to the Purchasers or their counsel.

5.11 Charter. The Charter shall read in its entirety as set forth in Exhibit D. The Charter shall provide that (a) all directors of the Company shall be indemnified against, and absolved of, liability to the Company and its stockholders to the maximum extent permitted under the laws of the [STATE], and (b) the number of shares of authorized Common Stock of the Company may be increased or decreased (but not below the number then outstanding) by the affirmative vote of the holders of [a majority] of the outstanding shares of capital stock of the Company entitled to vote thereon, voting together as a single class **[notwithstanding the provisions of Section 242(b)(2) of the Delaware General Corporation Law]**.

5.12 Bylaws. The Company's bylaws shall have been amended, if necessary, to provide that (a) unless otherwise required by the laws of the [STATE] (i) any two directors or (ii) any holder or holders of at least 25% of the outstanding shares of Series A Convertible Preferred Stock shall have the right to call a meeting of the board of directors or stockholders and (b) the number of directors fixed in accordance therewith shall in no event conflict with any of the terms or provisions of the Series A Convertible Preferred Stock as set forth in the Charter.

5.13 Election of Directors. The number of directors constituting the entire board of directors shall have been fixed at [NUMBER] and the following persons shall have been elected as the directors and shall each hold such position as of the Closing Date: [NAME OF DIRECTOR(S)] as the directors elected solely by the holders of the Common Stock, [NAME OF DIRECTOR(S)] as the directors elected solely by the holders of the Series A Convertible Preferred Stock, and [NAME OF DIRECTOR(S)] as the directors elected jointly by the holders of the Common Stock, voting as a separate class, and the holders of the Series A Convertible Preferred Stock, voting as a separate series.

5.14 Preemptive Rights. All stockholders of the Company having any preemptive, first refusal or other rights with respect to the issuance of the Preferred Shares or the Conversion Shares shall have irrevocably waived the same in writing.

5.15 Fees of Purchasers' Counsel. The Company shall have paid in accordance with Section 6.1 the fees and disbursements of Purchasers' counsel invoiced at the Closing.

All documents identified in this Section 5 shall be satisfactory in form and substance to the Purchasers and their counsel.

6. Miscellaneous.

6.1 Expenses. Each party hereto will pay its own expenses in connection with the transactions contemplated hereby, whether or not such transactions shall be consummated, provided, however, that the Company shall pay the fees and disbursements of the Purchasers' special counsel, [NAME OF SPECIAL COUNSEL], in connection with such transactions and any subsequent amendment, waiver, consent or enforcement thereof.

6.2 Brokerage. Each party hereto will indemnify and hold harmless the others against and in respect of any claim for brokerage or other commissions relative to this Agreement or to the transactions 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.

6.3 Survival of Agreements. All covenants, agreements, representations and warranties made in any of the Transaction Documents or any certificate or instrument delivered to the Purchasers pursuant to or in connection with any of the Transaction Documents shall survive the execution and delivery of all of the Transaction Documents, the issuance, sale and delivery of the Preferred Shares, and the issuance and delivery of the Conversion Shares, and all statements contained in any certificate or other instrument delivered by the Company hereunder or thereunder or in connection herewith or therewith shall be deemed to constitute representations and warranties made by the Company.

6.4 Governing Law. This Agreement will be construed in accordance with and governed by the laws of [STATE], without giving effect to the conflict of law principles of [STATE].

6.5 Successors and Assigns. Except as otherwise expressly provided in this Agreement, this Agreement will be binding on, and will inure to the benefit of, the successors and permitted assigns of the parties to this Agreement. Nothing in this Agreement is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights or obligations under or by reason of this Agreement, except as expressly provided in this Agreement, provided, however, that all representations, covenants and agreements benefiting the Purchasers shall inure to the benefit of any and all subsequent holders from time to time of Preferred Shares or Conversion Shares.

6.6 Notices. All notices and other communications required or permitted hereunder will be in writing and will be delivered by hand or sent by overnight courier, fax or e-mail to:

if to the Company:

fax: _____
e-mail: _____
Attention: _____

with a copy to:

fax: _____
e-mail: _____
Attention: _____

if to a Purchaser: to the person designated on Schedule 1.

Each party may furnish an address substituting for the address given above by giving notice to the other parties in the manner prescribed by this Section 6.6. All notices and other communications will be deemed to have been given upon actual receipt by (or tender to and rejection by) the intended recipient or any other person at the specified address of the intended recipient.

6.7 Disputes. Any controversy, claim or dispute arising out of or relating to this Agreement, shall be settled by binding arbitration in [CITY/STATE]. Such arbitration shall be conducted in accordance with the then prevailing commercial arbitration rules of [NAME OF ARBITRATOR], with the following exceptions if in conflict: (a) one arbitrator shall be chosen by [ARBITRATOR]; (b) each party to the arbitration will pay its pro rata share of the expenses and fees of the arbitrator, together with other expenses of the arbitration incurred or approved by

the arbitrator; and (c) arbitration may proceed in the absence of any party if written notice (pursuant to the Arbitrator's rules and regulations) of the proceeding has been given to such party. The parties agree to abide by all decisions and awards rendered in such proceedings. Such decisions and awards rendered by the arbitrator shall be final and conclusive and may be entered in any court having jurisdiction thereof as a basis of judgment and of the issuance of execution for its collection. All such controversies, claims or disputes shall be settled in this manner in lieu of any action at law or equity, provided however, that nothing in this subsection shall be construed as precluding bringing an action for injunctive relief or other equitable relief. The arbitrator shall not have the right to award punitive damages or speculative damages to either party and shall not have the power to amend this Agreement. IF FOR ANY REASON THIS ARBITRATION CLAUSE BECOMES NOT APPLICABLE, THEN EACH PARTY, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY AS TO ANY ISSUE RELATING HERETO IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER MATTER INVOLVING THE PARTIES HERETO

6.8 Severability. In the event that any provision of this Agreement is held to be unenforceable under applicable law, this Agreement will continue in full force and effect without such provision and will be enforceable in accordance with its terms.

6.9 Construction. The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement. Unless the context of this Agreement clearly requires otherwise: (a) references to the plural include the singular, the singular the plural, and the part the whole, (b) references to one gender include all genders, (c) "or" has the inclusive meaning frequently identified with the phrase "and/or," (d) "including" has the inclusive meaning frequently identified with the phrase "including but not limited to" or "including without limitation," and (e) references to "hereunder," "herein" or "hereof" relate to this Agreement as a whole. Any reference in this Agreement to any statute, rule, regulation or agreement, including this Agreement, shall be deemed to include such statute, rule, regulation or agreement as it may be modified, varied, amended or supplemented from time to time.

6.10 Entire Agreement. This Agreement embodies the entire agreement and understanding among the parties hereto with respect to the subject matter of this Agreement and supersedes all prior or contemporaneous agreements and understandings other than this Agreement relating to the subject matter hereof.

6.11 Amendment and Waiver. This Agreement may not be amended or modified, and no provisions hereof may be waived, without the written consent of the Company and the holders of at least two thirds of the outstanding shares of Common Stock issued or issuable upon conversion of the Preferred Shares. No waiver of a provision will be deemed to be or will constitute a waiver of any other provision of this Agreement. A waiver will be effective only in the specific instance and for the purpose for which it was given, and will not constitute a continuing waiver.

6.12 Counterparts. This Agreement may be in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one instrument.

[The remainder of this page has been intentionally left blank.]

IN WITNESS WHEREOF, the Company and the Purchasers have executed this Series A Convertible Preferred Stock Purchase Agreement as of the date first written above.

COMPANY:

[NAME OF COMPANY]

By: _____

Name: _____

Title: _____

PURCHASERS:

[NAME OF PURCHASER 1]

By: _____

Name: _____

Title: _____

[NAME OF PURCHASER 2]

By: _____

Name: _____

Title: _____

Schedule 1

Purchasers

<u>Name and Address of Purchaser</u>	<u>Number of Preferred Shares to be Purchased</u>	<u>Purchase Price for Preferred Shares</u>
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SCHEDULE 2
Disclosure Schedule

Form of Opinion Required Pursuant to Section 5.1

1. Each of the Company and its subsidiaries is a corporation duly incorporated, validly existing and in good standing under the laws of its respective jurisdiction of incorporation. To our knowledge, [Section 3.1(c) of the Disclosure Schedule contains a complete list of all subsidiaries of the Company and each subsidiary is wholly owned, directly or indirectly, by the Company] [The Company has no subsidiaries]. Each of the Company [and its subsidiaries] is duly licensed or qualified to transact business as a foreign corporation and is in good standing in [STATE] and each other jurisdiction in which it owns or leases real property. Each of the Company [and each of its subsidiaries] has the corporate power and authority to own and hold its properties and to carry on its business as currently conducted and as proposed to be conducted. The Company has the corporate power and authority to execute, deliver and perform all of the Transaction Documents, to issue, sell and deliver the Preferred Shares and, upon conversion thereof, to issue and deliver the Conversion Shares.
2. All of the Transaction Documents have been duly authorized, executed and delivered by the Company and constitute the legal, valid and binding obligations of the Company, enforceable in accordance with their respective terms (subject, as to enforcement of remedies, to the discretion of courts in awarding equitable relief and to applicable bankruptcy, reorganization, insolvency, moratorium and similar laws affecting the rights of creditors generally), except that we do not express any opinion as to the validity or enforceability of the indemnification provisions of the Investor Rights Agreement.
3. The execution and delivery by the Company of the Transaction Documents, the performance by the Company of its obligations thereunder, the issuance, sale and delivery of the Preferred Shares and, upon conversion thereof, the issuance and delivery of the Conversion Shares, will not violate any provision of law, the Charter or bylaws, as amended, of the Company, any order of any court or other agency of government or any indenture, agreement or other instrument known to us to which the Company, any of its subsidiaries or any of their respective properties or assets is bound, or conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any such indenture, agreement or other instrument, or result in the creation or imposition of any security interest of any nature whatsoever upon any of the properties or assets of the Company or any of its subsidiaries. In rendering the foregoing opinion, we assume with your permission (a) full disclosure to the Purchasers of all material facts and (b) with respect to performance by the Company of its registration obligations under the Investor Rights Agreement, compliance by the Company at such time with the registration requirements of the Securities Act and with applicable state securities laws, and we express no opinion as to the validity or enforceability of the indemnification provisions of the Investor Rights Agreement.
4. The authorized capital stock of the Company consists of (a) [NUMBER] shares of Preferred Stock, of which [NUMBER] shares have been designated Series A Convertible Preferred Stock, and (b) [NUMBER] shares of Common Stock. Immediately prior to the Closing, [NUMBER] shares of Common Stock will be validly issued, fully paid and nonassessable with no personal liability attaching to the ownership thereof, and no shares of Preferred Stock will have been issued. To our knowledge, all of the stockholders of record and

all holders of record of subscriptions, warrants, options, convertible securities, and other rights (contingent or other) to purchase or otherwise acquire equity securities of the Company, and the number of shares of Common Stock and the number of such subscriptions, warrants, options, convertible securities, and other such rights held by each, are as set forth in the Capitalization Table. The designations, powers, preferences, rights, qualifications, limitations and restrictions in respect of each class or series of authorized capital stock of the Company are as set forth in the Charter, and all such designations, powers, preferences, rights, qualifications, limitations and restrictions are valid, binding and enforceable and in accordance with all applicable laws (subject, as to enforcement, to the discretion of courts in awarding equitable relief and to applicable bankruptcy, reorganization, insolvency, moratorium and similar laws affecting the rights of creditors generally). Except as set forth in the Capitalization Table or as provided in the Charter, to our knowledge the Company has no obligation (contingent or other) to purchase, redeem or otherwise acquire any of its equity securities or any interest therein or to pay any dividend or make any other distribution in respect thereof.

5. The issuance, sale and delivery of the Preferred Shares and the issuance and delivery of the Conversion Shares upon conversion of the Preferred Shares have been duly authorized by all required corporate action; upon receipt by the Company of the required consideration, the Preferred Shares will be validly issued, fully paid and nonassessable with no personal liability attaching to the ownership thereof and, to our knowledge, free and clear of all security interests imposed by or through the Company except as set forth in the Investor Rights Agreement; and the Conversion Shares have been duly reserved for issuance upon conversion of the Preferred Shares and, when so issued, will be validly issued, fully paid and nonassessable with no personal liability attaching to the ownership thereof and, to our knowledge, will be free and clear of all security interests imposed by or through the Company except as set forth in the Investor Rights Agreement. Neither the issuance, sale or delivery of the Preferred Shares nor the issuance or delivery of the Conversion Shares is subject to any preemptive right of stockholders of the Company arising under law or the Charter or bylaws of the Company, each as amended, or, to our knowledge, to any contractual right of first refusal or other right in favor of any person.

6. Except as described in Section 3.5 of the Disclosure Schedule, to our knowledge there is no (a) action, suit, claim, proceeding or investigation pending or threatened against or affecting the Company or any of its subsidiaries, at law or in equity, or before or by any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, (b) arbitration proceeding relating to the Company or any of its subsidiaries pending under collective bargaining agreements or (c) governmental inquiry pending or threatened against or affecting the Company or any of its subsidiaries (including, without limitation, any inquiry as to the qualification of the Company or any of its subsidiaries to hold or receive any license or permit). To our knowledge, neither the Company nor any of its subsidiaries is in default with respect to any order, writ, injunction or decree known to us of any court or of any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign.

7. Assuming the accuracy of the representations and warranties of the Purchasers set forth in Section 4 of the Agreement, no registration or filing with, and no consent or approval of, or other action by any federal, state or other governmental agency or instrumentality is or will be necessary for the valid execution, delivery and performance by the Company of the Transaction

Documents, the issuance, sale and delivery of the Preferred Shares or, upon conversion thereof, the issuance and delivery of the Conversion Shares, other than filings pursuant to state securities laws (all of which filings, other than those which are required to be made after the Closing, have been made by the Company). In rendering the foregoing opinion with respect to performance by the Company of its obligations under the Investor Rights Agreement, we have assumed, with your permission, compliance by the Company at such time with the registration requirements of the Securities Act and with applicable state securities laws, and we express no opinion as to the validity or enforceability of the indemnification provisions of the Investor Rights Agreement.

8. All of the outstanding securities of the Company have been issued in compliance with the registration requirements of the Securities Act and all applicable state securities laws.