ATRIX LABORATORIES INC
Form 425
June 14, 2004

Filed by: QLT Inc.
Pursuant to Rule 425 under the Securities Act of 1933

Subject Company: Atrix Laboratories, Inc.
Commission File No. 0-18231

On June 14, 2004, QLT Inc. ("QLT") entered into an Agreement and Plan of Merger (the "Merger Agreement"), dated as of June 14, 2004, by and among QLT, Aspen Acquisition Corp., a wholly owned subsidiary of QLT ("Merger Sub") and Atrix Laboratories, Inc. ("Atrix") Pursuant to the Merger Agreement, Merger Sub will be merged with and Atrix, with Atrix as the surviving corporation. Immediately thereafter, the surviving corporation shall merge into a Delaware corporation that is a wholly owned subsidiary of QLT. A copy of the Merger Agreement is set forth below.

AGREEMENT AND PLAN OF MERGER

BY AND AMONG

QLT INC.

ASPEN ACQUISITION CORP.

AND

ATRIX LABORATORIES, INC.

DATED AS OF JUNE 14, 2004

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AGREEMENT AND PLAN OF MERGER, dated as of June 14, 2004 (this "Agreement"), by and among QLT Inc., a company incorporated under the laws of the Province of British Columbia ("Parent"), Aspen Acquisition Corp., a Delaware corporation and a wholly-owned subsidiary of Parent ("Merger Sub"), and Atrix Laboratories, Inc., a Delaware corporation (the "Company").

WHEREAS, the respective Boards of Directors of Parent, Merger Sub and the Company have approved the merger of Merger Sub with and into the Company (the "First Step Merger" or the "Merger") upon the terms and subject to the conditions of this Agreement and in accordance with the Delaware General Corporation Law (the "DGCL");

WHEREAS, the respective Boards of Directors of Parent and the Company have determined that the Merger is advisable, the Board of Directors of Parent has determined that the Merger is in the best interest of its shareholders, the Board of Directors of the Company has determined that the Merger is in the best interests of its stockholders, and Parent has approved this Agreement and the Merger as the sole stockholder of Merger Sub;

WHEREAS, for federal income tax purposes, Parent, Merger Sub and the Company intend that the First Step Merger and the Second Step Merger shall be treated as a single integrated transaction (together, the "Transaction") and shall qualify as a "reorganization" under Sections 367 and 368(a) of the Internal Revenue Code of 1986, as amended (the "Code") and the regulations promulgated thereunder.

NOW, THEREFORE, in consideration of the foregoing and the respective representations, warranties, covenants and agreements set forth in this Agreement and intending to be legally bound hereby, the parties hereto agree as follows:

ARTICLE 1.
THE MERGER

Section 1.1 The Merger. Upon the terms and subject to satisfaction or waiver of the conditions set forth in this Agreement, and in accordance with the DGCL, at the Effective Time, Merger Sub shall be merged with and into the Company. As a result of the Merger, the separate corporate existence of Merger Sub shall cease and the Company shall continue as the surviving corporation following the Merger (the "Surviving Corporation").

Section 1.2 Closing. The closing of the Merger (the "Closing") shall take place on the first Business Day after the satisfaction or waiver (subject to applicable Law) of the conditions (excluding conditions that, by their nature, cannot be satisfied until the Closing Date) set forth in Article 7, unless this Agreement has been theretofore terminated pursuant to its terms or unless another time or date is agreed to in writing by the parties hereto (the actual date of the Closing being referred to herein as the "Closing Date"). The Closing shall be held at the offices of Latham & Watkins LLP, 135 Commonwealth Drive, Menlo Park, California 94025, unless another place is agreed to in writing by the parties hereto. As soon as practicable after the Closing, the parties hereto

shall cause the Merger to be consummated by filing a certificate of merger relating to the Merger (the "Certificate of Merger") with the Secretary of State of the State of Delaware, in such form as required by, and executed in accordance with the relevant

provisions of, the DGCL (the date and time of such filing, or if another date and time is specified in such filing, such specified date and time, being the "Effective Time").

Section 1.3 Effect of the Merger. At the Effective Time, the effect of the Merger shall be as provided in the applicable provisions of the DGCL. Without limiting the generality of the foregoing, at the Effective Time, except as otherwise provided herein, all the property, rights, privileges, powers and franchises of the Company and Merger Sub shall vest in the Surviving Corporation, and all debts, liabilities and duties of the Company and Merger Sub shall become the debts, liabilities and duties of the Surviving Corporation.

Section 1.4 Certificate of Incorporation; Bylaws.

(a) Certificate of Incorporation. At the Effective Time, the Certificate of Incorporation of the Surviving Corporation shall be amended in its entirety to read as the Certificate of Incorporation of Merger Sub, until thereafter changed or amended as provided therein or by applicable Law, except that Article 1 thereof shall be amended to read as follows: "The name of the Corporation is Atrix Laboratories, Inc."

(b) Bylaws. At the Effective Time, the Bylaws of Merger Sub, as in effect immediately prior to the Effective Time, shall be the Bylaws of the Surviving Corporation, until thereafter changed or amended as provided therein or by applicable Law.

Section 1.5 Directors and Officers of the Surviving Corporation. The directors of Merger Sub immediately prior to the Effective Time shall be the initial directors of the Surviving Corporation, each to hold office in accordance with the Certificate of Incorporation and Bylaws of the Surviving Corporation. The President and Chief Executive Officer of Parent immediately prior to the Effective Time shall be the initial President and Chief Executive Officer of the Surviving Corporation, and the officers of the Company other than the Chairman of the Board and Chief Executive Officer shall be the other initial officers of the Surviving Corporation, each to hold office in accordance with the Certificate of Incorporation and Bylaws of the Surviving Corporation.

Section 1.6 Second Step Merger. Immediately following the Effective Time, Parent shall cause the Surviving Corporation to merge into a Delaware corporation (the "Second Merger Sub") that is a wholly owned subsidiary of Parent (the "Second Step Merger"). There shall be no conditions to the completion of the Second Step Merger other than the completion of the Merger.

ARTICLE 2.
CONVERSION OF SECURITIES; EXCHANGE OF CERTIFICATES

Section 2.1 Conversion of Securities. At the Effective Time, by virtue of the Merger and without any action on the part of the Company or the holders of any of the following securities:

(a) Conversion Generally.

(i) Each share of common stock, par value $0.001 per share, of the Company ("Company Common Stock") issued and outstanding immediately prior to the Effective Time, including shares of Company Common Stock resulting from the conversion of any Series A Convertible Exchangeable Preferred Stock, par value $0.001 per share, of the Company ("Series A Convertible Preferred Stock") immediately prior to consummation of the Merger (other than any shares of Company Common Stock to be canceled pursuant to Section 2.1(b) and Appraisal Shares referred to in Section 2.1(e) ("Excluded Common Shares")), shall be converted, subject to Section 2.2(e), into the right to receive: (A) 1.0000 (the "Exchange Ratio") common share, no par value per share ("Parent Common Shares"), of Parent (the "Common Share Consideration") and (B) $14.61 in cash (the "Common Cash Consideration," and together with the Common Share Consideration, the "Common Merger Consideration").

(ii) Each share of Series A Convertible Preferred Stock issued and outstanding immediately prior to the Effective Time (other than any shares of Series A Convertible Preferred Stock to be canceled pursuant to Section 2.1(b) and Appraisal Shares referred to in Section 2.1(e) ("Excluded Preferred Shares" and, together with the Excluded Common Shares, "Excluded Shares")), excluding shares of Series A Convertible Preferred Stock converted prior to consummation of the Merger, shall be converted, subject to Section 2.2(e), into the right to receive: (A) a number of Parent Common Shares (the "Preferred Share Consideration"), determined to seven decimal places, equal to the product of the number of shares of Company Common Stock into which such share of Series A Convertible Preferred Stock is convertible immediately prior to the Effective Time (the "Conversion Number") and the Exchange Ratio (the "Preferred Exchange Ratio") and (B) an amount of cash, determined to seven decimal places (the "Preferred Cash Consideration" and, together with the Preferred Share Consideration, the "Preferred Merger Consideration"), equal to the product of the Conversion Number and the Common Cash Consideration.

(iii) All such shares of Company Common Stock and Series A Convertible Preferred Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and each certificate (a "Certificate") previously representing any such shares shall thereafter represent only the right to receive the Common Merger Consideration or the Preferred Merger Consideration (collectively, the "Merger Consideration"), as the case may be, payable in respect of such shares of Company Common Stock or Series A Convertible Preferred Stock, as the case may be, and the right, if any, to receive cash in lieu of fractional Parent Common Shares pursuant to Section 2.2(e) and any distributions or dividends pursuant to Section 2.2(c).

(b) Cancellation of Shares. Each share of Company Common Stock or Series A Convertible Preferred Stock, if any, either (i) owned by Parent or any of its Subsidiaries, (ii) held in the Company treasury or (iii) owned by any wholly-owned Subsidiary of the Company immediately prior to the Effective Time shall be canceled and retired and shall cease to exist and no Merger Consideration or other consideration shall be delivered in exchange therefor.

(c) Merger Sub. Each share of common stock of Merger Sub issued and outstanding immediately prior to the Effective Time shall be converted into and be exchanged for one newly and validly issued, fully paid and nonassessable share of common stock of the Surviving Corporation.

(d) Change in Shares. If, between the date of this Agreement and the Effective Time, the outstanding Parent Common Shares, shares of Company Common Stock or shares of Series A Convertible Preferred Stock shall have been changed into, or exchanged for, a different number of shares or a different class, by reason of any stock dividend, subdivision, reclassification, recapitalization, split, combination or exchange of shares, the Exchange Ratio, the Preferred Exchange Ratio and the Option Exchange Ratio shall be correspondingly adjusted to provide the holders of Company Common Stock, Series A Convertible Preferred Stock and Company Options the same economic effect as contemplated by this Agreement prior to such event.

(e) Appraisal Rights. Notwithstanding anything in this Agreement to the contrary, shares of Company Common Stock and Series A Convertible Preferred Stock outstanding immediately prior to the Effective Time and held by a Company stockholder who has not voted in favor of the Merger or consented thereto in writing and who has properly demanded appraisal for such shares in accordance with the DGCL (the "Appraisal Shares"), shall not be converted into a right to receive the Merger Consideration as provided in Section 2.1(a), until such time as such stockholder fails to perfect or withdraws or otherwise loses such stockholder's right to appraisal. If after the Effective Time such stockholder fails to perfect or withdraws or loses such stockholder's right to appraisal, such shares of Company Common Stock or Series A Convertible Preferred Stock, as the case may be, shall be treated as if they had been converted as of the Effective Time into the right to receive the Merger Consideration as provided in Section 2.1(a). The Company shall give Parent prompt notice of any demands received by the Company pursuant to the DGCL for appraisal of shares of Company Common Stock or Series A Convertible Preferred Stock, and Parent shall have the right to participate in all negotiations and proceedings with respect to such demands. The Company shall not settle, make any payments with respect to, or offer to settle, any claim with respect to Appraisal Shares without the written consent of Parent.

(f) Adjustments to Preserve Tax Treatment.

(i) If the amount obtained by dividing (x) the Aggregate Parent Share Value by (y) the Closing Transaction Value is less than 0.4500, the following shall occur:

(A) The Exchange Ratio shall be adjusted to a number, rounded to the nearest fourth decimal place, equal to (x) the product of 0.4500 and the Closing Transaction Value, divided by (y) the product of the Aggregate Company Share Number and the Closing Parent Share Price.

(B) The Common Cash Consideration shall be adjusted to an amount, rounded to the nearest cent, equal to the quotient obtained by dividing (x) the amount obtained by subtracting the Aggregate Appraisal Value from the product of 0.5500 and the Closing Transaction Value, by (y) the Aggregate Company Share Number.

(ii) In the event that the Exchange Ratio and the Common Cash Consideration are adjusted as provided for in this Section 2.1(f), all references in this Agreement (including, for the avoidance of doubt, references in Section 2.1(a)(ii)) to the "Exchange Ratio" and the "Common Cash Consideration" shall refer to the Exchange Ratio and the Common Cash Consideration as adjusted in this Section 2.1(f) except as may be otherwise specified herein.

(iii) For purposes of this Section 2.1(f), the following terms shall have the following meanings:

(A) "Aggregate Appraisal Value" means the product of (x) the aggregate number of Appraisal Shares determined at Closing, and (y) the sum of (1) the Common Cash Consideration (before any adjustment pursuant to Section 2.1(f)) and (2) the product of the Exchange Ratio (before any adjustment pursuant to Section 2.1(f)) and the Closing Parent Share Price.

(B) "Aggregate Cash Amount" means the product of (x) the Common Cash Consideration (before any adjustment pursuant to Section 2.1(f)) and (y) the Aggregate Company Share Number.

(C) "Aggregate Company Share Number" means the number obtained by subtracting (x) the aggregate number of shares of Company Common Stock to be cancelled in the Merger pursuant to Section 2.1(b) and (y) the aggregate number of Appraisal Shares determined at Closing, from (z) the aggregate number of shares of Company Common Stock outstanding on the Closing Date (assuming exercise of the Warrant, if it is exercised prior to the Effective Time, and exercise of any stock options, if such options are exercised prior to the Effective Time).

(D) "Aggregate Parent Share Number" means the product of (x) the Exchange Ratio (before any adjustment pursuant to Section 2.1(f)) and (y) the Aggregate Company Share Number.

(E) "Aggregate Parent Share Value" means the product of (x) the Aggregate Parent Share Number (before any adjustment pursuant to Section 2.1(f)) and (y) the Closing Parent Share Price.

(F) "Closing Parent Share Price" means the mean between the high and low selling prices, regular way, of a Parent Common Share on The Nasdaq Stock Market on the date of the Effective Time, as reported by Bloomberg LP (or if not so reported, as reported by such other reporting service as is reasonably agreed to by the parties).

(G) "Closing Transaction Value" means the sum of (x) the Aggregate Cash Amount, (y) the Aggregate Parent Share Value and (z) the Aggregate Appraisal Value.

(iv) For purposes of this Section 2.1(f), all shares of Series A Convertible Preferred Stock that are outstanding at Closing shall be deemed to have been converted into Company Common Stock immediately prior to Closing in accordance with their terms.

(g) Associated Rights. References in this Agreement to Parent Common Shares shall include, unless the context requires otherwise, the associated rights ("Parent Rights") issued pursuant to the Amended and Restated Shareholder Rights Plan Agreement, as amended and restated, dated as of April 8, 2002, between Parent and Computershare Trust Company of Canada, as Rights Agent (the "Parent Rights Plan"). References in this Agreement

to Company Common Stock shall include, unless the context requires otherwise, the Company Rights (defined in Section 3.3(a) below).

Section 2.2 Exchange of Certificates.

(a) Exchange Agent. As of the Effective Time, Parent shall deposit, or shall cause to be deposited, with Computershare Trust Company of Canada or another bank or trust company designated by Parent and satisfactory to the Company (the "Exchange Agent"), for the benefit of the holders of shares of Company Common Stock and Series A Convertible Preferred Stock, for exchange, in accordance with this Article 2, through the Exchange Agent, sufficient cash and certificates representing Parent Common Shares to make all deliveries pursuant to this Article 2. Parent agrees to make available to the Exchange Agent, from time to time as needed, cash sufficient to pay any dividends and other distributions pursuant to Section 2.2(c). The Exchange Agent shall, pursuant to irrevocable instructions delivered by Parent to the Exchange Agent on or prior to the Effective Time, deliver to the holders of shares of Company Common Stock and Series A Convertible Preferred Stock (other than holders of Excluded Shares) the Merger Consideration contemplated to be paid for shares of Company Common Stock and Series A Convertible Preferred Stock pursuant to this Agreement out of the Exchange Fund. Except as contemplated by Sections 2.2(c) and 2.2(e) hereof, the Exchange Fund shall not be used for any other purpose. Any cash and certificates representing Parent Common Shares deposited with the Exchange Agent shall be referred to as the "Exchange Fund."

(b) Exchange Procedures. Promptly (and in any event, within five (5) Business Days) after the Effective Time, Parent shall cause the Exchange Agent to mail to each holder of record of a Certificate or Certificates which immediately prior to the Effective Time represented outstanding shares of Company Common Stock or Series A Convertible Preferred Stock (other than holders of Excluded Shares) (i) a letter of transmittal (which shall specify that delivery shall be effected, and risk of loss and title to the Certificates shall pass, only upon proper delivery of the Certificates to the Exchange Agent and shall be in customary form) and (ii) customary instructions for use in effecting the surrender of the Certificates in exchange for the Merger Consideration payable in respect of the shares represented by such Certificates, any cash in lieu of fractional Parent Common Shares pursuant to Section 2.2(e) and any distributions or dividends pursuant to Section 2.2(c). Upon surrender of a Certificate for cancellation to the Exchange Agent together with such letter of transmittal, properly completed and duly executed, and such other documents as may be required pursuant to such instructions, the holder of such Certificate shall be entitled to receive in exchange therefor the Merger Consideration payable in respect of the shares represented by such Certificate, any cash in lieu of fractional Parent Common Shares to which such holder is entitled pursuant to Section 2.2(e) and any dividends or other distributions to which such holder is entitled pursuant to Section 2.2(c), and the Certificate so surrendered shall forthwith be canceled. No interest shall be paid or accrued on any Cash Consideration, cash in lieu of fractional shares or any unpaid dividends and distributions payable to holders of Certificates. In the event of a transfer of ownership of shares of Company Common Stock or Series A Convertible Preferred Stock which is not registered in the transfer records of the Company, the Merger Consideration payable in respect of such shares of Company Common Stock or Series A Convertible Preferred Stock together with any cash to be paid upon due surrender of the Certificate and any other dividends or distributions in respect thereof may be paid to a transferee if the Certificate representing such shares of Company Common Stock or

Series A Convertible Preferred Stock is presented to the Exchange Agent, accompanied by all documents required to evidence and effect such transfer and to evidence that any applicable stock transfer Taxes have been paid. Until

surrendered as contemplated by this Section 2.2, each Certificate shall be deemed at any time after the Effective Time to represent only the right to receive upon such surrender the Merger Consideration payable in respect of the shares of Company Common Stock or Series A Convertible Preferred Stock represented by such Certificate, cash in lieu of any fractional Parent Common Shares to which such holder is entitled pursuant to Section 2.2(e) and any dividends or other distributions to which such holder is entitled pursuant to Section 2.2(c).

(c) Distributions with Respect to Unexchanged Parent Common Shares. No dividends or other distributions declared or made with respect to Parent Common Shares, with a record date after the Effective Time, shall be paid to the holder of any unsurrendered Certificate, and no cash payment in lieu of fractional Parent Common Shares shall be paid to any such holder pursuant to Section 2.2(e), unless and until the holder of such Certificate shall surrender such Certificate. Subject to the effect of escheat, Tax or other applicable Laws, following surrender of any such Certificate, there shall be paid to such holder of the certificates representing whole Parent Common Shares issuable in exchange therefor, without interest, (i) the amount of any cash due pursuant to Section 2.1 and cash payable in lieu of fractional Parent Common Shares to which such holder is entitled pursuant to Section 2.2(e) and the amount of dividends or other distributions with a record date at or after the Effective Time theretofore paid with respect to such whole Parent Common Shares and (ii) at the appropriate payment date, the amount of dividends or other distributions, with a record date at or after the Effective Time but prior to such surrender and a payment date subsequent to such surrender, payable with respect to such whole Parent Common Shares.

(d) Further Rights in Company Common Stock. The Merger Consideration issued upon conversion of a share of Company Common Stock or Series A Convertible Preferred Stock in accordance with the terms hereof (including any dividends or distributions pursuant to Section 2.2(c) or cash in lieu of fractional shares pursuant to Section 2.2(e)) shall be deemed to have been issued in full satisfaction of all rights pertaining to such share of Company Common Stock or Series A Convertible Preferred Stock, as the case may be.

(e) Fractional Shares. No fraction of a Parent Common Share will be issued in connection with the Merger, and no certificates or scrip for any such fractional shares shall be issued. In lieu thereof, each holder of shares of Company Common Stock or Series A Convertible Preferred Stock who would otherwise be entitled to receive a fraction of a Parent Common Share (after aggregating all fractional Parent Common Shares to be received by such holder) shall, upon surrender of such holder's Certificate(s), receive from Parent an amount of cash (rounded to the nearest whole cent), without interest, equal to the product of (i) such fraction, multiplied by (ii) the volume weighted average price, regular way, on The Nasdaq Stock Market, as reported by Bloomberg LP (or if not so reported, as reported by such other reporting service as is reasonably agreed to by the parties) of the Parent Common Shares for the five (5) most recent trading days ending on the full trading day immediately prior to the Effective Time (the "Parent Closing Price").

(f) Termination of Exchange Fund. Any portion of the Exchange Fund which remains undistributed to the holders of Company Common Stock and Series A Convertible Preferred Stock for six (6) months after the Effective Time shall be delivered to Parent, upon demand, and, from and after such delivery to Parent, any holders of Company Common Stock or Series A Convertible Preferred Stock who

have not theretofore complied with this Article 2 shall thereafter look only to Parent for the Merger Consideration payable in respect of such shares of Company Common Stock or Series A Convertible Preferred Stock, as the case may be, any cash in lieu of fractional Parent Common Shares to which they are entitled pursuant to Section 2.2(e) and any dividends or other distributions with respect to Parent Common Shares to which they are entitled pursuant to Section 2.2(c), in each case, without any interest thereon.

(g) No Liability. None of Parent, the Surviving Corporation or the Company shall be liable to any holder of shares of Company Common Stock or Series A Convertible Preferred Stock for any such Parent Common Shares (or dividends or distributions with respect thereto) or cash from the Exchange Fund delivered to a public official pursuant to any abandoned property, escheat or similar Law.

(h) Lost Certificates. If any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such Certificate to be lost, stolen or destroyed and, if required by Parent, the posting by such Person of a bond, in such reasonable amount as Parent may direct, as indemnity against any claim that may be made against it with respect to such Certificate, the Exchange Agent shall pay in exchange for such lost, stolen or destroyed Certificate the Merger Consideration payable in respect of the shares of Company Common Stock or Series A Convertible Preferred Stock represented by such Certificate, any cash in lieu of fractional Parent Common Shares to which the holders thereof are entitled pursuant to Section 2.2(e) and any dividends or other distributions to which the holders thereof are entitled pursuant to Section 2.2(c), in each case, without any interest thereon.

(i) Withholding. Parent or the Exchange Agent shall be entitled to deduct and withhold from the consideration otherwise payable pursuant to this Agreement to any holder of Company Common Stock or Series A Convertible Preferred Stock such amounts as Parent or the Exchange Agent are required to deduct and withhold under the Code, or any Tax Law, with respect to the making of such payment. To the extent that amounts are so withheld by Parent or the Exchange Agent, Parent shall, or shall cause the Exchange Agent to, provide the applicable holder of Company Common Stock or Series A Convertible Preferred Stock with notice of the reason for withholding such amounts and such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the holder of Company Common Stock Series A Convertible Preferred Stock, as the case may be, in respect of whom such deduction and withholding was made by Parent or the Exchange Agent.

(j) Investment of Exchange Fund. The Exchange Agent shall invest any cash included in the Exchange Fund, as directed by Parent, on a daily basis. Any interest and other income resulting from such investments shall be paid to Parent upon termination of the Exchange Fund pursuant to Section 2.2(f). In the event the cash in the Exchange Fund shall be insufficient to fully satisfy all of the payment obligations to be made by the Exchange Agent hereunder, Parent shall promptly deposit cash into the Exchange Fund in an amount which is equal to the deficiency in the amount of cash required to fully satisfy such payment obligations.

Section 2.3 Stock Transfer Books. At the Effective Time, the stock transfer books of the Company shall be closed and thereafter there shall be no further registration of transfers of shares of Company Common Stock or Series A Convertible Preferred Stock theretofore outstanding on the records of the Company. From and after the Effective Time, the holders of Certificates representing shares of Company Common Stock or Series A Convertible Preferred

Stock outstanding immediately prior to the Effective Time shall cease to have any rights with respect to such shares of Company Common Stock or Series A Convertible Preferred Stock except as otherwise provided herein or by Law. On or after the Effective Time, any Certificates presented for any reason to the Exchange Agent or Parent shall be converted into the Merger Consideration payable in respect of the shares of Company Common Stock or Series A Convertible Preferred Stock represented by such Certificates, any cash in lieu of fractional Parent Common Shares to which the holders thereof are entitled pursuant to Section 2.2(e) and any dividends or other distributions to which the holders thereof are entitled pursuant to Section 2.2(c), without any interest thereon.

Section 2.4 Stock Options.

(a) The Company shall take all actions necessary to provide that, immediately prior to the Effective Time, each Company Option then outstanding under any Company Stock Option Plan shall become vested and exercisable with respect to one hundred percent (100%) of the shares of Company Common Stock subject to each such Company Option; provided that the holder of such Company Option renders continuous service to the Company as an employee, consultant or member of the Board of Directors of the Company from the date hereof until at least immediately prior to the Effective Time. At the Effective Time, each Company Option then outstanding under any Company Stock Option Plan, whether or not then exercisable, shall be assumed and become an option to purchase Parent Common Shares in accordance with this Section 2.4. Each Company Option so assumed shall continue to have, and be subject to, the same terms and conditions (including vesting schedule, as adjusted pursuant to the first sentence of this Section 2.4(a)) as set forth in the applicable Company Stock Option Plan and any agreements thereunder immediately prior to the Effective Time, except that, as of the Effective Time, (i) each Company Option shall be exercisable (or shall become exercisable in accordance with its terms) for that number of whole Parent Common Shares equal to the product of the number of shares that were issuable upon exercise of such Company Option immediately prior to the Effective Time multiplied by the sum of (A) the Exchange Ratio and (B) the quotient obtained by dividing the Common Cash Consideration by the Parent Closing Price (such sum, the "Option Exchange Ratio"), rounded down to the nearest whole number of Parent Common Shares, and (ii) the per share exercise price for the Parent Common Shares issuable upon exercise of such Company Option so converted shall be equal to the quotient determined by dividing the exercise price per share of Company Common Stock at which such Company Option was exercisable immediately prior to the Effective Time by the Option Exchange Ratio, rounded up to the nearest whole cent. Notwithstanding the foregoing, the conversion of any Company Options which are "incentive stock options," within the meaning of Section 422 of the Code, into options to purchase Parent Common Shares shall be made so as not to constitute a "modification" of such Company Options within the meaning of Section 424 of the Code. Following the assumption of the Company Options, all references to the Company in the Company Options and the Company Stock Option Plans shall be deemed to refer to Parent.

(b) As soon as practicable after the Effective Time, Parent shall deliver to each holder of an outstanding Company Option an appropriate notice setting forth such holder's rights pursuant thereto and that such Company Option shall continue in effect on the same terms and conditions (subject to the adjustments, amendments and other terms required by this Section 2.4 and Section 6.16(e), as applicable, after giving effect to the Merger).

Section 2.5 Warrant. If outstanding immediately prior to the Effective Time, at the Effective Time the Warrant shall cease to represent a right to

acquire shares of Company Common Stock and automatically shall be converted into a warrant to purchase Parent Common Shares in accordance with its terms.

ARTICLE 3.
REPRESENTATIONS AND WARRANTIES OF THE COMPANY

Except as set forth on the disclosure schedule delivered by the Company to Parent prior to the execution of this Agreement, which disclosure schedule specifies the section or subsection of this Agreement to which the exception relates, and subject to Section 9.13 (the "Company Disclosure Schedule"), the Company represents and warrants to Parent and Merger Sub as follows:

Section 3.1 Organization, Standing and Corporate Power. Each of the Company and its Subsidiaries is a corporation duly organized, validly existing and in good standing under the Laws of the jurisdiction in which it is organized and has all requisite corporate power and authority to own, lease or operate its properties and to carry on its business as now being conducted. Section 3.1 of the Company Disclosure Schedule contains a true and complete list of each jurisdiction where the Company is qualified to do business. Each of the Company and its Subsidiaries has corporate or equivalent qualification to do business and is in good standing in each jurisdiction in which the nature of its business or the ownership, leasing or operation of its properties makes such qualification or licensing necessary, other than in such jurisdictions where the failure to be so qualified or licensed individually or in the aggregate is not reasonably likely to have a Material Adverse Effect on the Company. The Company has made available to Parent prior to the execution of this Agreement true and complete copies of its Certificate of Incorporation (the "Company Certificate of Incorporation") and Bylaws (the "Company Bylaws"), and the comparable organizational documents of each of its Subsidiaries, in each case as amended to date. The Company is not in violation of any of the provisions of the Company Certificate of Incorporation or the Company Bylaws. The Company has made available to Parent complete and accurate copies of the minutes (or, in the case of minutes that have not yet been finalized, drafts thereof (if available)) of all meetings of the stockholders of the Company and each of the Company's Subsidiaries, the Board of Directors of the Company and each of the Company's Subsidiaries and the committees of each of such Board of Directors, in each case held at any time during the five years prior to the date of this Agreement.

Section 3.2 Subsidiaries. Section 3.2 of the Company Disclosure Schedule lists each of the Subsidiaries of the Company and, for each such Subsidiary, the jurisdiction under which laws it was organized and, as of the date hereof, each jurisdiction in which such Subsidiary has corporate or equivalent qualification to do business. All the issued and outstanding shares of capital stock of, or other equity interests in, each such Subsidiary have

been validly issued and are fully paid and nonassessable and are owned directly or indirectly by the Company free and clear of all pledges, liens, charges, encumbrances or security interests of any kind or nature whatsoever (collectively, "Liens"), and free of any restriction on the right to vote, sell or otherwise dispose of such capital stock or other equity interests. Except with respect to (a) the securities of non-Affiliates held for investment purposes which do not constitute more than a 2% interest in any such non-Affiliate or (b) the capital stock of, or voting securities or equity interests in, its Subsidiaries, neither the Company nor any of its Subsidiaries owns, directly or indirectly, any capital stock of, or other voting securities or equity interests in, any corporation, partnership, joint venture, association or other entity.

Section 3.3 Capital Structure.

(a) The authorized capital stock of the Company consists of 45,000,000 shares of Company Common Stock and 5,000,000 shares of preferred stock, par value $.001 per share (of which 200,000 shares have been designated Series A Preferred Stock ("Series A Preferred Stock") and 20,000 shares have been designated Series A Convertible Preferred Stock (collectively with the Series A Preferred Stock, the "Company Preferred Stock")). At the close of business on June 11, 2004:

(i) 21,077,288 shares of Company Common Stock were issued and outstanding;

(ii) an additional 866,800 shares of Company Common Stock were held by the Company in its treasury;

(iii) 858,707 shares of Company Common Stock were reserved and available for issuance pursuant to the Company Stock Option Plans, and 3,388,825 shares of Company Common Stock were subject to outstanding Company Options;

(iv) 200,000 shares of Series A Preferred Stock were reserved for issuance in connection with the rights (the "Company Rights") issued pursuant to the Amended and Restated Rights Agreement, dated as of November 16, 2001, by and between the Company and American Stock Transfer & Trust Company, as Rights Agent (the "Company Rights Plan");

(v) 15,291 shares of Series A Convertible Preferred Stock were issued and outstanding, which were convertible by their terms into 816,480 shares of Company Common Stock, and no shares of preferred stock of the Company were held by the Company as treasury shares; and

(vi) a warrant to acquire 1,000,000 shares of Company Common Stock from the Company pursuant to the warrant agreement set forth on Section 3.3(a) of the Company Disclosure Schedule, of which a complete and accurate copy was previously made available or delivered to Parent (the "Warrant"), was issued and outstanding.

Section 3.3(a) of the Company Disclosure Schedule sets forth a true and complete list, as of June 11, 2004, of all outstanding Company Options and all outstanding Company Stock-Based Awards, granted under the Company Stock Option Plans or otherwise, and all

outstanding warrants to purchase shares of Company Common Stock, the number of shares of Company Common Stock (or other stock) subject thereto, the grant dates, expiration dates, exercise or base prices (if applicable) and vesting schedules thereof.

(b) All outstanding shares of capital stock of the Company are, and all shares which may be issued pursuant to the Company Preferred Stock, Company Options, Company Stock-Based Awards or the Warrant will be, when issued in accordance with the terms thereof, duly authorized, validly issued, fully paid and nonassessable and not subject to preemptive rights. There are no bonds, debentures, notes or other indebtedness of the Company having the right to vote (or convertible into, or exchangeable for, securities having the right to vote) on any matters on which stockholders of the Company may vote.

(c) Except as set forth above in Section 3.3(a), as of the close of business on June 11, 2004:

(i) there are not issued, reserved for issuance or outstanding (A) any shares of capital stock or other voting securities or equity interests of the Company, (B) any securities of the Company convertible into or exchangeable or exercisable for shares of capital stock or other voting securities or equity interests of the Company or (C) any warrants, calls, options or other rights to acquire from the Company or any of its Subsidiaries, and no obligation of the Company or any of its Subsidiaries to issue, any capital stock, voting securities, equity interests or securities convertible into or exchangeable or exercisable for capital stock or voting securities of the Company; and

(ii) there are no outstanding obligations of the Company or any of its Subsidiaries to repurchase, redeem or otherwise acquire any such securities or to issue, deliver or sell, or cause to be issued, delivered or sold, any such securities.

(d) As of the date hereof, there are no outstanding:

(i) securities of the Company or any of its Subsidiaries convertible into or exchangeable or exercisable for shares of capital stock or voting securities or equity interests of any Subsidiary of the Company;

(ii) warrants, calls, options or other rights to acquire from the Company or any of its Subsidiaries, and no obligation of the Company or any of its Subsidiaries to issue, any capital stock, voting securities, equity interests or securities convertible into or exchangeable or exercisable for capital stock or voting securities of any Subsidiary of the Company; or

(iii) obligations of the Company or any of its Subsidiaries to repurchase, redeem or otherwise acquire any such outstanding securities or to issue, deliver or sell, or cause to be issued, delivered or sold, any such securities.

There are no outstanding contractual obligations of the Company or any of its Subsidiaries to make any loan or guarantees to, or any equity or other investment (in the form of a capital contribution or otherwise) in, any of the Company's Subsidiaries or any other Person, other than guarantees by the Company of any indebtedness or other obligations of any of its

wholly-owned Subsidiaries and other than loans or guarantees made in the ordinary course consistent with past practice to employees of the Company and its Subsidiaries.

(e) There are no outstanding contractual obligations of the Company or any of its Subsidiaries (i) restricting the transfer of, (ii) affecting the voting rights of, or (iii) granting any preemptive, right of first refusal or antidilutive right with respect to, any Company Common Stock or Company Preferred Stock or any capital stock of, or other securities in, any of the Company's Subsidiaries.

Section 3.4 Authority; Noncontravention.

(a) The Company has all requisite corporate power and authority to execute

and deliver this Agreement and, subject to receipt of the Company Stockholder Approval, to consummate the transactions contemplated by this Agreement. The execution and delivery of this Agreement by the Company and the consummation by the Company of the transactions contemplated by this Agreement have been duly authorized by all necessary corporate action on the part of the Company and no other corporate proceedings on the part of the Company are necessary to authorize this Agreement or to consummate the transactions contemplated hereby, other than obtaining the Company Stockholder Approval. This Agreement has been duly executed and delivered by the Company and, assuming the due authorization, execution and delivery by each of the other parties hereto, constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, subject to bankruptcy, insolvency, fraudulent transfer, moratorium, reorganization or similar Laws affecting the rights of creditors generally and the availability of equitable remedies (regardless of whether such enforceability is considered in a proceeding in equity or at law). The Board of Directors of the Company, at a meeting duly called and held, duly adopted resolutions (i) approving and declaring advisable this Agreement, the Merger and the other transactions to be entered into by the Company contemplated by this Agreement, (ii) declaring that it is in the best interests of the stockholders of the Company that the Company enter into this Agreement and consummate the Merger and the other transactions contemplated by this Agreement, (iii) directing that the adoption of this Agreement be submitted as promptly as practicable to a vote at the Company Stockholders' Meeting and (iv) recommending that the stockholders of the Company adopt this Agreement and approve the Merger, which resolutions, as of the date of this Agreement, have not been subsequently rescinded, modified or withdrawn in any way.

(b) The execution and delivery of this Agreement do not, and (assuming receipt of the Company Stockholder Approval) the consummation of the Merger and the other transactions to be entered into by the Company contemplated by this Agreement and compliance by the Company with the provisions of this Agreement will not, (i) conflict with, or result in any violation or breach of, or default (with or without notice or lapse of time, or both) under, the Company Certificate of Incorporation or the Company Bylaws or the comparable organizational documents of any of its Subsidiaries, (ii) conflict with, or result in any violation or breach of, or default (with or without notice or lapse of time, or both) under, or give rise to a right of termination, cancellation or acceleration of any obligation or to the loss of a benefit under, or alter the rights or obligations of any party under, or result in the creation of any Lien in or upon any of the properties or other assets of the Company or any of its Subsidiaries under, any Contract to which the Company or any of its Subsidiaries is a party or any of their respective properties or other assets is subject or (iii) conflict with, or result in any violation or breach of, or default (with or without notice or lapse of time, or both) under, any Law applicable to the Company or any of its Subsidiaries or their respective

properties or other assets or the rules and regulations of any stock exchange or regulatory organization applicable to the Company or its Subsidiaries, other than, in the case of clauses (ii) and (iii), any such conflicts, violations, breaches, defaults, rights, losses or Liens that individually or in the aggregate have not had and would not reasonably be expected to have a Material Adverse Effect on the Company, and subject to, in the case of clauses (ii) and (iii), the governmental filings, the obtaining of the Company Stockholder Approval and the other matters referred to in Section 3.4(c).

(c) No consent, approval, order or authorization of, action by or in respect of, or registration, declaration or filing with, any federal, state,

local or foreign government, any court, administrative, regulatory or other governmental agency, commission or authority or any non-governmental self-regulatory agency, commission or authority (each, a "Governmental Entity") is required by or with respect to the Company or any of its Subsidiaries in connection with the execution and delivery of this Agreement by the Company or the consummation of the Merger or the other transactions contemplated by this Agreement by the Company, except for:

(i) the filing of a premerger notification and report form under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations thereunder (the "HSR Act"), and the receipt, termination or expiration, as applicable, of approvals or waiting periods required under the HSR Act or any other applicable competition, merger control, antitrust or similar Law;

(ii) the filing with the United States Securities and Exchange Commission (the "SEC") of (A) the Joint Proxy/Prospectus to be included in the Registration Statement and (B) such reports under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), as may be required in connection with this Agreement and the transactions contemplated by this Agreement;

(iii) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware and appropriate documents with the relevant authorities of other states in which the Company or any of its Subsidiaries is qualified to do business;

(iv) filings with Governmental Entities to satisfy applicable requirements of Canadian securities Laws and Blue Sky Laws;

(v) any filings required under the rules and regulations of Nasdaq; and

(vi) such other consents, approvals, orders, authorizations, actions, registrations, declarations and filings the failure of which to be obtained or made individually or in the aggregate would not reasonably be expected to have a Material Adverse Effect on the Company.

Section 3.5 Company SEC Filings.

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(a) The Company has since January 1, 2002 timely filed all reports, schedules, forms, statements and other documents (including exhibits and other information incorporated therein) with the SEC required to be filed by the Company (the "Company SEC Filings"). As of their respective filing dates, or if amended, the date of such amendment, the Company SEC Filings complied as to form in all material respects with the requirements of the Securities Act of 1933, as amended (the "Securities Act"), or the Exchange Act, as the case may be, and the rules and regulations of the SEC promulgated thereunder applicable to such Company SEC Filings. None of the Company SEC Filings, as of their respective filing dates, or, if amended, the dates of such amendment, if any, filed prior to the date hereof, contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. As of the date hereof, except to the extent that information contained in any Company SEC Filing has been revised, amended, supplemented or superseded by a later-filed Company SEC Filing, to the Knowledge of the Company, none of the Company SEC Filings contains any untrue statement of

a material fact or omits to state any material fact required to be stated therein or necessary in order to make the statements made therein, in light of the circumstances under which they were made, not misleading.

(b) The financial statements (including the related notes) of the Company included in the Company SEC Filings complied at the time they were filed, or if amended, the date of such amendment, as to form in all material respects with applicable accounting requirements and the published rules and regulations of the SEC with respect thereto, were prepared in accordance with generally accepted accounting principles in the United States ("GAAP") (except, in the case of unaudited statements, as permitted by the rules and regulations of the SEC) applied on a consistent basis during the periods involved (except as may be indicated in the notes thereto) and each fairly presented in all material respects the consolidated financial position of the Company and its Subsidiaries as of the respective dates thereof and the consolidated results of their operations and cash flows for the respective periods then ended (subject, in the case of unaudited statements, to normal year-end audit adjustments).

(c) Except as and to the extent set forth on the consolidated balance sheet of the Company and its Subsidiaries as of December 31, 2003 included in the Company's Form 10-K for the year ended December 31, 2003, including the notes thereto (the "Company Form 10-K"), or in the financial statements included in any Company SEC Filing filed prior to the date hereof with the SEC after filing the Company Form 10-K, neither the Company nor any of its Subsidiaries has any liabilities or obligations of any nature (whether accrued, absolute, contingent or otherwise), except for (i) liabilities or obligations incurred in the ordinary course of business consistent with past practice since December 31, 2003, (ii) liabilities and obligations incurred in connection with this Agreement and the Company's performance of its obligations hereunder, and (iii) liabilities and obligations that would not reasonably be expected to have a Material Adverse Effect on the Company. None of the Subsidiaries of the Company are, or have at any time since January 1, 2002 been, subject to the reporting requirements of Sections 13(a) and 15(d) of the Exchange Act.

(d) No "material contract" (as such term is defined in Item 601(b)(10) of Regulation S-K of the SEC) filed as an exhibit to the Company Form 10-K has been amended or

modified, except for such amendments or modifications that have been filed as an exhibit to a subsequently dated Company SEC Filing or are not currently required to be filed with the SEC.

Section 3.6 Absence of Certain Changes or Events. Except for liabilities incurred in connection with this Agreement or as permitted pursuant to Section 5.1, since December 31, 2003, except as disclosed in the Filed Company SEC Filings, the Company and each of its Subsidiaries have conducted their businesses in the ordinary course consistent with past practice and there has not been any Material Adverse Effect on the Company, and from such date to the date hereof there has not been:

(a) any material change by the Company or by any of its Subsidiaries in its accounting methods not required pursuant to GAAP;

(b) any declaration, setting aside or payment of any dividend or other distribution with respect to the Company's or any of its Subsidiaries' capital stock;

(c) any split, combination or reclassification of the Company's or any of its Subsidiaries' capital stock or any issuance of or the authorization of any issuance of any other securities in respect of, in lieu of or in substitution for, shares of its capital stock;

(d) any revaluation by the Company or any of its Subsidiaries of any of their assets having a Material Adverse Effect on the Company; or

(e) any event or development that would, individually or in the aggregate, reasonably be expected to prevent or materially delay the performance of this Agreement by the Company.

Section 3.7 Litigation. Except as and to the extent disclosed in the Filed Company SEC Filings, there is no suit, claim, action or proceeding pending or, to the Knowledge of the Company, threatened against or affecting the Company or any of its Subsidiaries or any of their respective assets that individually or in the aggregate has had or would reasonably be expected to have a Material Adverse Effect on the Company, nor is there any judgment, decree, injunction, rule or order of any Governmental Entity or arbitrator outstanding against, or, to the Knowledge of the Company, any demand, investigation, audit, inquiry, hearing, review or other similar action brought by any Governmental Entity involving, the Company or any of its Subsidiaries or any of their respective assets that individually or in the aggregate has had or would reasonably be expected to have a Material Adverse Effect on the Company. There is no suit, claim, action, proceeding, enforcement action or investigation pending or, to the Knowledge of the Company, threatened against the Company or any of its Subsidiaries that, as of the date hereof, challenges the validity or propriety of, or seeks to prevent consummation of, the Merger or any other transaction contemplated by this Agreement.

Section 3.8 Contracts.

(a) Except as filed as exhibits to the Filed Company SEC Filings or as set forth in Section 3.8 of the Company Disclosure Schedule, none of the Company or any of its Subsidiaries is a party to or bound by any Contract as of the date hereof:

(i) any of the benefits to any party of which will be increased, or the vesting of the benefits to any party of which will be accelerated, by the occurrence of any of the transactions contemplated by this Agreement or the value of any of the benefits to any party of which will be calculated on the basis of any of the transactions contemplated by this Agreement; or

(ii) which:

(A) involves, or is reasonably expected to involve, aggregate receipts or expenditures in excess of $1,000,000 in the aggregate or $300,000 per annum and is not cancelable by the Company within one year without penalty;

(B) purports to impose any non-compete or exclusivity provisions in the Designated Territory with respect to, or otherwise purports to restrict in any material respect the development, marketing or distribution of or the conduct of the Company's, its Subsidiaries' or its Affiliates' business with respect to, drug delivery technology, marketed products or products in human clinical trials, except for Contracts listed under Section 3.8(a)(ii)(E);

(C) relates to the registration of securities;

(D) is with an Affiliate of the Company (other than any Subsidiary of the Company), excluding any Company Benefit Agreements;

(E) relates in a material manner to the research, development, distribution, sale, supply, license, marketing, manufacturing or commercialization of Company Products & Technology, provides an exclusive license to a third party relating to Intellectual Property Rights of the Company, or is the in-license of material Intellectual Property relating to Company Products & Technology other than pre-clinical trial agreements, clinical trial agreements and service agreements entered into in the ordinary course of business consistent with past practice;

(F) would prohibit or materially delay the consummation of the Merger or any of the other transactions contemplated by this Agreement; or

(G) is a "material contract" (as such term is defined in Item 601(b)(10) of Regulation S-K of the SEC).

Each Contract to which the Company or any of its Subsidiaries is a party or by which the Company or any of its Subsidiaries is bound of the type described in clauses (i) and (ii) above is referred to herein as a "Company Material Contract." The Company has made

available to Parent true and complete copies of all Company Material Contracts as of the date hereof.

(b) Each Company Material Contract is valid and binding on the Company and each of its Subsidiaries party thereto and, to the Company's Knowledge, each other party thereto, and is in full force and effect, except, insofar as this representation is made as of the Closing Date, as would not be reasonably likely to have a Material Adverse Effect on the Company. The Company has not received any written notice from any other party to any Company Material Contract, and otherwise has no Knowledge, that such third party intends to terminate, not renew, or challenge the validity or enforceability of any Company Material Contract, except for such terminations, non-renewals or challenges as would not be reasonably likely to have a Material Adverse Effect on the Company. Neither the Company nor any of its Subsidiaries, and, to the Knowledge of the Company, no other party thereto, is in violation of or in default under (nor does there exist any condition which upon the passage of time or the giving of notice or both would cause such a violation of or default under) any Company Material Contract to which it is a party or by which it or any of its properties or assets is bound, except for violations or defaults that individually or in the aggregate are not reasonably likely to have a Material Adverse Effect on the Company.

Section 3.9 Compliance with Laws; Permits. Each of the Company and its Subsidiaries is in compliance with all Laws and rules and regulations of any stock exchange or regulatory organization applicable to it, its properties or other assets or its business or operation except for failures to be in compliance that individually or in the aggregate have not had and would not reasonably be expected to have a Material Adverse Effect on the Company. Each of the Company and its Subsidiaries has in full force and effect all approvals, authorizations, certificates, filings, consents, clearances, franchises,

licenses, notices and permits of or with all Governmental Entities (collectively, "Permits"), including all Permits under the Federal Food, Drug and Cosmetic Act of 1938, as amended (the "FDCA"), and the regulations of the Federal Food and Drug Administration (the "FDA") promulgated thereunder, necessary for it to own, lease or operate its properties and other assets and to carry on its business and operations as presently conducted, except where the failure to have such Permits individually or in the aggregate has not had and would not reasonably be expected to have a Material Adverse Effect on the Company. There has occurred no default under, or violation of, any such Permit, except for any such default or violation that individually or in the aggregate has not had and would not reasonably be expected to have a Material Adverse Effect on the Company. The consummation of the Merger, in and of itself, will not cause the revocation, limitation, suspension or cancellation of any such Permit that individually or in the aggregate would reasonably be expected to have a Material Adverse Effect on the Company.

Section 3.10 Employee Benefit Plans.

(a) Section 3.10(a) of the Company Disclosure Schedule sets forth a true and complete list of each "employee benefit plan" as defined in Section 3(3) of ERISA and any other plan, policy, program, practice, agreement, understanding or arrangement (whether written or oral) providing compensation or other benefits to any current or former director, officer, employee or consultant (or to any dependent or beneficiary thereof) of the Company or any of its Subsidiaries, which are as of the date hereof, or with respect to any plan intended to be qualified

under Section 401(a) of the Code, were within the past 6 years, maintained, sponsored or contributed to by the Company or any of its Subsidiaries, or under which the Company or any of its Subsidiaries has any obligation or liability, whether actual or contingent, including all incentive, bonus, deferred compensation, vacation, holiday, cafeteria, medical, disability, stock purchase, stock option, stock appreciation, phantom stock, restricted stock or other stock-based compensation plans, policies, programs, practices or arrangements (each a "Company Benefit Plan"). Neither the Company nor, to the Knowledge of the Company, any other Person or entity has any express commitment, whether legally enforceable or not, to modify, change or terminate any Company Benefit Plan, other than with respect to a modification, change or termination required by ERISA or the Code or as otherwise contemplated by this Agreement. With respect to each Company Benefit Plan, the Company has delivered to Parent true and complete copies of (i) each Company Benefit Plan (or, if not written, a written summary of its material terms), including all plan documents, adoption agreements, trust agreements, insurance contracts or other funding vehicles and all material amendments thereto, (ii) all summaries and summary plan descriptions, including any summary of material modifications, provided by any plan provider or to employees generally, (iii) the most recent annual reports (Form 5500 series) filed with the United States Internal Revenue Service (the "IRS") or United States Department of Labor (the "DOL") with respect to such Company Benefit Plan (and, if the most recent annual report is a Form 5500R, the most recent Form 5500C filed with respect to such Company Benefit Plan), (iv) the most recent actuarial report or other financial statement relating to such Company Benefit Plan, if any, (v) the most recent determination or opinion letter, if any, issued by the IRS with respect to any Company Benefit Plan and any pending request for such a determination letter, (vi) the most recent nondiscrimination tests performed under the Code (including 401(k) and 401(m) tests) for each Company Benefit Plan, if any, and (vii) all filings made with

any Governmental Entity since January 1, 2001, including any filings under the Voluntary Compliance Resolution or Closing Agreement Program or the Department of Labor Delinquent Filer Program.

(b) Each Company Benefit Plan has been administered in all material respects in accordance with its terms and all applicable Laws, including ERISA and the Code, and contributions required to be made under the terms of any of the Company Benefit Plans as of the date of this Agreement have been timely made or, if not yet due, have been properly reflected on the most recent consolidated balance sheet filed or incorporated by reference in the Company's SEC filings prior to the date of this Agreement. With respect to the Company Benefit Plans, no event has occurred and, to the Knowledge of the Company, there exists no condition or set of circumstances in connection with which the Company could reasonably be expected to be subject to any Material Adverse Effect (other than for routine benefit liabilities) under the terms of, or with respect to, such Company Benefit Plans, ERISA, the Code or any other applicable Law.

(c) (i) Each Company Benefit Plan that is intended to qualify under Section 401(a), Section 401(k), Section 401(m) or Section 4975(e)(6) of the Code has either received a favorable determination letter from the IRS as to its qualified status, taking into account the provisions of the legislation collectively referred to as GATT, or the remedial amendment period for such Company Benefit Plan has not yet expired, and each trust established in connection with any Company Benefit Plan that is intended to be exempt from federal income taxation under Section 501(a) of the Code is so exempt, and to the Knowledge of the Company no fact or event

has occurred that could adversely affect the qualified status of any such Company Benefit Plan or the exempt status of any such trust, (ii) to the Knowledge of the Company there has been no prohibited transaction (within the meaning of Section 406 of ERISA or Section 4975 of the Code and other than a transaction that is exempt under a statutory or administrative exemption) with respect to any Company Benefit Plan that could result in liability to the Company, (iii) each Company Benefit Plan can be amended, terminated or otherwise discontinued after the Effective Time in accordance with its terms, without liability (other than benefits payable under the terms of such Company Benefit Plan and liability for ordinary administrative expenses typically incurred in a termination event), (iv) no suit, administrative proceeding, action or other litigation, including any audit or inquiry by the IRS or DOL (other than routine benefit claims), has been brought, or to the Knowledge of the Company is threatened, against or with respect to any such Company Benefit Plan, (v) neither the Company nor any ERISA Affiliate has any liability under ERISA Section 502(i), and (vi) all Tax, annual reporting and other governmental filings required by ERISA and the Code with respect to each Company Benefit Plan have been timely filed in all material respects with the appropriate Governmental Entity and all notices and disclosures have been timely provided in all material respects to participants.

(d) No Company Benefit Plan is a multiemployer pension plan (as defined in Section 3(37) of ERISA) (a "Multiemployer Plan") or other pension plan subject to Title IV of ERISA and none of the Company or any ERISA Affiliate has sponsored or contributed to or been required to contribute to a Multiemployer Plan or other pension plan subject to Title IV of ERISA. No material liability under Title IV of ERISA has been incurred by the Company or any ERISA Affiliate that has not been satisfied in full, and no condition exists that presents a material risk to the Company or any ERISA Affiliate of incurring or being

subject (whether primarily, jointly or secondarily) to a material liability thereunder. None of the assets of the Company or any ERISA Affiliate is, or may reasonably be expected to become, the subject of any lien arising under ERISA or Section 412(n) of the Code.

(e) No amount that could be received (whether in cash or property or the vesting of property), as a result of the consummation of the transactions contemplated by this Agreement or any other related agreement, by any employee, officer or director of the Company or any of its Subsidiaries who is a "disqualified individual" (as such term is defined in Treasury Regulation Section 1.280G-1) under any Company Benefit Plan could be characterized as an "excess parachute payment" (as defined in Section 280G(b)(1) of the Code).

(f) Except as required by applicable Law, no Company Benefit Plan provides any of the following retiree or post-employment benefits to any Person: medical, disability or life insurance benefits. The Company and each ERISA Affiliate is in material compliance with (i) the requirements of the applicable health care continuation and notice provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, and the regulations (including proposed regulations) thereunder and any similar state Law and (ii) the applicable requirements of the Health Insurance Portability and Accountability Act of 1996, as amended, and the regulations (including the proposed regulations) thereunder.

(g) With respect to employee benefit plans, programs, and other arrangements providing incentive compensation or other benefits similar to those provided under any Company Benefit Plan to any employee or former employee or dependent thereof, which plan, program or

arrangement is subject to the Laws of any jurisdiction outside of the United States ("Foreign Plans"): (i) the Foreign Plans have been maintained in all material respects in accordance with all applicable requirements and all applicable Laws, (ii) if intended to qualify for special tax treatment, the Foreign Plans meet all requirements for such treatment, (iii) if intended to be funded and/or book-reserved, the Foreign Plans are fully funded and/or book reserved, as appropriate, based upon reasonable actuarial assumptions, and (iv) no material liability exists or reasonably could be imposed upon the assets of the Company or any of its Subsidiaries by reason of such Foreign Plans.

(h) There are no pending or, to the Knowledge of the Company, threatened claims (other than claims for benefits in the ordinary course), lawsuits or arbitrations which have been asserted or instituted against any Company Benefit Plan, any fiduciaries thereof with respect to their duties to the Company Benefit Plans or the assets of any of the trusts under any of the Company Benefit Plans which could reasonably be expected to result in any material liability of the Company or any of its Subsidiaries to the Pension Benefit Guaranty Corporation, the Department of Treasury or the DOL.

Section 3.11 Labor and Other Employment Matters.

(a) To the Knowledge of the Company, each of the Company and each of its Subsidiaries is in compliance with all applicable Laws respecting labor, employment, fair employment practices, terms and conditions of employment, workers' compensation, occupational safety, plant closings, and wages and hours. None of the Company or any of its Subsidiaries is liable for any payment to any trust or other fund or to any Governmental Entity, with respect to unemployment compensation benefits, social security or other benefits or obligations for employees (other than routine payments to be made in the ordinary course of

business and consistent with past practice). None of the Company or any of its Subsidiaries is a party to any collective bargaining or other labor union contract applicable to Persons employed by the Company or any of its Subsidiaries, and, as of the date hereof, no collective bargaining agreement or other labor union contract is being negotiated by the Company or any of its Subsidiaries. As of the date hereof, there is no labor dispute, strike, slowdown or work stoppage against the Company or any of its Subsidiaries pending or, to the Knowledge of the Company, threatened which may interfere in any respect that would have a Material Adverse Effect on the Company. No labor union or similar organization has otherwise been certified to represent any Persons employed by the Company or any of its Subsidiaries or, as of the date hereof, has applied to represent such employees or is attempting to organize so as to represent such employees. None of the Company, any of the Company's Subsidiaries or their respective employees has committed any unfair labor practices in connection with the operation of the respective businesses of the Company or any of its Subsidiaries, and there is no charge or complaint against the Company or any of its Subsidiaries by the National Labor Relations Board or any comparable state or foreign agency pending or, to the Knowledge of the Company, threatened, except where such unfair labor practice, charge or complaint would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on the Company. There are no material controversies pending or, to the Knowledge of the Company, threatened, between the Company or any of its Subsidiaries and any of their current or former employees, which controversies have or could reasonably be expected to result in an action, suit, proceeding, claim, arbitration or investigation before any Governmental Entity. To the Knowledge of the

Company, no employee of the Company or any of its Subsidiaries is in any material respect in violation of any term of any employment contract, non-disclosure agreement, non-competition agreement, or any restrictive covenant to a former employer relating to the right of any such employee to be employed by the Company or any of its Subsidiaries because of the nature of the business conducted or presently proposed to be conducted by it or to the use of trade secrets or proprietary information of others. As of the date hereof, no employee at the level of director or above of the Company or any of its Subsidiaries has given written notice terminating his or her employment with the Company or any of its Subsidiaries.

(b) The Company has identified in Section 3.11(b) of the Company Disclosure Schedule and has made available to Parent true and complete copies of:

(i) (A) all severance and employment agreements with directors, officers or employees of the Company or any of its Subsidiaries in effect as of the date hereof, and (B) all consulting agreements in effect as of the date hereof to which the Company or any of its Subsidiaries is a party that (1) require a payment by the Company or a Subsidiary upon termination of such agreement prior to the end of its current term, or (2) are not terminable with or without cause within six months;

(ii) all severance programs and policies of the Company and each of its Subsidiaries with or relating to its employees in effect as of the date hereof; and

(iii) all plans, programs, agreements and other arrangements of the Company and each of its Subsidiaries with or relating to its directors, officers, employees or consultants which contain change in control provisions in

effect as of the date hereof (all agreements and arrangements in clauses (i) through (iii), the "Company Benefit Agreements").

None of the execution and delivery of this Agreement or any other related agreement or the consummation of the transactions contemplated hereby or thereby will (either alone or in conjunction with any other event, such as termination of employment) (i) result in any payment (including severance, unemployment compensation, parachute or otherwise) becoming due to any director or any employee of the Company or any of its Subsidiaries or Affiliates from the Company or any of its Subsidiaries or Affiliates under any Company Benefit Plan or otherwise, (ii) significantly increase any benefits otherwise payable under any Company Benefit Plan or (iii) result in any acceleration of the time of payment or vesting of any material benefits. As of the date hereof, no individual who is a party to an employment agreement listed in Section 3.11(b) of the Company Disclosure Schedule or any agreement incorporating change in control provisions with the Company has terminated employment or been terminated, nor to the Knowledge of the Company has any event occurred that could give rise to a termination event, in either case under circumstances that has given, or could give, rise to a severance obligation on the part of the Company under such agreement.

(c) The Company has provided Parent a list identifying as of the date hereof all full-time and part-time employees of the Company and its Subsidiaries and the employees' respective positions therewith.

Section 3.12 Taxes.

(a) The Company and each of its Subsidiaries has duly and timely filed with the appropriate Tax authorities or other Governmental Entities all Tax Returns that it was required to file. All such Tax Returns are true and complete in all material respects. All Taxes due and owing by any of the Company and its Subsidiaries (whether or not shown on any Tax Returns) have been paid. Neither the Company nor any of the Company's Subsidiaries currently is the beneficiary of any extension of time within which to file any material Tax Return. No written claim has ever been made by a Tax authority in a jurisdiction where any of the Company and its Subsidiaries does not file Tax Returns that it is or may be subject to taxation by that jurisdiction.

(b) The unpaid Taxes of the Company and its Subsidiaries did not, as of the date of the financial statements contained in the most recent Company SEC Filings, exceed the reserve for Tax liability (excluding any reserve for deferred Taxes established to reflect timing differences between book and Tax income) set forth on the face of the balance sheets (rather than in any notes thereto) contained in such financial statements. Since the date of the financial statements in the most recent Company SEC Filings, neither the Company nor any of its Subsidiaries has incurred any liability for Taxes outside the ordinary course of business or otherwise inconsistent with past custom and practice.

(c) No deficiencies for Taxes with respect to any of the Company and its Subsidiaries have been claimed in writing, proposed or assessed by a Tax authority. There are no pending or, based on written notice, threatened audits, assessments, administrative proceedings, court proceedings or other actions for or relating to any liability in respect of material Taxes of any of the Company or its Subsidiaries. There are no matters under discussion with any Tax Authority with respect to Taxes that are likely to result in an additional liability for Taxes with respect to any of the Company or its Subsidiaries. No issues relating to Taxes of the Company or any of its Subsidiaries were raised

by the relevant Tax authority in any completed audit or examination that would reasonably be expected to recur with a Material Adverse Effect on Taxes in a later taxable period. The Company has delivered or made available to Parent true and complete copies of federal, state and local income Tax Returns of each of the Company and its Subsidiaries and their predecessors for the years ended December 31, 1997, 1998, 1999, 2000, 2001, 2002 and promptly upon their availability, 2003, and true and complete copies of all examination reports and statements of deficiencies assessed against or agreed to by any of the Company and its Subsidiaries or any predecessors since December 31, 1999, with respect to Taxes of any type. Neither the Company nor any of its Subsidiaries nor any predecessor has waived any statute of limitations in respect of Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency, nor has any request been made in writing for any such extension or waiver.

(d) There are no material Liens for Taxes upon the assets of any of the Company and its Subsidiaries (other than with respect to Permitted Liens for Taxes or Liens for Taxes that are being contested in good faith and for which an adequate reserve has been established). No power of attorney (other than powers of attorney authorizing employees of the Company or any of its Subsidiaries to act on behalf of the Company or such Subsidiaries, respectively) with respect to any Taxes has been executed or filed with any Tax authority.

(e) None of the Company nor any of its Subsidiaries has been a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code. Each of the Company and its Subsidiaries has, within the time and in the manner prescribed by applicable Law, withheld and paid over all material Taxes required to have been withheld and paid over in connection with amounts paid or owing to any employee, independent contractor, creditor, stockholder or other third party (whether domestic or foreign).

(f) Neither the Company nor any of its Subsidiaries has any liability for the Taxes of any other Person (other than the Company and any of its Subsidiaries) under Treasury Regulation Section 1.1502 - 6 (or any similar provision of state, local, or foreign Law), as a transferee, by contract, or otherwise. None of the Company nor any of its Subsidiaries has been a member of an affiliated group filing a consolidated federal income Tax Return (other than a group the common parent of which is the Company). None of the Company nor any of its Subsidiaries is a party to, is bound by or has any obligation under any Tax sharing, Tax allocation or Tax indemnity agreement or similar Contract or arrangement.

(g) Neither the Company nor any of its Subsidiaries has distributed the stock of any corporation in a transaction satisfying the requirements of Section 355 of the Code since April 16, 1997, and neither the stock of the Company nor the stock of any of its Subsidiaries has been distributed in a transaction satisfying the requirements of Section 355 of the Code since April 16, 1997.

(h) Neither the Company nor any of its Subsidiaries (i) is a partner for Tax purposes with respect to any joint venture, partnership, or other arrangement or contract which is treated by the parties as a partnership for Tax purposes, (ii) owns a single member limited liability company which is treated as a disregarded entity, (iii) is a "United States shareholder" (as defined in Section 951(b) of the Code) of a "controlled foreign corporation" as defined in Section 957 of the Code, (iv) is a "personal holding company" as defined in Section 542 of the Code or (v) is a "passive foreign investment company" within

the meaning of Section 1297 of the Code.

(i) Neither the Company nor any of its Subsidiaries has entered into or participated in any transaction identified as a "listed transaction" for purposes of Treasury Regulations Sections 1.6011-4(b)(2) or 301.6111-2(b)(2).

Section 3.13 Environmental Matters. Except as disclosed in the Filed Company SEC Filings:

(a) The Company and each of its Subsidiaries (i) are in compliance with all, and are not subject to any liability, in each case with respect to any, applicable Environmental Laws, (ii) hold or have applied for all Environmental Permits necessary to conduct their current operations and (iii) are in compliance with their respective Environmental Permits, except, in each case, as would not, and would not reasonably be expected to, individually or in the aggregate have a Material Adverse Effect on the Company.

(b) Since January 1, 2000, neither the Company nor any of its Subsidiaries has received any written notice, demand, letter, claim or request for information from any

Governmental Entity alleging that the Company or any of its Subsidiaries may be in violation of, or liable under, any Environmental Law. Since January 1, 2000 to the date hereof, neither the Company nor any of its Subsidiaries has received any written notice, demand, letter, claim or request for information alleging that the Company or any of its Subsidiaries may be in violation of, or liable under, any Environmental Law.

(c) Since January 1, 2000, neither the Company nor any of its Subsidiaries (i) has entered into or agreed to any consent decree or order or is subject to any judgment, decree or judicial order relating to compliance with Environmental Laws, Environmental Permits or the investigation, sampling, monitoring, treatment, remediation, removal or cleanup of Hazardous Materials and, to the Knowledge of the Company, no investigation, litigation or other proceeding is pending or threatened in writing with respect thereto or (ii) is an indemnitor in connection with any claim threatened or asserted in writing by any third-party indemnitee for any liability under any Environmental Law or relating to any Hazardous Materials.

(d) None of the real property owned or leased by the Company or any of its Subsidiaries is listed or, to the Knowledge of the Company, proposed for listing on the "National Priorities List" under CERCLA.

(e) There have been no Hazardous Materials generated by the Company or any of its Subsidiaries that have been disposed of by the Company, or to its Knowledge, any third party, or come to rest at any site that has been listed or, to the Knowledge of the Company, proposed for listing on the "National Priorities List" under CERCLA, as updated through the date hereof, or any similar state or foreign list of sites requiring investigation or cleanup, except as would not, and would not reasonably be expected to, individually or in the aggregate, have a Material Adverse Effect on the Company.

Section 3.14 Title to Properties.

(a) Each of the Company and its Subsidiaries has good and valid title to, or valid leasehold or sublease interests or other comparable contract rights in or relating to all of its properties and other assets (other than Intellectual

Property and other intangible assets) necessary for the conduct of its business as currently conducted, except as have been disposed of in the ordinary course of business consistent with past practice and except for defects in title, easements, restrictive covenants and similar encumbrances that individually or in the aggregate have not materially interfered with, and would not reasonably be expected to materially interfere with, its ability to conduct its business as presently conducted. All such properties and other assets, other than properties and other assets in which the Company or any of its Subsidiaries has a leasehold or sublease interest or other comparable contract right, are free and clear of all Liens, except for Permitted Liens and for defects in title, easements, restrictive covenants and similar encumbrances that individually or in the aggregate have not materially interfered with, and would not reasonably be expected to materially interfere with, its ability to conduct its business as presently conducted.

(b) Each of the Company and its Subsidiaries has complied with the terms of all leases or subleases to which it is a party and under which it is in occupancy, and all leases to which the Company is a party and under which it is in occupancy are in full force and effect, except for such failure to comply or be in full force and effect that individually or in the

aggregate has not had and would not reasonably be expected to have a Material Adverse Effect on the Company. Each of the Company and its Subsidiaries is in possession of the properties or assets purported to be leased under all its leases, except for such failure to be in possession that individually or in the aggregate has not had and would not reasonably be expected to have a Material Adverse Effect on the Company. Neither the Company nor any of its Subsidiaries has received as lessee any written notice from the lessor of any event or occurrence that has resulted or could result (with or without the giving of notice, the lapse of time or both) in a default with respect to any material lease or sublease to which it is a party.

Section 3.15 Intellectual Property.

(a) Section 3.15(a) of the Company Disclosure Schedule sets forth, as of the date hereof, a true and complete list of all patents and applications therefor, registered trademarks and applications therefor and material domain name registrations owned by the Company or any of its Subsidiaries. Such intellectual property rights as listed in Section 3.15(a) of the Company Disclosure Schedule, together with any rights in the Intellectual Property owned or licensed by the Company or any of its Subsidiaries, are collectively referred to herein as "Intellectual Property Rights." All Intellectual Property Rights necessary to conduct the business of the Company and its Subsidiaries as presently conducted (including the manufacture, use or sale of Company Products & Technology) are either (i) owned by, or subject to an obligation of assignment to, the Company or a Subsidiary of the Company free and clear of all Liens other than Permitted Liens or (ii) licensed to the Company or a Subsidiary of the Company free and clear of all Liens, other than Permitted Liens, subject in the case of both (i) and (ii) to any rights granted by the Company or its Subsidiaries to any third party pursuant to any license agreements disclosed in the Company Disclosure Schedule or under a license to use such information for evaluation purposes provided pursuant to confidentiality and nondisclosure agreements or material transfer agreements entered into in the ordinary course of business. There are no actions, suits, proceedings or claims pending or, to the Knowledge of the Company, threatened in writing or in a manner that would reasonably be expected to result in any actions, suits, proceedings or claims with regard to the ownership or licensing by the Company or any of its

Subsidiaries of any Intellectual Property Rights.

(b) To the Knowledge of the Company, the Intellectual Property Rights of the Company or any of its Subsidiaries have not been infringed or misappropriated, and are not being infringed or misappropriated, in a manner which individually or in the aggregate has had or would reasonably be expected to have a Material Adverse Effect on the Company.

(c) There are no actions, suits, proceedings or claims pending or, to the Knowledge of the Company, threatened in writing or in a manner that would reasonably be expected to result in any actions, suits, proceedings or claims claiming that the Company or any of its Subsidiaries has infringed or is infringing (including with respect to the manufacture, use or sale by the Company or any of its Subsidiaries of any Company Products & Technology or to the operations of the Company and its Subsidiaries) any intellectual property rights of any Person. To the Knowledge of the Company, there is no intellectual property right or other legal right (except as may be contained in any Company Material Contract) that could be asserted by a Person to exclude or prevent the Company or any of its Subsidiaries from developing, manufacturing, using or selling any Company Products & Technology that is material to the

conduct of the business of the Company and its Subsidiaries. To the Knowledge of the Company, other than pursuant to a license to use such information for evaluation purposes provided pursuant to nondisclosure agreements or material transfer agreements entered into in the ordinary course of business, there is no contractual restriction on the use of any Intellectual Property Rights which are owned by or licensed to the Company, other than as set forth in the agreements identified in the Company Disclosure Schedule.

(d) The patent applications listed in Section 3.15(a) of the Company Disclosure Schedule that are owned by the Company or any of its Subsidiaries are pending and have not been abandoned (except in the ordinary course of prosecution), and have been prosecuted in the ordinary course. All patents, registered trademarks and applications therefor owned by the Company or any of its Subsidiaries that are material to the conduct of the business of the Company or its Subsidiaries have been duly registered and/or filed with or issued by each appropriate Governmental Entity in the jurisdiction(s) indicated in Section 3.15(a) of the Company Disclosure Schedule, all necessary affidavits of continuing use have been timely filed, and all necessary maintenance fees have been timely paid to continue all such rights in effect except with respect to abandoned applications, patents or trademarks in the ordinary course of prosecution and maintenance. None of the patents listed in Section 3.15(a) of the Company Disclosure Schedule that are owned by the Company or any of its Subsidiaries has been declared invalid, in whole or in part, by any Governmental Entity. There are no ongoing interferences, oppositions, reissues, reexaminations or other proceedings involving any of the patents or patent applications listed in Section 3.15(a) of the Company Disclosure Schedule and owned by the Company or any of its Subsidiaries, including ex parte and post-grant proceedings, in the United States Patent and Trademark Office or in any foreign patent office or similar administrative agency, other than such interferences, oppositions, reissues, reexaminations or proceedings that individually or in the aggregate have not had and would not reasonably be expected to have a Material Adverse Effect on the Company. Each of the patents owned by the Company or any of its Subsidiaries to the Knowledge of the Company does not fail to name an inventor or name a Person not an inventor of the claims thereof under circumstances that would rise to the level of a violation of 37 CFR 1.56(c) or foreign equivalent thereof as determined in accordance with the

Laws of the jurisdiction in which such patent is issued. Each inventor named on the patents and patent applications listed in Section 3.15(a) of the Company Disclosure Schedule that are owned by the Company or any of its Subsidiaries, alone or together with any joint owners, has executed an agreement agreeing to assign or actually assigning his or her entire right, title and interest in and to such patent or patent application, and the inventions embodied and claimed therein, to the Company or a Subsidiary of the Company, alone or together with any joint owners as appropriate. To the Knowledge of the Company, no such inventor has any contractual or other obligation that would preclude any such assignment or otherwise conflict with the obligations of such inventor to the Company or such Subsidiary or appropriate owners under such agreement with the Company or such Subsidiary or such appropriate owners, as the case may be.

(e) Section 3.15(e) of the Company Disclosure Schedule sets forth a true and complete list of all Contracts with respect to any options, rights or licenses relating to Intellectual Property Rights granted (i) to the Company or any of its Subsidiaries (other than Contracts commonly generated in the ordinary course of business (including software licenses for generally available software, employee assignment agreements, nondisclosure agreements, consulting agreements, material transfer agreements, service agreements, clinical trial agreements and

evaluation agreements)) or (ii) by the Company or any of its Subsidiaries to any other Person (other than agreements commonly generated in the ordinary course of business (including software licenses for generally available software, employee assignment agreements, nondisclosure agreements, consulting agreements, material transfer agreements, service agreements, clinical trial agreements and evaluation agreements)), in the case of each of clauses (i) and (ii) other than Contracts that are not material to the business of the Company and its Subsidiaries taken as a whole. Section 3.15(e) of the Company Disclosure Schedule sets forth, as of the date hereof, all Contracts under which the Company or any Subsidiary of the Company is obligated to make any payments of amounts in excess of $50,000 (in any form, including royalties, milestones and other contingent payments) to third parties for use of any Intellectual Property Rights with respect to the commercialization of any of the Company Products & Technology.

(f) The Company and its Subsidiaries have taken reasonable steps to maintain their material trade secrets in confidence, including entering into Contracts that generally require licensees, contractors and other third persons with access to such trade secrets to keep such trade secrets confidential.

(g) Section 3.15(g) of the Company Disclosure Schedule sets forth a true and complete list of each application or official request for any extension (i.e., under Hatch-Waxman) of the term of any patent owned or licensed by the Company or any of its Subsidiaries relating to any Company Products & Technology that was subject to regulatory review, including an identification of the patent and the term extension requested.

(h) As used in this Agreement, "Company Products & Technology" means the drug products or candidates being sold or manufactured by the Company or that are the subject of human clinical trials conducted for or by the Company, each of which is set forth in Section 3.15(h) of the Company Disclosure Schedule, and the drug delivery platform technologies listed in Section 3.15(h) of the Company Disclosure Schedule.

Section 3.16 Development, Distribution, Marketing, Supply and Manufacturing Agreements. Section 3.16 of the Company Disclosure Schedule sets forth, as of the date hereof, a true and complete list of all Contracts to which the Company or any of its Subsidiaries is a party (i) relating in a material manner to research, development, distribution, sale, supply, license, marketing or manufacturing of any product of the Company or any Subsidiary of the Company or any product or patent or other Intellectual Property Right licensed by the Company or any Subsidiary of the Company to any third party, in each case that have a remaining value of $250,000 or more individually and (ii) relating in a material manner to the distribution by third parties of any product of the Company or any Subsidiary of the Company or any product or patent or other Intellectual Property Right licensed by the Company or any Subsidiary of the Company to any third party. The Company has made available to Parent a true and complete copy of each such Contract.

Section 3.17 Regulatory Compliance.

(a) As to each product subject to the FDCA and the FDA regulations promulgated thereunder or similar Laws in any foreign jurisdiction that are developed, manufactured, tested, distributed, labeled, stored and/or marketed by the Company or any of its

Subsidiaries (each such product, a "Medical Device", a "Biologic" or a "Drug", as the case may be), each such Medical Device, Biologic or Drug is being developed, manufactured, tested, distributed, labeled, stored and/or marketed by the Company and, to the Knowledge of the Company, marketed, by each other Person developing, manufacturing, testing, distributing, labeling, storing and/or marketing such Medical Device or Drug on behalf of the Company, in compliance with all applicable FDA, state and foreign Laws, including those relating to investigational use, premarket clearance or marketing approval to test, manufacture or market a Medical Device, and investigational new drug applications, investigational device exemptions, new drug applications, biological license applications or abbreviated new drug applications to test, manufacture or market a new Biologic or a new Drug, good manufacturing and quality systems requirements, labeling, advertising, record keeping, filing of reports and security, and in compliance with the American Medical Association's guidelines on gifts to physicians, except for failures in compliance that individually or in the aggregate have not had and would not reasonably be expected to have a Material Adverse Effect on the Company. As of the date hereof, neither the Company nor any of its Subsidiaries has received and, to the Knowledge of the Company, none of its or its Subsidiaries' licensees have received, any material notice or other material communication from the FDA or any other Governmental Entity (i) contesting the investigational or premarket clearance or approval of, the testing of, the uses of or the labeling or promotion of any products of the Company or any of its Subsidiaries or (ii) otherwise alleging any material violation applicable to any Medical Device, Biologic or Drug by the Company or any of its Subsidiaries of any Law, including Notice of Inspectional Observations (Form FDA 483), Notices of Adverse Findings, Warning Letters, Untitled Letters or other similar communication by any Governmental Entity.

(b) No Medical Device, Biologic or Drug is under consideration for or has been recalled, withdrawn, suspended, or discontinued (other than for commercial or other business reasons) or required a field notification, field alert, or field correction by the Company or any of its Subsidiaries in the United States or outside the United States (whether voluntarily or otherwise). No proceedings

in the United States or outside of the United States of which the Company has Knowledge (whether completed or pending) seeking the recall, withdrawal, suspension, seizure or discontinuance of any Medical Device, Biologic or Drug are pending against the Company or any of its Subsidiaries or, to the Knowledge of the Company, any licensee of any Medical Device, Biologic or Drug, nor have any such proceedings been pending at any time in the five year period prior to the date hereof. To the Knowledge of the Company, there are no facts, circumstances or conditions that would reasonably be expected to form the basis for any audit, investigation, suit, claim, action (legal or regulatory) or proceeding (legal or regulatory) with respect to a recall, withdrawal, suspension, seizure or discontinuance, or a change in the marketing classification or labeling of any Drug, Medical Device or Biologic of the Company or with respect to any of the Company Products & Technology. True and complete copies of all material data of the Company with respect to the safety or efficacy of the Medical Devices, Biologics, Drugs or Company Products & Technology have been made available to Parent.

(c) All clinical trials and, to the Knowledge of the Company, all studies, tests and preclinical studies conducted by or on behalf of the Company or any of its Subsidiaries were and, if still pending, are being conducted in all material respects in accordance with experimental protocols, procedures and controls pursuant to accepted professional scientific standards and all

applicable Laws and Permits. The descriptions of the results of such studies, tests and trials submitted to FDA and other Governmental Entities are true and complete in all material respects and fairly present the data derived from such studies, tests and trials, and neither the Company nor any of its Subsidiaries has Knowledge of any such studies, tests or trials the results of which the Company or any of its Subsidiaries believes reasonably call into question its studies, tests, or trial results. Neither the Company nor any of its Subsidiaries has received any notices or correspondence from any Governmental Entity requiring the termination of, suspension of, or modification which materially affects the design, end points or intended purpose of, any studies, tests or preclinical or clinical trials conducted by or on behalf of the Company or any of its Subsidiaries.

(d) All reports, documents, claims, notices, or approvals required to be filed, obtained, maintained, or furnished to any Governmental Entity for each material Medical Device, Biologic or Drug by the Company or any of its Subsidiaries have been so filed, obtained, maintained or furnished, and all such reports, documents, claims and notices were true and complete in all material respects on the date filed (or were corrected in or supplemented by a subsequent filing). As to each Medical Device, Biologic or Drug of the Company or any of its Subsidiaries for which a premarket approval application, biological license application, new drug application, premarket clearance or approval, investigational new drug application, ANDA investigational device exemption other state or foreign regulatory application has been submitted, approved or cleared, the Company and its Subsidiaries are in compliance with all legal requirements including 21 U.S.C. Sections 360c and 355 or 21 C.F.R. Parts 800, 312, 314, 600 or 601 et seq., respectively, and other applicable Laws and all terms and conditions of such licenses or applications, except for any such failure or failures to be in compliance which individually or in the aggregate has not had and would not reasonably be expected to have a Material Adverse Effect on the Company. As to each such Drug, the Company and any relevant Subsidiary of the Company, and the officers, employees or agents of the Company or such Subsidiary, have included in the application for such Drug, where required, the certification described in 21 U.S.C. Section 335a(k)(1) or any

similar Law and the list described in 21 U.S.C. Section 335a(k)(2) or any similar Law, and each such certification and list was true and correct in all material respects when made. In addition, the Company and its Subsidiaries are in substantial compliance with all applicable registration and listing requirements set forth in 21 U.S.C. Section 360 and 21 C.F.R. Part 207 and all similar Laws.

(e) No article of any Medical Device, Biologic or Drug manufactured and/or distributed by the Company or any of its Subsidiaries is (i) adulterated within the meaning of 21 U.S.C. Section 351 (or similar Laws) (ii) misbranded within the meaning of 21 U.S.C. Section 352 (or similar Laws) or (iii) a product that is in violation of 21 U.S.C. Section 355, Section 360c or 42 U.S.C. Section 262 (or similar Laws), except for failures to be in compliance with the foregoing that individually or in the aggregate have not had and would not reasonably be expected to have a Material Adverse Effect on the Company.

(f) Neither the Company nor any of its Subsidiaries, nor, to the Knowledge of the Company, any officer, Affiliate, employee or agent of the Company or any of its Subsidiaries, has made an untrue statement of a material fact or fraudulent statement to the FDA or any other Governmental Entity, failed to disclose a material fact required to be disclosed to the FDA or any other Governmental Entity, or committed an act, made a statement, or failed to

make a statement that, at the time such disclosure was made, would reasonably be expected to provide a basis for the FDA or any other Governmental Entity to invoke its policy respecting "Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities", set forth in 56 Fed. Reg. 46191 (September 10, 1991) or any similar policy. Neither the Company nor any of its Subsidiaries, nor, to the Knowledge of the Company, any officer, employee or agent of the Company or any of its Subsidiaries, has been convicted of any crime or engaged in any conduct for which debarment is mandated by 21 U.S.C. Section 335a(a), or any similar Law or authorized by 21 U.S.C. Section 335a(b), or any similar Law.

(g) Neither the Company nor any of its Subsidiaries has received any written notice that the FDA or any other Governmental Entity has (i) commenced, or threatened to initiate, any action to withdraw its approval or request the recall of any Medical Device, Biologic or Drug, (ii) commenced, or threatened to initiate, any action to enjoin production of any Medical Device, Biologic or Drug or (iii) to the Company's Knowledge, commenced, or threatened to initiate, any action to enjoin the production of any Medical Device, Biologic or Drug produced at any facility where any Medical Device, Biologic or Drug is manufactured, tested or packaged, except for any such action that individually or in the aggregate has not had and would not reasonably be expected to have a Material Adverse Effect on the Company.

(h) To the Knowledge of the Company, there are no facts, circumstances or conditions that would reasonably be expected to form the basis for any material investigation, suit, claim, audit, action (legal or regulatory) or proceeding (legal or regulatory) by a Governmental Entity against or affecting the Company or any of its Subsidiaries relating to or arising under (i) the FDCA or the regulations of the FDA promulgated thereunder or (ii) the Health Care Laws.

(i) Notwithstanding the foregoing, each representation and warranty made by the Company in this Section 3.17 with respect to the Medical Devices, Biologics or Drugs licensed by the Company to third parties (to the extent the Company has assumed or retained no responsibility for regulatory compliance) set

forth on Section 3.17(h) of the Company Disclosure Schedule shall be deemed to be limited to the Company's Knowledge.

Section 3.18 Corporate Governance Matters.

(a) The Company and to the Company's Knowledge each of its officers are in compliance in all material respects with (i) the applicable provisions of the Sarbanes-Oxley Act of 2002 and the related rules and regulations promulgated under such act or the Exchange Act (in each case, as currently in effect, the "Sarbanes-Oxley Act") and (ii) the applicable qualification requirements and corporate governance rules and regulations promulgated by the National Association of Securities Dealers. The Company has delivered to Parent the information required to be disclosed by the Company and certain of its officers to the Company's Board of Directors or any committee thereof pursuant to the certification requirements of Rule 13a-14 under the Exchange Act. Since the date such provisions became applicable to the Company and its Subsidiaries, all auditing services and non-audit services provided to the Company and each of its Subsidiaries have been approved by the audit committee of the Company's Board of Directors in compliance with Section 10A(h) or Section 10A(i) of the Exchange Act, and to the Company's Knowledge, no registered public accounting firm or any associate thereof that

performs any audit for the Company or any of its Subsidiaries has provided to the Company or any of its Affiliates any service prohibited by Section 10A(g) of the Exchange Act. Except as permitted by the Exchange Act, including Sections 13(k)(2) and (3), since the enactment of the Sarbanes-Oxley Act, neither the Company nor any of its Subsidiaries has, directly or indirectly, made, entered into, arranged, renewed, modified (in any material way) or forgiven any personal loans to any executive officer or director of the Company.

(b) The management of the Company has (i) in accordance with Rule 13a-15 under the Exchange Act, designed disclosure controls and procedures (as such term is defined in Rule 13a-15(e) under the Exchange Act) to ensure that material information relating to the Company, including its Subsidiaries, is made known to the management of the Company by others within those entities, and (ii) disclosed, based on its most recent evaluation prior to the date hereof, to the Company's auditors and the audit committee of the Company's Board of Directors (A) any significant deficiencies in the design or operation of internal controls over financial reporting ("Internal Controls") which are reasonably likely to adversely affect the Company's ability to record, process, summarize and report financial information and has disclosed to the Company's auditors any material weaknesses in Internal Controls and (B) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's Internal Controls. The Company has made available to Parent a summary of any such disclosure made by management to the Company's auditors and/or audit committee since December 31, 2003.

Section 3.19 Insurance. Section 3.19 of the Company Disclosure Schedule contains a true and complete list of all policies of fire, liability, workers' compensation, title and other forms of insurance owned, held by or applicable to the Company (or its assets or business) as of the date hereof, and the Company has heretofore made available to Parent a true and complete copy of all such policies, including all occurrence-based policies applicable to the Company (or its assets or business) for all periods prior to the Closing Date. All such policies (or substitute policies with substantially similar terms and underwritten by insurance carriers with substantially similar or higher ratings) are in full force and effect, all premiums due with respect thereto have been

paid as of the date hereof, and, insofar as this representation is made as of the Closing Date, there has not been a lapse of coverage between the date hereof and the Effective Time with respect to the matters covered by any such policies. Such policies are sufficient for compliance by the Company in all material respects with all Contracts to which the Company is a party, and each of the Company and its Subsidiaries has complied in all material respects with the provisions of each such policy under which it is an insured party. There are no pending or, to the Knowledge of the Company, threatened claims under any insurance policy that individually or in the aggregate have had or would reasonably be expected to have a Material Adverse Effect on the Company

Section 3.20 Voting Requirements. The affirmative vote of holders of a majority of the outstanding shares of Company Common Stock at the Company Stockholders' Meeting or any adjournment or postponement thereof to adopt this Agreement and approve the Merger (the "Company Stockholder Approval") is the only action or vote of the holders of any class or series of capital stock of the Company necessary to adopt this Agreement and approve the transactions contemplated hereby.

Section 3.21 State Takeover Statutes; Self-Dealing. The Board of Directors of the Company has approved the terms of this Agreement and the consummation of the Merger and the other transactions contemplated by this Agreement, and such approval represents all the action necessary to render inapplicable to this Agreement, the Merger and the other transactions contemplated by this Agreement, the provisions of Section 203 of the DGCL and the provisions of Section Fifth of the Company Certificate of Incorporation. No other Delaware or Colorado state takeover statute (including any "fair price," "merger moratorium" or "control share acquisition" statute or regulation) or similar Delaware or Colorado statute or regulation applies to or purports to apply to this Agreement or the Merger or the other transactions contemplated by this Agreement.

Section 3.22 Brokers; Advisory Fees. No broker, investment banker, financial advisor or other Person, other than Banc of America Securities LLC, is entitled to any broker's, finder's, financial advisor's or other similar fee or commission in connection with the transactions contemplated by this Agreement based upon arrangements made by or on behalf of the Company. The Company has delivered or made available to Parent true and complete copies of all agreements under which any such fees or expenses are payable and all indemnification and other agreements related to the engagement of the persons to whom such fees are payable.

Section 3.23 Opinion of Financial Advisor. The Board of Directors of the Company has received the opinion of its financial advisor, Banc of America Securities LLC, dated the date, or shortly prior to the date, of this Agreement, to the effect that, as of the date of such opinion, the Merger Consideration to be received by the holders of shares of Company Common Stock is fair, from a financial point of view, to such holders. A signed copy of the written opinion confirming such oral opinion will be delivered to Parent promptly after delivery thereof to the Company.

Section 3.24 Company Rights Plan. Neither the execution and delivery of this Agreement nor the consummation of the Merger and the other transactions contemplated hereby will (a) cause any of the Company Rights to become exercisable, (b) cause Parent or Merger Sub to be an Acquiring Person (each as defined in the Company Rights Plan) or (c) give rise to a Distribution Date, a

Stock Acquisition Date, a Section 11(a)(ii) event or a Section 13 Event (each as defined in the Company Rights Plan).

ARTICLE 4.
REPRESENTATIONS AND WARRANTIES OF PARENT AND MERGER SUB

Except as set forth on the disclosure schedule delivered by Parent to the Company prior to the execution of this Agreement, which disclosure schedule specifies the section or subsection of this Agreement to which the exception relates, and subject to Section 9.13 (the "Parent Disclosure Schedule"), Parent and Merger Sub represent and warrant to the Company as follows:

Section 4.1 Organization, Standing and Corporate Power. Each of Parent and its Subsidiaries is a corporation duly organized, validly existing and in good standing under the Laws of the jurisdiction in which it is organized and has all requisite corporate power and authority to carry on its business as now being conducted. Section 4.1 of the Parent Disclosure Schedule contains a true and complete list of each jurisdiction where Parent is qualified to do