ASX ANNOUNCEMENT
16 February 2009

Thoratec Corporation to Acquire HeartWare for US$282 million

Framingham, MA and Sydney, Australia: HeartWare International, Inc. (ASX: HIN) confirms that it has entered into a merger agreement whereby Thoratec Corporation ("Thoratec") will acquire HeartWare for a consideration of US$282 million (approximately AUS$429 million*) of which approximately 50% will be paid in cash and approximately 50% will be paid in Thoratec common stock. The purchase consideration reflects a current price of AUS$1.32 per HeartWare Chess Depositary Instrument ("CDI").

In addition to the above, Thoratec will provide HeartWare with a convertible loan facility of up to US$28 million (approximately AUS$43 million*) to fund ongoing operations until the close of the transaction, which is currently expected to occur in the second half of 2009. The Board of Directors of both companies have approved the transaction. The transaction is subject to HeartWare shareholder approval and other customary closing conditions, including regulatory clearance in the United States.

Attached is a joint announcement from Thoratec and HeartWare together with other documentation that has been filed with the United States Securities & Exchange Commission.

Specific enquires in relation to the transaction should be directed as follows:

United States
Mr Doug Godshall
Chief Executive Officer & President
+1 508 739 0840

Australia
Mr David McIntyre
Chief Financial Officer / Chief Operating Officer
0408 227 102

* Exchange rate as at 13 February 2009

About HeartWare International

HeartWare International develops and manufactures miniaturized implantable heart pumps, or Left Ventricular Assist Devices (LVADs), to treat patients suffering from advanced heart failure. The HeartWare® Ventricular Assist System features the HVAD™ pump, the only full-output pump designed to be implanted next to the heart, avoiding the abdominal surgery generally required to implant competing devices. HeartWare has completed an international clinical trial for the device involving five investigational centres in Europe and Australia. The device is currently the subject of a 150-patient clinical trial in the United States for a Bridge-to-Transplant indication.

For general enquiries:

www.heartware.com
Howard Leibman
Director Corporate Development
HeartWare Limited
Email. howard.leibman@heartware.com.au
Tel. +61 2 9238 2064

US Investor Relations
Matt Clawson
Partner
Allen & Caron, Inc.
Email. matt@allencaron.com
Tel. +1 949 474 4300

Forward-Looking Statements

This announcement contains forward-looking statements that are based on management's beliefs, assumptions and expectations and on information currently available to management. All statements that address operating performance, events or developments that we expect or anticipate will occur in the future are forward-looking statements, including without limitation our expectations with respect to the progress of clinical trials. Management believes that these forward-looking statements are reasonable as and when made. However, you should not place undue reliance on forward-looking statements because they speak only as of the date when made. We do not assume any obligation to publicly update or revise any forward-looking statements, whether as a result of new information, future events or otherwise. We may not actually achieve the plans, projections or expectations disclosed in forward-looking statements, and actual results, developments or events could differ materially from those disclosed in the forward-looking statements. Forward-looking statements are subject to a number of risks and uncertainties, including without limitation those described in "Item 1A. Risk Factors" in our Annual Report on Form 10-K filed with the SEC on February 28, 2008, and those described in other reports filed from time to time with the SEC.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): February 12, 2009

HEARTWARE INTERNATIONAL, INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or Other Jurisdiction of Incorporation)

000-52595	26-3636023
(Commission File Number)	*(I.R.S. Employer Identification Number)*

205 Newbury Street
Framingham, MA 01701
(Address of principal executive offices including zip code)

(508) 739-0950
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☑ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c)

Item 8.01 Other Events

On February 12, 2009, HeartWare International, Inc., a Delaware corporation ("HeartWare") entered into an Agreement and Plan of Merger with Thoratec Corporation, a California corporation ("Thoratec"), Thomas Merger Sub I, Inc., a Delaware corporation and a direct wholly owned subsidiary of Thoratec, and Thomas Merger Sub II, Inc., a Delaware corporation and a direct wholly owned subsidiary of Thoratec.

A copy of the press release is furnished as Exhibit 99.1.

Additional Information about the Mergers and Where to Find it

In connection with the proposed merger, Thoratec will file a Registration Statement on Form S-4 that will include a proxy statement of HeartWare that also constitutes a prospectus of Thoratec. **Investors are urged to read the proxy statement/prospectus when it becomes available and other relevant documents filed with the Securities and Exchange Commission (the "SEC") because they will contain important information.** Security holders may obtain a free copy of the proxy statement/prospectus (when it is available) and other documents filed by HeartWare and Thoratec with the SEC at the SEC's web site at http://www.sec.gov. The proxy statement/prospectus and other documents may also be obtained for free by contacting HeartWare Investor Relations by e-mail at enquiries@heartware.com.au or by telephone at 61 2 9238 2064 or on the Investor Relations page of Thoratec's web site at www.thoratec.com or by telephone at (925) 847-8600.

HeartWare, Thoratec and their respective directors, executive officers, certain members of management and certain employees may be deemed to be participants in the solicitation of proxies in connection with the proposed merger. A description of the interests in HeartWare of its directors and executive officers is set forth in HeartWare's Annual Report on Form 10-K for the fiscal year ended December 31, 2007 filed with the SEC on February 28, 2008. This document is available free of charge at the SEC's web site at www.sec.gov or by contacting HeartWare Investor Relations by e-mail at enquiries@heartware.com.au or by telephone at 61 2 9238 2064. Information concerning Thoratec's directors and executive officers is set forth in Thoratec's proxy statement for its 2008 Annual Meeting of Shareholders, which was filed with the SEC on April 16, 2008. This document is available free of charge at the SEC's web site at www.sec.gov or by going to Thoratec's Investors page on its corporate web site at www.thoratec.com. Additional information regarding the persons who may, under the rules of the SEC, be deemed participants in the solicitation of proxies in connection with the proposed merger, and a description of their direct and indirect interests in the proposed merger, which may differ from the interests of HeartWare stockholders or Thoratec shareholders generally will be set forth in the proxy statement/prospectus when it is filed with the SEC.

Forward-Looking Statements

This document includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934. These statements can be identified by the words, "believes," "views," "expects," "projects," "hopes," "could," "will," "intends," "should," "estimate," "would," "may," "anticipates," "plans"

and other similar words. These forward-looking statements are subject to a number of risks and uncertainties that may cause actual results to differ materially from those contained in the forward-looking information, and are based on HeartWare's current expectations, estimates, forecasts and projections. The following factors, among others, could cause actual results to differ materially from those described in the forward-looking statements: failure of HeartWare's stockholders to approve the proposed transaction; the challenges and costs of closing, integrating, restructuring and achieving anticipated synergies; the ability to retain key employees; and other economic, business, competitive, and/or regulatory factors affecting the businesses of HeartWare and Thoratec generally, including those set forth in the filings of HeartWare and Thoratec with the Securities and Exchange Commission, especially in the "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations" sections of their respective annual reports on Form 10-K and quarterly reports on Form 10-Q, their current reports on Form 8-K and other SEC filings. These forward-looking statements speak only as of the date hereof. HeartWare undertakes no obligation to publicly release the results of any revisions or updates to these forward-looking statements that may be made to reflect events or circumstances after the date hereof, or to reflect the occurrence of unanticipated events.

Item 9.01 Financial Statements and Exhibits

(d) Exhibits

99.1 Press Release, dated February 13, 2009.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Dated as of February 13, 2009

HEARTWARE INTERNATIONAL, INC.

By: /s/ David McIntyre
Name: David McIntyre
Title: Chief Financial Officer & Chief Operating Officer

EXHIBIT INDEX

Exhibit No.	Description
99.1	Press Release, dated as of February 13, 2009.

THORATEC ANNOUNCES DEFINITIVE AGREEMENT TO ACQUIRE HEARTWARE INTERNATIONAL FOR US$282 MILLION;

COMBINED COMPANY WILL OFFER BROAD PORTFOLIO OF DEVICES TO IMPROVE THERAPIES FOR HEART FAILURE PATIENTS

(Pleasanton, CA/Framingham, MA/Sydney, Australia), February 13, 2009—Thoratec Corporation (NASDAQ: THOR), a world leader in device-based mechanical circulatory support therapies to save, support and restore failing hearts, and HeartWare International (ASX: HIN), which develops and manufactures miniaturized implantable heart pumps, announced today that they have entered into a definitive merger agreement under which Thoratec will acquire HeartWare for a consideration currently valued at approximately US$282 million, of which approximately 50% will be paid in cash and approximately 50% will be paid in shares of Thoratec common stock. Based on a Thoratec common stock price of $26.25 per share, this reflects a current price of US$0.86 for each HeartWare Chess Depositary Interest (CDI), or AUS$1.32 based on the current US/AUS exchange rate of 1.5265. Upon completion of the transaction, the combined company will offer a broad portfolio of approved devices and will continue to develop emerging technologies for the treatment of heart failure patients.

Under the merger agreement, each share of HeartWare common stock (representing 35 CDIs) will be converted into the right to receive $14.30 in cash and 0.6054 of a share of Thoratec common stock, reflecting a current per share price of approximately US$30.19 for each share of HeartWare common stock. Prior to the closing of the transaction, the CDIs will be converted into the underlying shares of common stock of HeartWare and exchanged for the merger consideration. In addition, Thoratec will provide HeartWare a convertible loan facility of up to US$28 million to fund ongoing operations until the closing of the transaction, which is currently expected to occur in the second half of 2009. The boards of directors of both companies have approved the transaction. The transaction is subject to approval of HeartWare's stockholders and satisfaction of other customary closing conditions, including regulatory clearance.

"This transaction is a positive development for heart failure patients and the clinicians who treat them by combining Thoratec's portfolio of commercially approved devices with HeartWare's innovative technologies. The use of mechanical circulatory support for the treatment of heart failure is gaining increasing adoption as a result of the positive patient outcomes and clinician enthusiasm realized with the HeartMate II. We believe that combining the strengths of the two companies will enable us to build upon each of our strong technology and product platforms, giving more and better options for a large and significantly underserved heart failure patient population. Because of the complementary nature of Thoratec's and HeartWare's products, the combined company intends to aggressively develop and make available to patients both Thoratec's and HeartWare's products using Thoratec's extensive clinical and administrative support network," said Gary F. Burbach, president and chief executive officer of Thoratec.

"This transaction is a positive outcome for our stockholders, our employees and heart failure patients," said Doug Godshall, president and chief executive officer of HeartWare. "We have made great strides with our technology, having recently received the CE Mark for the

HeartWare Ventricular Assist System and are experiencing strong initial progress in our U.S. BTT trial. In addition, we have realized significant progress with our MVAD, a next generation miniaturized axial flow LVAD (left ventricular assist device). Combining our R&D focus with Thoratec's product line, support infrastructure and financial strength will facilitate and accelerate the commercial rollout of the HVAD pump, as well as the development of future products," he added.

Mr. Burbach noted, "The product pipeline and organizational capabilities of Thoratec and HeartWare are highly complementary. In addition to facilitating the development of a product portfolio that will serve a wide continuum of patients, we believe that this combination will enable us to bring new, life-saving technologies to market more quickly and at a greater scale. Thoratec already has clinical, regulatory and market development teams with a proven track record of developing devices, achieving regulatory approvals and realizing commercial success. We believe this transaction will increase the acceptance and availability of mechanical circulatory support devices, and should result in operating synergies over the long-term."

Thoratec said it expects the transaction will be dilutive to earnings on both a GAAP and non-GAAP basis into 2011. Thoratec said it will provide additional details on the financial impact of this transaction as the process moves forward, including its effect on 2009 guidance, and related expenses. Thoratec expects non-recurring charges associated with the transaction of approximately US$15-20 million will be recorded through the balance of 2009, but will be excluded from non-GAAP earnings.

"We are excited about the long-term benefits of the transaction to Thoratec. The structure of the transaction leverages the strength of Thoratec's balance sheet while preserving capital for our future operational needs and strategic opportunities," Burbach noted.

Thoratec's product line includes several commercially approved cardiac assist devices including the HeartMate II® LVAS (Left Ventricular Assist System), which received U.S. approval for bridge-to-transplantation (BTT) in April 2008 and is currently in clinical trials in the United States for Destination Therapy (DT)—or the long-term support of heart failure patients not eligible for transplantation. HeartWare's HVAD™, part of the HeartWare® Ventricular Assist System, is a full-output pump designed to be implanted next to the heart. It recently received Conformite Europeene (CE) Mark approval to begin commercial sales of the device in Europe and has enrolled approximately 10 patients in a 150-patient U.S. BTT clinical trial.

Upon the close of the transaction, HeartWare's operations will be integrated into Thoratec's Cardiovascular Division. Further details regarding the nature and timing of the integration will be provided in the future.

Advisors

Banc of America Securities LLC acted as exclusive financial advisor, and Latham & Watkins, LLP acted as legal counsel, to Thoratec. J.P. Morgan acted as exclusive financial advisor, and Shearman & Sterling LLP acted as legal counsel, to HeartWare.

Conference Call/Webcast Information

Thoratec and HeartWare will hold a conference call to discuss this transaction for all interested parties at 5:30 a.m., Pacific Standard Time (8:30 a.m., Eastern Standard Time) today. The teleconference can be accessed by calling (719) 325-4767, passcode 4706062. Please dial in 10-15 minutes prior to the beginning of the call. The webcast will be available on the Internet at http://www.thoratec.com. A replay of the conference call will be available through Friday, February 20, 2009, by telephone at (719) 457-0820, passcode 4706062.

Thoratec is a world leader in therapies to address advanced-stage heart failure. The company's product lines include the Thoratec® VAD (Ventricular Assist Device) and HeartMate LVAS with more than 12,000 devices implanted in patients suffering from heart failure. Additionally, its International Technidyne Corporation (ITC) Division supplies point-of-care blood testing and skin incision products. Thoratec is headquartered in Pleasanton, California. For more information, visit the company's web sites at http://www.thoratec.com or http://www.itcmed.com.

Thoratec, the Thoratec logo, HeartMate and HeartMate II are registered trademarks of Thoratec Corporation, and IVAD is a trademark of Thoratec Corporation.

HeartWare International develops and manufactures miniaturized implantable heart pumps, or Left Ventricular Assist Devices (LVADS), to treat patients suffering from advanced heart failure. HeartWare's HVAD™ pump is the only full-output pump designed to be implanted in the chest, avoiding the abdominal surgery generally required to implant competing devices. HeartWare has completed an international clinical trial for the device involving five investigational centers in Europe and Australia. The device is currently the subject of a 150-patient clinical trial in the United States for a bridge-to-transplantation indication.

Use of Forward-Looking Statements

This document includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934. These statements can be identified by the words, "believes," "views," "expects," "projects," "hopes," "could," "will," "intends," "should," "estimate," "would," "may," "anticipates," "plans" and other similar words. These forward-looking statements are subject to a number of risks and uncertainties that may cause actual results to differ materially from those contained in the forward-looking information, and are based on Thoratec's current expectations, estimates, forecasts and projections. The following factors, among others, could cause actual results to differ materially from those described in the forward-looking statements: failure of HeartWare's stockholders to approve the proposed transaction; the challenges and costs of closing, integrating, restructuring and achieving anticipated synergies; the ability to retain key employees; and other economic, business, competitive, and/or regulatory factors affecting the businesses of Thoratec and HeartWare generally, including those set forth in the filings of Thoratec and HeartWare with the Securities and Exchange Commission, especially in the "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations" sections of their respective annual reports on Form 10-K and quarterly reports on Form 10-Q, their current reports on Form 8-K and other SEC filings. These forward-looking statements speak only as of the date hereof. Thoratec undertakes no obligation to publicly release

the results of any revisions or updates to these forward-looking statements that may be made to reflect events or circumstances after the date hereof, or to reflect the occurrence of unanticipated events.

Additional Information and Where You Can Find It

Thoratec will file a Registration Statement on Form S-4 containing a proxy statement/prospectus and other documents concerning the proposed acquisition and HeartWare will file a proxy statement and other documents concerning the acquisition, in each case with the Securities and Exchange Commission (the "SEC"). Investors are urged to read the proxy statement/prospectus when it becomes available and other relevant documents filed with the SEC because they will contain important information. Security holders may obtain a free copy of the proxy statement/prospectus (when it is available) and other documents filed by Thoratec and HeartWare with the SEC at the SEC's web site at http://www.sec.gov. The proxy statement/prospectus and other documents may also be obtained for free by contacting Thoratec Investor Relations by e-mail at ir@thoratec.com or by telephone at 925-847-8600 or by contacting HeartWare Investor Relations by e-mail at enquiries@heartware.com.au or by telephone at 61 2 9238 2064.

Thoratec, HeartWare and their respective directors, executive officers, certain members of management and certain employees may be deemed to be participants in the solicitation of proxies in connection with the proposed merger. A description of the interests in HeartWare of its directors and executive officers is set forth in HeartWare's Annual Report on Form 10-K for the fiscal year ended December 31, 2007 filed with the SEC on February 28, 2008. Information concerning Thoratec's directors and executive officers is set forth in Thoratec's proxy statement for its 2008 Annual Meeting of Shareholders, which was filed with the SEC on April 16, 2008. This document is available free of charge at the SEC's web site at www.sec.gov or by going to Thoratec's Investors page on its corporate web site at www.Thoratec.com. Additional information regarding the persons who may, under the rules of the SEC, be deemed participants in the solicitation of proxies in connection with the proposed merger, and a description of their direct and indirect interests in the proposed merger, which may differ from the interests of HeartWare stockholders or Thoratec shareholders, generally will be set forth in the proxy statement/prospectus when it is filed with the SEC.

Contact Information

Thoratec Contacts

David Smith
Executive Vice President, Chief Financial Officer
Thoratec Corporation
(925) 847-8600

Neal B. Rosen
Ruder-Finn
(415) 692-3058

HeartWare Contacts

www.heartware.com
Howard Leibman
Director Corporate Development
HeartWare Limited
Email. howard.leibman@heartware.com.au
Tel. +61 2 9238 2064

U.S. Investor Relations
Matt Clawson
Partner
Allen & Caron, Inc.
Email. matt@allencaron.com
Tel. +1 949 474 4300

Table of Contents

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): February 12, 2009

HEARTWARE INTERNATIONAL, INC.

(Exact name of registrant as specified in its charter)

Delaware
(State or Other Jurisdiction of Incorporation)

000-52595	26-3636023
(Commission File Number)	*(I.R.S. Employer Identification Number)*

205 Newbury Street
Framingham, MA 01701
(Address of principal executive offices including zip code)

(508) 739-0950
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☑ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

TABLE OF CONTENTS

Table of Contents

Item 1.01 Entry into a Material Definitive Agreement

Agreement and Plan of Merger

On February 12, 2009, HeartWare International, Inc., a Delaware corporation ("HeartWare"), entered into an Agreement and Plan of Merger (the "Merger Agreement") with Thoratec Corporation, a California corporation ("Thoratec"), Thomas Merger Sub I, Inc., a Delaware corporation and a direct wholly owned subsidiary of Thoratec ("Merger Subsidiary"), and Thomas Merger Sub II, Inc., a Delaware corporation and a direct wholly owned subsidiary of Thoratec ("Merger Subsidiary Two").

Pursuant to the terms of the Merger Agreement, Merger Subsidiary will merge with and into HeartWare, with HeartWare continuing as the surviving corporation (the "Merger") and, if the stock value of the consideration is at least 41% of the aggregate merger consideration at closing, immediately following the Merger, HeartWare, as the surviving corporation in the Merger, will merge with and into Merger Subsidiary Two, with Merger Subsidiary Two continuing as the surviving corporation and a wholly owned subsidiary of Thoratec (the "Second Merger" and together with the Merger, the "Mergers").

In the Merger, each share of common stock, including shares of common stock that prior to the closing were represented by CHESS Depositary Interests, of HeartWare will be converted into the right to receive a combination of (1) $14.30 in cash, without interest, and (2) 0.6054 shares of common stock of Thoratec. The aggregate value of the cash consideration payable in the Merger is approximately $141 million and, based on a price per share of Thoratec common stock of $26.25, the aggregate value of the stock consideration payable in the Merger is currently approximately $141 million.

In addition, if the volume weighted average of the per share closing prices of Thoratec common stock on The Nasdaq Stock Market, Inc. for the 20 consecutive trading days ending on and including the 5th trading day prior to, but not including, the closing date is less than 70% of $26.25, the Thoratec per share price used to determine the merger consideration, then HeartWare will have an option to terminate the Merger Agreement unless, subject to certain adjustments provided for in the Merger Agreement, Thoratec increases the number of shares of Thoratec common stock payable in the Merger such that the value of the stock portion of the merger consideration at closing is equal to 70% of the value of the stock consideration at signing. If that same volume weighted average price exceeds 130% of $26.25, then Thoratec may reduce the number of shares of Thoratec common stock payable in the Merger such that the value of the stock portion of the merger consideration at closing is equal to 130% of the value of the stock consideration at the signing of the Merger Agreement. The Merger is intended to qualify as a tax-free reorganization for federal income tax purposes.

Thoratec and HeartWare have made customary representations and warranties in the Merger Agreement and agreed to certain customary covenants, including covenants regarding operation of the business of HeartWare and its subsidiaries prior to the closing and covenants prohibiting HeartWare from soliciting, or providing information or entering into discussions concerning, proposals relating to alternative business combination transactions, except in limited

circumstances to permit the board of directors of HeartWare to comply with its fiduciary duties under applicable law.

Consummation of the Merger is subject to customary conditions, including adoption of the Merger Agreement by HeartWare's stockholders, the absence of legal impediments to consummation of the Merger and the expiration or termination of the required waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Approval by Thoratec's shareholders is not required.

Thoratec and HeartWare may terminate the Merger Agreement under certain circumstances specified in the Merger Agreement. Upon the termination of the Merger Agreement in specified circumstances, HeartWare may be required to pay Thoratec a termination fee equal to $11.3 million, and in other specified circumstances, HeartWare may be obligated to pay Thoratec a termination fee equal to $5.0 million.

Support Agreements

In connection with the Merger Agreement, Apple Tree Partners I, L.P., a beneficial owner of approximately 30.2% of HeartWare common stock, and all of the directors and certain executive officers of HeartWare, entered into support agreements with Thoratec (each, a "Support Agreement") pursuant to which such stockholders have agreed to vote the shares of HeartWare common stock held by them to adopt the Merger Agreement and, subject to certain exceptions, not to dispose of their shares prior to the date of the HeartWare stockholder vote. The Support Agreements terminate upon termination of the Merger Agreement.

Loan Documents

Concurrent with the execution and delivery of the Merger Agreement, Thoratec entered into a loan agreement with HeartWare and all of HeartWare's subsidiaries, as guarantors (the "Loan Agreement"), pursuant to which Thoratec agreed to deposit up to an aggregate of $28.0 million into an escrow account and to loan such funds through one or more term loans to HeartWare, subject to the terms and conditions set forth in the Loan Agreement, in order to fund the ongoing operations of HeartWare through the closing of the transaction.

Thoratec has deposited $20.0 million into the escrow account, although HeartWare may not borrow any funds prior to May 1, 2009. Beginning on May 1, 2009, HeartWare may borrow up to an aggregate of $12.0 million and beginning on July 31, 2009 HeartWare may borrow up to an aggregate of $20.0 million. In the event that all of the conditions to closing the Merger other than the receipt of regulatory approvals have been satisfied and Thoratec exercises an option under the Merger Agreement to extend the outside date for the completion of the Merger until January 31, 2010, HeartWare may borrow up to an additional $8.0 million, which Thoratec must deposit into the escrow account at the time it exercises its extension option. The maximum aggregate amount that HeartWare may borrow under the Loan Agreement will not exceed $28.0 million.

In the event that the Merger Agreement is terminated in accordance with its terms, Thoratec may convert the outstanding principal amount of the loans to HeartWare, including any accrued and unpaid interest, as well as any amounts remaining in the escrow account that have not been

loaned to HeartWare, in whole or in part, into shares of HeartWare common stock based on a conversion rate equal to (i) $35.00 Australian dollars per share of HeartWare common stock or (ii) $21.5355 per share of HeartWare common stock in the event the Mergers are not consummated as a result of a termination by either HeartWare or Thoratec due to a competing acquisition proposal that the Board of Directors of HeartWare determines is a superior proposal in accordance with the terms of the Merger Agreement, in each case subject to adjustment as provided in the Loan Agreement.

The loans to HeartWare under the Loan Agreement accrue interest at the rate of 10% per annum and are due and payable, together with accrued and unpaid interest, on the earlier of (i) November 1, 2011 and (ii) the date on which all of the loans accelerate and become due and payable in full in accordance with the Loan Agreement.

Concurrent with the execution of the Loan Agreement, Thoratec and HeartWare entered into an investor rights agreement (the "Investor Rights Agreement"). Pursuant to the Investor Rights Agreement, HeartWare has agreed to provide certain registration rights with respect to any HeartWare common stock issued upon the conversion of the loans or any amounts held in the escrow account.

The foregoing description of the Merger Agreement, the form of Support Agreement, the Loan Agreement and the Investor Rights Agreement does not purport to be complete and is qualified in its entirety by reference to the full text of the Merger Agreement, the form of Support Agreement, the Loan Agreement, and the Investor's Rights Agreement, copies of which are attached hereto as Exhibit 2.1, Exhibit 10.1, Exhibit 10.2 and Exhibit 10.3, respectively, to this report and are incorporated into this report by reference.

The Merger Agreement contains representations and warranties by HeartWare, on the one hand, and by Thoratec, Merger Subsidiary and Merger Subsidiary Two, on the other hand, made solely for the benefit of the other. The assertions embodied in those representations and warranties are qualified by information in confidential disclosure schedules that the parties have exchanged in connection with signing the Merger Agreement. The disclosure schedules contain information that modifies, qualifies and creates exceptions to the representations and warranties set forth in the Merger Agreement. Moreover, certain representations and warranties in the Merger Agreement were made as of a specified date, may be subject to a contractual standard of materiality different from what might be viewed as material to shareholders, or may have been used for the purpose of allocating risk between HeartWare, on the one hand, and Thoratec, Merger Subsidiary and Merger Subsidiary Two, on the other hand. Accordingly, the representations and warranties in the Merger Agreement should not be relied on by any persons as characterizations of the actual state of facts about HeartWare, Thoratec, Merger Subsidiary or Merger Subsidiary Two at the time they were made or otherwise.

Additional Information about the Mergers and Where to Find it

In connection with the proposed merger, Thoratec will file a Registration Statement on Form S-4 that will include a proxy statement of HeartWare that also constitutes a prospectus of Thoratec. **Investors are urged to read the proxy statement/prospectus when it becomes available and other relevant documents filed with the SEC because they will contain important information.** Investors may obtain a free copy of the proxy statement/prospectus (when

it is available) and other documents filed by HeartWare and Thoratec with the SEC at the SEC's web site at http://www.sec.gov. The proxy statement/prospectus and other documents may also be obtained for free by contacting HeartWare Investor Relations by e-mail at enquiries@heartware.com.au or by telephone at 61 2 9238 2064 or on the Investor Relations page of Thoratec's web site at www.thoratec.com or by telephone at (925) 847-8600.

HeartWare, Thoratec and their respective directors, executive officers, certain members of management and certain employees may be deemed to be participants in the solicitation of proxies in connection with the proposed merger. A description of the interests in HeartWare of its directors and executive officers is set forth in HeartWare's proxy statement for its 2008 Annual Meeting of Shareholders, which was filed with the SEC on April 8, 2008 and the Annual Report filed with the SEC on February 28, 2008. This document is available free of charge at the SEC's web site at www.sec.gov or by contacting HeartWare Investor Relations by e-mail at enquiries@heartware.com.au or by telephone at 61 2 9238 2064. Information concerning Thoratec's directors and executive officers is set forth in Thoratec's proxy statement for its 2008 Annual Meeting of Shareholders, which was filed with the SEC on April 16, 2008. This document is available free of charge at the SEC's web site at www.sec.gov or by going to Thoratec's Investors page on its corporate web site at www.thoratec.com. Additional information regarding the persons who may, under the rules of the SEC, be deemed participants in the solicitation of proxies in connection with the proposed merger, and a description of their direct and indirect interests in the proposed merger, which may differ from the interests of HeartWare stockholders or Thoratec shareholders, generally will be set forth in the proxy statement/prospectus when it is filed with the SEC.

Forward-Looking Statements

This document includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934. These statements can be identified by the words, "believes," "views," "expects," "projects," "hopes," "could," "will," "intends," "should," "estimate," "would," "may," "anticipates," "plans" and other similar words. These forward-looking statements are subject to a number of risks and uncertainties that may cause actual results to differ materially from those contained in the forward-looking information, and are based on HeartWare's current expectations, estimates, forecasts and projections. The following factors, among others, could cause actual results to differ materially from those described in the forward-looking statements: failure of HeartWare's stockholders to approve the proposed transaction; the challenges and costs of closing, integrating, restructuring and achieving anticipated synergies; the ability to retain key employees; and other economic, business, competitive, and/or regulatory factors affecting the businesses of HeartWare and Thoratec generally, including those set forth in the filings of HeartWare and Thoratec with the Securities and Exchange Commission, especially in the "Risk Factors" and "Management's Discussion and Analysis of Financial Condition and Results of Operations" sections of their respective annual reports on Form 10-K and quarterly reports on Form 10-Q, their current reports on Form 8-K and other SEC filings. These forward-looking statements speak only as of the date hereof. HeartWare undertakes no obligation to publicly release the results of any revisions or updates to these forward-looking statements that may be made to reflect events or circumstances after the date hereof, or to reflect the occurrence of unanticipated events.

Table of Contents

Item 9.01 Financial Statements and Exhibits

(d) Exhibits

2.1	Agreement and Plan of Merger, dated as of February 12, 2009, among Thoratec Corporation, HeartWare International, Inc., Thomas Merger Sub I, Inc. and Thomas Merger Sub II, Inc.
10.1	Form of Support Agreement, dated as of February 12, 2009 by and among Thoratec Corporation and certain stockholders of HeartWare International, Inc.
10.2	Loan Agreement, dated as of February 12, 2009 by and among Thoratec Corporation, HeartWare International, Inc. and the Guarantors thereto.
10.3	Investor's Rights Agreement, dated as of February 12, 2009 by and among Thoratec Corporation and HeartWare International, Inc.

Table of Contents

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Dated as of February 13, 2009

HEARTWARE INTERNATIONAL, INC.

By: /s/ David McIntyre
Name: David McIntyre
Title: Chief Financial Officer & Chief Operating Officer

Table of Contents

Exhibit Number	Description of Exhibits
2.1	Agreement and Plan of Merger, dated as of February 12, 2009, among Thoratec Corporation, HeartWare International, Inc., Thomas Merger Sub I, Inc. and Thomas Merger Sub II, Inc.
10.1	Form of Support Agreement, dated as of February 12, 2009 by and among Thoratec Corporation and certain stockholders of HeartWare International, Inc.
10.2	Loan Agreement, dated as of February 12, 2009 by and among Thoratec Corporation, HeartWare International, Inc. and the Guarantors thereto.
10.3	Investor's Rights Agreement, dated as of February 12, 2009 by and among Thoratec Corporation and HeartWare International, Inc.

<DOCUMENT>
<TYPE>EX-2.1
<FILENAME>y74656exv2w1.htm
<DESCRIPTION>EX-2.1: AGREEMENT AND PLAN OF MERGER
<TEXT>

Exhibit 2.1

AGREEMENT AND PLAN OF MERGER

BY AND AMONG

THORATEC CORPORATION,

THOMAS MERGER SUB I, INC.,

THOMAS MERGER SUB II, INC.,

AND

HEARTWARE INTERNATIONAL, INC.

DATED AS OF

FEBRUARY 12, 2009

TABLE OF CONTENTS

AGREEMENT AND PLAN OF MERGER

This Agreement and Plan of Merger (this "**Agreement**") dated as of February 12, 2009 among HeartWare International, Inc., a Delaware corporation (the "**Company**"), Thoratec Corporation, a California corporation ("**Parent**"), Thomas Merger Sub I, Inc., a Delaware corporation and a direct wholly-owned subsidiary of Parent ("**Merger Subsidiary**"), and Thomas Merger Sub II, Inc., a Delaware corporation and a direct wholly-owned subsidiary of Parent ("**Merger Subsidiary Two**"). Each of the Company, Parent, Merger Subsidiary and Merger Subsidiary Two are referred to herein as a "**Party**" and together as the "**Parties**."

RECITALS

WHEREAS, the Board of Directors of the Company has (a) determined that it is in the best interests of the Company and the Company Stockholders, and declared it advisable, to enter into this Agreement providing for (i) the merger, in accordance with Delaware Law, of Merger Subsidiary with and into the Company (the "**Merger**"), with the Company continuing as the corporation surviving the Merger (the "**Intermediate Surviving Corporation**") and (ii) if the Continuity Percentage equals or exceeds the Reorganization Threshold, immediately following the Merger, the merger, in accordance with Delaware Law, of the Intermediate Surviving Corporation with and into Merger Subsidiary Two (the "**Second Merger**" and, together with the Merger, the "**Mergers**"), with Merger Subsidiary Two continuing as the corporation surviving the Second Merger (the "**Surviving Corporation**" and, together with the Intermediate Surviving Corporation, the "**Surviving Corporations**"), (b) approved the execution, delivery and performance by the Company of this Agreement and the consummation of the Mergers and the other transactions contemplated hereby and (c) resolved and, subject to Section 6.04(b), agreed to recommend adoption of this Agreement by the Company Stockholders;

WHEREAS, the Boards of Directors of each of Parent, Merger Subsidiary and Merger Subsidiary Two has approved this Agreement and declared it advisable for Parent, Merger Subsidiary and Merger Subsidiary Two, respectively, to enter into this Agreement and to consummate the Mergers and the other transactions contemplated hereby;

WHEREAS, concurrently with the execution and delivery of this Agreement, and as a condition and inducement to the Company's willingness to enter into this Agreement, Parent and the Company are entering into a Loan Agreement, an Escrow Agreement and an Investor's Rights Agreement (the "**Loan Documents**") pursuant to which Parent has agreed to place certain funds into escrow and to loan those funds to the Company on the terms set forth in the Loan Documents;

WHEREAS, concurrently with the execution and delivery of this Agreement, and as a condition and inducement to Parent's willingness to enter into this Agreement, certain of the Company Stockholders are entering into agreements (the "**Support Agreements**") pursuant to which such Company Stockholders have agreed, among other things, to vote the shares of Company Stock held by such Company Stockholders in favor of the Merger, subject to the terms of the Support Agreements;

WHEREAS, concurrently with the execution and delivery of this Agreement, and as a condition and inducement to Parent's willingness to enter into this Agreement, certain employees of the Company are entering into separation benefit agreements and non-competition agreements with Parent;

WHEREAS, concurrently with the execution and delivery of this Agreement, certain employees of the Company are entering into retention bonus agreements (the "**Incentive Agreements**") with the Company;

WHEREAS, the Company, Parent, Merger Subsidiary and Merger Subsidiary Two intend that, in the event the Continuity Percentage equals or exceeds the Reorganization Threshold, the Mergers, taken together, will qualify for federal income tax purposes as a "reorganization" described in Section 368(a) of the Code, subject to the limitations set forth in this Agreement; and

WHEREAS, the Company, Parent, Merger Subsidiary and Merger Subsidiary Two desire to make certain representations, warranties, covenants and agreements in connection with the Mergers and also to prescribe certain conditions to the Mergers as specified herein.

AGREEMENT

NOW, THEREFOR, 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 agree as follows:

ARTICLE 1
DEFINITIONS

Section 1.01. *Definitions*. (a) As used herein, the following terms have the following meanings:

"**Acquisition Proposal**" means, other than the transactions contemplated by this Agreement, any offer or proposal from any Third Party relating to, whether in a single transaction or series of related transactions, (A) any acquisition or purchase, direct or indirect, of twenty percent (20%) or more of the assets (based on fair market value) of the Company and its Subsidiaries, taken as a whole, or over twenty percent (20%) of any class of equity or voting securities of the Company or of any of its Subsidiaries, (B) any tender offer (including a self-tender offer) or exchange offer that, if consummated, would result in such Third Party's beneficially owning twenty percent (20%) or more of any class of equity or voting securities of the Company or of any of its Subsidiaries or (C) a merger, consolidation, share exchange, business combination, sale of substantially all the assets, reorganization, recapitalization, liquidation, dissolution or other similar transaction involving the Company or any of its Subsidiaries whose assets, individually or in the aggregate, constitute more than twenty percent (20%) of the assets (based on fair market value) of the Company and its Subsidiaries, taken as a whole.

"**Affiliate**" means, with respect to any Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with such Person.

"**Applicable Law**" means, with respect to any Person, any federal (including United States or Australian), state, local or foreign law (statutory, common or otherwise), constitution, treaty, convention, ordinance, code, rule, regulation, order, injunction, judgment, decree, ruling or other similar requirement enacted, adopted, promulgated or applied by a Governmental Authority that is binding upon or applicable to such Person.

"**ASIC**" means the Australian Securities and Investments Commission.

"**ASTC**" means ASX Settlement and Transfer Corporation Pty Ltd ACN 008 504 532.

"**ASX**" means ASX Limited ACN 008 624 691 or the Australian Securities Exchange, as the context requires.

"**Australian Company Subsidiary**" means HeartWare Limited ABN 34 111 970 257.

"**Average Parent Stock Price**" means an amount equal to the volume weighted average of the per share daily closing prices of one share of Parent Stock on NASDAQ, as such closing stock prices are reported by the *Wall Street Journal*, for the twenty (20) consecutive trading days ending on and including the Measurement End Date.

"**Business Day**" means a day, other than Saturday, Sunday or other day on which commercial banks in New York, New York are authorized or required by Applicable Law to close.

"**Capital Expenditure and Loan Proceeds Budget**" means the capital expenditure and loan proceeds budget regarding the projected capital expenditures of the Company and its Subsidiaries and the intended uses of funds borrowed by the Company under the Loan Documents, as provided by the Company to Parent on the date hereof.

"**CDIs**" means CHESS Depositary Interests representing shares of Company Stock (in the ratio of one (1) share of Company Stock to thirty five (35) CDIs).

"**CDN**" means CHESS Depositary Nominees Pty Ltd ACN 071 346 506.

"**CHESS**" means the clearing house electronic sub-register system of share transfers operated by ASTC.

"**Code**" means the Internal Revenue Code of 1986, as amended.

"**Company Disclosure Schedule**" means the disclosure schedule dated the date hereof, including the Company Schedule of Options, regarding this Agreement that has been provided by the Company to Parent.

"**Company Group**" means the Company, the Australian Company Subsidiary and any of their respective Subsidiaries.

"**Company Material Adverse Effect**" means any event, change or occurrence which, individually or together with any one or more other events, changes or occurrences (A) has had, or is reasonably likely to have, a material adverse effect upon the business, assets, liabilities, condition (financial or otherwise) or operating results of the Company and its Subsidiaries taken as a whole; *provided*, that in no event shall any of the following events, changes, or occurrences constitute a "Company Material Adverse Effect" or be considered in determining whether a "Company Material Adverse Effect" has occurred or is reasonably likely to occur: (i) changes in general economic, securities market or business conditions except to the extent that such changes have a materially disproportionate effect (relative to other industry participants) on the Company and its Subsidiaries, taken as a whole, (ii) changes in conditions generally affecting the industry in which the Company and its Subsidiaries operate, except to the extent that such changes have a materially disproportionate effect (relative to other industry participants that are development stage companies at a similar stage of development as the Company and its Subsidiaries) on the Company and its Subsidiaries, taken as a whole, (iii) any change in the trading price or trading volume of the Company's common stock or CDIs in and of itself or any failure to meet internal or published projections or forecasts for any period in and of itself (in each case, as distinguished from any change, event or occurrence giving rise or contributing to such change or failure), (iv) changes in GAAP or Applicable Laws or (v) changes resulting from the announcement or the existence of, or that result from the compliance by the Company with its obligations under, this Agreement, or (B) would prevent the Company from consummating, or materially delay, the Merger.

"**Company Stock**" means the common stock, $0.001 par value, of the Company (including common stock in respect of which CDIs have been issued).

"**Company Stock Award Amount**" means an amount, rounded to the nearest whole cent, equal to $$30.19.

"**Company Stock Award Exchange Ratio**" means 1.1499.

"**Company Stockholders**" means the holders of Shares and the holders of CDIs.

"**Corporations Act**" means the Australian Corporations Act 2001 (Cth), as amended and the Corporations Regulations made under it.

"**Delaware Law**" means the General Corporation Law of the State of Delaware.

"**Equity Interest**" shall mean any share, capital stock, partnership, membership, unit or similar ownership interest in any entity and any option, warrant, right or security convertible, exchangeable or exercisable therefor.

"**ERISA**" means the Employee Retirement Income Security Act of 1974, as amended.

"**Exchange Act**" means the Securities Exchange Act of 1934, as amended.

"**Expenses**" means all out-of-pocket costs, fees and expenses (including all fees and expenses of counsel, accountants, investment bankers, experts and consultants to a Party hereto and its Affiliates) incurred by a Party or on its behalf in connection with or related to the authorization, preparation, negotiation, execution and performance of this Agreement and the transactions contemplated hereby, including the preparation, printing, filing and mailing of the Company Proxy Statement, the solicitation of stockholder or shareholder approvals, the filing of any required notices under the HSR Act or other similar regulations, and all other matters related to the Mergers and the other transactions contemplated by this Agreement.

"**GAAP**" means generally accepted accounting principles in the United States.

"**Governmental Authority**" means any transnational, domestic or foreign federal, state or local, governmental authority, department, court, agency or official, including any political subdivision thereof.

"**HSR Act**" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

"**knowledge**" of (i) the Company means the actual knowledge, after reasonable inquiry, of each of Messrs. Doug Godshall, David McIntyre and Jeff LaRose, and (ii) Parent means the actual knowledge, after reasonable inquiry, of each of Messrs. Gary Burbach, David Smith and David Lehman.

"**Lien**" means, with respect to any property or asset, any mortgage, lien, pledge, charge, security interest, encumbrance, or other adverse claim of any kind in respect of such property or asset.

"**Measurement End Date**" means the fifth (5th) trading day prior to, but not including, the Closing Date.

"**NASDAQ**" means The NASDAQ Stock Market.

"**Parent Disclosure Schedule**" means the disclosure schedule dated the date hereof regarding this Agreement that has been provided by Parent to the Company.

"**Parent Material Adverse Effect**" means any event, change or occurrence which, individually or together with any one or more other events, changes or occurrences (A) has had, or is reasonably likely to have, a material adverse effect upon the business, assets, liabilities, condition (financial or otherwise) or operating results of Parent and its Subsidiaries taken as a whole; *provided*, that in no event shall any of the following events, changes, or occurrences constitute a "Parent Material Adverse Effect" or be considered in determining whether a "Parent Material Adverse Effect" has occurred or is reasonably likely to occur: (i) changes in general economic, securities market or business conditions except to the extent that such changes have a materially disproportionate effect (relative to other industry participants) on Parent and its Subsidiaries, taken as a whole, (ii) changes in conditions generally affecting the industry in which Parent and its Subsidiaries operate, except to the extent that such changes have a materially disproportionate effect (relative to other industry participants that are at a similar stage of development as Parent and its Subsidiaries) on Parent and its Subsidiaries, taken as a whole,

(iii) any change in the trading price or trading volume of Parent's common stock in and of itself or any failure to meet internal or published projections or forecasts for any period in and of itself (in each case, as distinguished from any change, event or occurrence giving rise or contributing to such change or failure), (iv) changes in GAAP or Applicable Laws or (v) changes resulting from the announcement or the existence of, or that result from the compliance by Parent with its obligations under, this Agreement or (B) would prevent Parent, Merger Subsidiary or Merger Subsidiary Two from consummating, or materially delay, the Merger.

"**Parent Stock**" means the common stock, no par value, of Parent.

"**Permitted Investments**" means (i) direct obligations of the United States, (ii) obligations for which the full faith and credit of the United States is pledged to provide for the payment of principal and interest, (iii) commercial paper rated the highest quality by Moody's Investor Service, Inc. or Standard & Poor's rating Group or (iv) any money market or similar account invested primarily in obligations of the type set forth in the foregoing clauses (i) through (iii).

"**Person**" means an individual, corporation, partnership, limited liability company, association, trust or other entity or organization, including a government or political subdivision or an agency or instrumentality thereof.

"**Redomicile**" means the transactions effecting the redomicile of the Company Group from Australia to the United States, as described in the Company Group's Information Memorandum dated and lodged with ASX on September 22, 2008.

"**Registered IP**" means an item of Intellectual Property that is issued by, registered or filed with, renewed by or the subject of a pending application before any Governmental Authority or Internet domain name registrar.

"**Sarbanes-Oxley Act**" means the Sarbanes-Oxley Act of 2002, as amended.

"**SEC**" means the Securities and Exchange Commission.

"**Securities Act**" means the Securities Act of 1933, as amended.

"**Subsidiary**" means, with respect to any Person, any corporation, limited liability company, partnership or other entity or organization of which such Person (either alone or through or together with any other Subsidiary of such Person), owns, directly or indirectly, a majority of the stock or other Equity Interests having ordinary voting power to elect a majority of the board of directors or other persons performing similar functions of such entity or organization.

"**Superior Proposal**" means any bona fide, unsolicited written Acquisition Proposal (for this purpose, substituting "fifty percent (50%)" for each reference to "twenty percent (20%)" in the definition of Acquisition Proposal) which the Board of Directors of the Company determines in good faith (after consultation with its outside legal counsel and financial advisors) (a) is reasonably likely to be consummated and (b) if consummated, would result in a transaction more favorable to the Company Stockholders than the transactions provided for in this Agreement

(including any adjustment to the terms and conditions of this Agreement proposed by Parent in response to such Acquisition Proposal), in each case with respect to clauses (a) and (b), taking into account all of the terms and conditions of such Acquisition Proposal, including the Third Party making such Acquisition Proposal and the legal, financial, regulatory and other aspects of such Acquisition Proposal, including any conditions relating to financing, regulatory approvals or other events or circumstances.

"**Third Party**" means any Person or "group" (within the meaning of Section 13(d)(3) of the Exchange Act), other than the Company or any of its Subsidiaries or Parent or any of its Subsidiaries.

(b) Each of the following terms is defined in the Section set forth opposite such term:

Term	Section
Antitrust Division	6.06(a)
Adverse Recommendation Change	6.04(a)
Adverse Recommendation Change Fee	8.03(a)
Agreement	Preamble
Aggregate Reorganization Consideration Closing Value	6.11(b)
Aggregate Stock Consideration Closing Value	6.11(b)
ASX Listing Rules	4.03
Australian Prospectus	6.03(a)
Bankruptcy and Equity Exceptions	4.02(a)
Book-Entry Shares	2.04
Cancelled Company Option	2.03(b)
Cash Consideration	2.02(b)
Certificate of Merger	2.01(c)
Certificate	2.04
Change of Control Payment Plan	6.09(a)
Closing	2.01(b)
Closing Date	2.01(b)
COBRA	4.16(e)
Company	Preamble
Company ASX Documents	4.07(a)
Company Benefit Plan	4.16(a)
Company Board Recommendation	4.02(b)
Company Contributor	4.18(c)
Company ESOP	2.03(b)
Company Financial Statements	4.08
Company Incentive Option	2.03(a)
Company Intellectual Property	4.17(c)
Company Option	2.03(b)
Company Permits	4.12(a)
Company Preferred Stock	4.05(a)
Company Proxy Statement	4.10
Company Public Documents	4.07(a)
Company Registered Copyrights	4.17(b)

Term	Section
Company Registered IP	4.17(b)
Company Registered Marks	4.17(b)
Company Registered Patents	4.17(b)
Company Schedule of Options	4.05(a)
Company SEC Documents	4.07(a)
Company Securities	4.05(b)
Company Stock Awards	2.03(c)
Company Stock-Based Award	2.03(c)
Company Stock Plan	2.03(f)
Company Stockholder Approval	4.02(a)
Company Stockholder Meeting	6.03(d)
Company Subsidiary Securities	4.06(b)
Company Termination Fee	8.03(a)
Confidentiality Agreement	6.04(d)
Continuing Employees	6.09(a)
Continuity Percentage	6.11(b)
Contract	4.04
Copyrights	4.17(a)
Dissenting Share	2.02(b)
Dissenting Stockholders	2.02(b)
Effective Time	2.01(c)
Environmental Law	4.18(a)
Environmental Permit	4.18(a)
ERISA Affiliate	4.16(d)
Excess Parent Stock	2.02(e)
Exchange Agent	2.04
Exchange Fund	2.04
FDA	4.12(b)
FTC	6.06(a)
Hazardous Substances	4.18(a)
In Licensed Company IP Agreements	4.17(f)
Incentive Agreements	Recitals
Indebtedness	4.05(c)
Indemnified Person	6.10(c)
Insurance Policy	4.20
Intellectual Property	4.17(a)
Intermediate Surviving Corporation	Recitals
IRS	4.16(a)
Leased Property	4.21(a)
Loan Documents	Recitals
Marks	4.17(a)
Material Contract	4.14(b)
Merger	Recitals
Merger Consideration	2.02(b)
Mergers	Recitals

Term	Section
Merger Subsidiary	Preamble
Merger Subsidiary Two	Preamble
NHA	4.12(a)
Outside Date	8.01(b)
Parent	Preamble
Parent Financial Statements	5.07
Parent Incentive Option	2.03(a)
Parent Permits	5.09(a)
Parent Preferred Stock	5.05(a)
Parent SEC Documents	5.06
Parent Stock Closing Price	6.11(b)
Party	Preamble
Parties	Preamble
Patents	4.17(a)
Permitted Liens	4.21(c)
PHIA	4.12(a)
Property Leases	4.21(b)
Registration Statement	5.08(a)
Regulatory Approval	6.05(a)
Reorganization Threshold	6.11(b)
Representatives	6.04(a)
Reset Notice	2.02(c)
Second Merger	Recitals
Second Merger Certificate of Merger	2.01(d)
Second Merger Effective Time	2.01(d)
Share	2.02(b)
SSA	4.12(a)
Stock Consideration	2.02(b)
Support Agreements	Recitals
Surviving Corporation	Recitals
Surviving Corporations	Recitals
Taxes	4.15(m)
Tax Representation Letters	6.11(a)
Tax Return	4.15(m)
TGA	4.12(b)
Top-Up Notice	2.02(c)
Trade Secrets	4.17(a)
Treasury Shares	2.02(d)
Walk-Away Notice	2.02(c)
Walk-Away Price	2.02(c)
WARN Act	4.16(h)

Section 1.02. *Other Definitional and Interpretative Provisions*. In this Agreement, unless otherwise specified, the following rules of interpretation apply:

(a) A defined term has its defined meaning throughout this Agreement and in each Exhibit and Schedule to this Agreement, regardless of whether it appears before or after the place where it is defined. References to Articles, Sections, Exhibits and Schedules are to Articles, Sections, Exhibits and Schedules of this Agreement unless otherwise specified. All Exhibits and Schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein. Any capitalized terms used in any Exhibit or Schedule but not otherwise defined therein, shall have the meaning as defined in this Agreement.

(b) References to any agreement or contract are to that agreement or contract as amended, modified or supplemented from time to time in accordance with the terms hereof and thereof.

(c) The words "hereof", "herein" and "hereunder" and words of like import used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement. Whenever the words "include", "includes" or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation", whether or not they are in fact followed by those words or words of like import. "Writing", "written" and comparable terms refer to printing, typing and other means of reproducing words (including electronic media) in a visible form. References to "$" or "dollars" refer to U.S. dollars unless otherwise noted.

(d) Any singular term in this Agreement shall be deemed to include the plural, and any plural term the singular. Words importing one gender include the other gender. References to any Person include the successors and permitted assigns of that Person.

(e) References to "law", "laws" or to a particular statute or law shall be deemed also to include any Applicable Law, and references to any Applicable Law shall be deemed to include references to any rules or regulations promulgated, or statutory instruments issued, thereunder.

(f) To the extent this Agreement refers to information or documents to be made available, delivered or provided by the Company to Parent, Merger Subsidiary or Merger Subsidiary Two, the Company shall be deemed to have satisfied such obligation if the Company or any of its Representatives has made such information or document available by (i) posting such information or document prior to the date of this Agreement to the "electronic data room" maintained by the Company and accessible by Parent and its Representatives for purposes of the transactions contemplated by this Agreement or (ii) delivering such information or document to Parent or its Representatives prior to the date of this Agreement.

(g) References from or through any date mean, unless otherwise specified, from and including or through and including, respectively.

ARTICLE 2
THE MERGERS

Section 2.01. *The Mergers*. (a) *The Mergers*. At the Effective Time, upon the terms and subject to satisfaction or valid waiver of the conditions set forth in this Agreement, Merger Subsidiary shall be merged with and into the Company in the Merger, whereupon the separate existence of Merger Subsidiary shall cease, and the Company shall continue as the Intermediate

Surviving Corporation. If, and only if, the Continuity Percentage equals or exceeds the Reorganization Threshold, immediately following the Effective Time, the Intermediate Surviving Corporation shall be merged with and into Merger Subsidiary Two in the Second Merger, whereupon the separate existence of the Intermediate Surviving Corporation shall cease, and Merger Subsidiary Two shall continue as the Surviving Corporation. For the avoidance of doubt, if the Continuity Percentage is less than the Reorganization Threshold, the Parties shall not, and shall have no obligation to, consummate the Second Merger pursuant to this Agreement.

(b) *The Closing*. Subject to the terms and conditions of this Agreement, the closing of the Mergers (the "**Closing**") shall take place on a day that is a Business Day (i) at the offices of Latham & Watkins LLP, 140 Scott Drive, Menlo Park, California 94025 at 9:00 a.m. (Pacific time), no later than the third (3rd) Business Day following the satisfaction of the conditions set forth in Article 7 (other than (A) those conditions that are waived in accordance with the terms of this Agreement by the Party or Parties for whose benefit such conditions exist and (B) any such conditions that, by their terms, are not capable of being satisfied until the Closing) or (ii) at such other place, time and/or date as the Parties may otherwise agree. The date upon which the Closing shall occur is referred to herein as the "**Closing Date**."

(c) *The Merger*. At the Closing, the Parties shall cause the Merger to be consummated by filing a certificate of merger (the "**Certificate of Merger**") with the Secretary of State of the State of Delaware, in such form as required by, and properly executed in accordance with, Delaware Law. The Merger shall become effective at such time as the Certificate of Merger is duly filed with the Secretary of State of the State of Delaware or at such other time as is agreed upon by the Parties and specified as the effective time in the Certificate of Merger (the "**Effective Time**"). At the Effective Time, the effect of the Merger shall be as provided in this Agreement and the applicable provisions of Delaware Law. Without limiting the generality of the foregoing, at the Effective Time, all the property, rights, privileges, immunities, powers and franchises of the Company and Merger Subsidiary shall vest in the Intermediate Surviving Corporation, and all debts, liabilities and duties of the Company and Merger Subsidiary shall become the debts, liabilities and duties of the Intermediate Surviving Corporation.

(d) *The Second Merger*. If, and only if, the Continuity Percentage equals or exceeds the Reorganization Threshold, at the Closing, immediately following the consummation of the Merger, the Parties shall cause the Second Merger to be consummated by filing a certificate of merger (the "**Second Merger Certificate of Merger**") with the Secretary of State of the State of Delaware, in such form as required by, and properly executed in accordance with, Delaware Law. The Second Merger shall become effective at such time as the Second Merger Certificate of Merger is duly filed with the Secretary of State of the State of Delaware or at such other time as is agreed upon by the Parties and specified as the effective time in the Second Merger Certificate of Merger (the "**Second Merger Effective Time**"); *provided*, *however*, that in no event shall the Second Merger Effective Time precede the Effective Time. At the Second Merger Effective Time, the effect of the Second Merger shall be as provided in this Agreement and the applicable provisions of Delaware Law. Without limiting the generality of the foregoing, at the Second Merger Effective Time, all the property, rights, privileges, immunities, powers and franchises of the Intermediate Surviving Corporation and Merger Subsidiary Two shall vest in the Surviving

Corporation, and all debts, liabilities and duties of the Intermediate Surviving Corporation and Merger Subsidiary Two shall become the debts, liabilities and duties of the Surviving Corporation.

Section 2.02. *Conversion of Shares*. At the Effective Time, by virtue of the Merger and without any action on the part of the Company, Parent, Merger Subsidiary or Merger Subsidiary Two or the holders of any shares of capital stock of the Company, Parent or Merger Subsidiary:

(a) *Merger Subsidiary Common Stock*. Each share of common stock of Merger Subsidiary outstanding immediately prior to the Effective Time shall be converted into and become one (1) share of common stock of the Intermediate Surviving Corporation with the same rights, powers and privileges as the shares so converted and shall constitute the only outstanding shares of capital stock of the Intermediate Surviving Corporation.

(b) *Company Stock*. Subject to Section 2.02(e), each share of Company Stock (each, a "**Share**") issued and outstanding immediately prior to the Effective Time (other than Treasury Shares that will be cancelled in accordance with Section 2.02(d) and any shares of Company Stock ("**Dissenting Shares**") which are held by Company Stockholders exercising appraisal rights in accordance with Section 262 of the Delaware Law ("**Dissenting Stockholders**")) shall automatically be converted into the right to receive (i) $14.30 in cash, without interest (the "**Cash Consideration**") and (ii) 0.6054 validly issued, fully paid and non-assessable shares of Parent Stock, subject to the adjustments set forth in Section 2.02(c) (the "**Stock Consideration**" and together with the Cash Consideration, the "**Merger Consideration**").

(c) *Adjustments to Stock Consideration.* Notwithstanding the foregoing:

(i) If the Average Parent Stock Price is less than or equal to $18.38 (the "**Walk-Away Price**"), the Company shall have the right to give written notice to Parent (a "**Walk-Away Notice**"), of the Company's election to terminate this Agreement in accordance with Section 8.01 (d)(iii) hereof. Any Walk-Away Notice shall be delivered to Parent no later than 5:00 p.m. Pacific time on the second (2nd) Business Day following the Measurement End Date. If the Company delivers a timely Walk-Away Notice, Parent shall have the right to give written notice to the Company (the "**Top-Up Notice**"), of Parent's election to increase (A) the per share Stock Consideration otherwise payable hereunder to a number of shares of Parent Stock equal to (i) the product of (x) the Stock Consideration, (y) $26.25 and (z) seventy percent (70%) divided by (ii) the Average Parent Stock Price and (B) the Company Stock Award Exchange Ratio to (i) the product of (x) the Company Stock Award Exchange Ratio, (y) $26.25 and (z) seventy percent (70%) divided by (ii) the Average Parent Stock Price. Any Top-Up Notice shall be delivered to the Company no later than 5:00 p.m. Pacific time on the second (2nd) Business Day following delivery to Parent of the Walk-Away Notice. In the event that Parent delivers a Top-Up Notice in response to a duly delivered Walk-Away Notice in accordance with this Section 2.02(c)(i), (1) the Company shall not be entitled to terminate this Agreement pursuant to Section 8.01(d)(iii) and (2) for all purposes under this Agreement, the Stock Consideration and the Company Stock Award Exchange Ratio shall mean the Stock Consideration and the Company Stock Award Exchange Ratio as adjusted pursuant to this Section 2.02(c)(i).

(ii) If the Average Parent Stock Price is greater than or equal to $34.13, Parent shall have the right to give written notice to the Company (a "**Reset Notice**"), of Parent's election to decrease (A) the per share Stock Consideration otherwise payable hereunder to a number of shares of Parent Stock equal to (i) the product of (x) the Stock Consideration, (y) $26.25 and (z) one hundred thirty percent (130%) divided by (ii) the Average Parent Stock Price and (B) the Company Stock Award Exchange Ratio to (i) the product of (x) the Company Stock Award Exchange Ratio, (y) $26.25 and (z) one hundred thirty percent (130%) divided by (ii) the Average Parent Stock Price. Any Reset Notice shall be delivered to the Company no later than 5:00 p.m. Pacific time on the second (2nd) Business Day following the Measurement End Date. In the event that Parent delivers a Reset Notice in accordance with this Section 2.02(c)(ii), for all purposes under this Agreement, the Stock Consideration and the Company Stock Award Exchange Ratio shall mean the Stock Consideration and the Company Stock Award Exchange Ratio as adjusted pursuant to this Section 2.02(c)(ii).

(d) *Treasury Shares*. Each Share held in the treasury of the Company or owned, directly or indirectly, by Parent, Merger Subsidiary or Merger Subsidiary Two immediately prior to the Effective Time (collectively, "**Treasury Shares**") shall automatically be cancelled and retired and shall cease to exist, and no consideration shall be delivered in exchange therefor.

(e) *Treatment of Fractional Shares*. Notwithstanding any other provision of this Agreement, no fractional shares of Parent Stock will be issued and, in lieu of any fractional share of Parent Stock that otherwise would be issuable pursuant to the Merger, each holder of Shares (and, to the extent applicable, CDIs) who otherwise would be entitled to receive a fraction of a share of Parent Stock pursuant to the Merger will be paid an amount in cash, without interest, in lieu thereof equal to such holder's proportionate interest in the net proceeds from the sale or sales by the Exchange Agent on behalf of such holder of the aggregate fractional shares of Parent Stock that such holder otherwise would be entitled to receive. As soon as practicable following the completion of the Merger, the Exchange Agent shall determine the excess of (i) the number of whole shares of Parent Stock issuable to the former holders of Shares pursuant to the Merger including fractional shares, over (ii) the aggregate number of whole shares of Parent Stock to be distributed to former holders of Shares (and, to the extent applicable, CDIs) (such excess being collectively called the "**Excess Parent Stock**"). The Exchange Agent shall, as promptly as reasonably practicable following the Effective Time (and in any event within five (5) Business Days after the date upon which the Certificate (or affidavit(s) of loss in lieu thereof) that would otherwise result in the issuance of such fractional shares of Parent Stock has been received by the Exchange Agent), sell the Excess Parent Stock on NASDAQ at the then prevailing prices on NASDAQ and such sales shall be executed in round lots to the extent practicable. Parent shall pay all commissions, transfer Taxes and other out-of-pocket transaction costs, including the expenses and compensation of the Exchange Agent and costs associated with calculating and distributing the respective cash amounts payable to the applicable former holders of Shares, incurred in connection with such sales of Excess Parent Stock. Until the proceeds of such sales have been distributed to the former holders of Shares (and, to the extent applicable, CDIs) to whom fractional shares of Parent Stock otherwise would have been issued in the Merger, the Exchange Agent will hold such proceeds in trust for such former holders. As soon as practicable after the determination of the amount of cash to be paid to former holders of Shares (and, to the

extent applicable, CDIs) in respect of any fractional shares of Parent Stock, the Exchange Agent shall distribute such amounts to such former holders.

(f) *Changes in Capitalization*. If, between the date of this Agreement and the Effective Time, any change in the outstanding shares of capital stock of the Company or Parent shall occur, including by reason of any reclassification, recapitalization, stock split or combination, exchange or readjustment of shares, or any stock dividend thereon with a record date during such period, but excluding any change that results from any exercise of Company Stock Awards to purchase shares of Company Stock, the Cash Consideration, the Stock Consideration, the Company Stock Award Amount and the Company Stock Award Exchange Ratio and any other amounts payable pursuant to this Agreement shall be adjusted appropriately to account for such change.

(g) *Limitation on Issuance of Parent Stock*. Notwithstanding any provision to the contrary in this Agreement, if the Company delivers a Walk-Away Notice and Parent elects to deliver a Top-Up Notice in response thereto, and, as a result of Parent's delivery of such Top-Up Notice, after giving effect to the increase in the Stock Consideration and the Company Stock Award Exchange Ratio that would result therefrom in accordance with Section 2.02(c)(i), the issuance of shares of Parent Stock and Parent Incentive Options in connection with the transactions contemplated by this Agreement would require the approval of Parent's stockholders under NASDAQ Marketplace Rule 4350, then (i) the per share Stock Consideration shall be reduced to a number of shares of Parent Stock such that the aggregate number of shares of Parent Stock issued or to be issued in connection with the transactions contemplated by this Agreement shall be equal to the maximum number of shares of Parent Stock that may be issued without requiring the approval of Parent's stockholders under NASDAQ Marketplace Rule 4350, and, for all purposes under this Agreement, the Stock Consideration shall mean the Stock Consideration as so adjusted and (ii) the per share Cash Consideration shall be increased by an amount equal to the product of (A) the number of shares by which the per share Stock Consideration has been reduced pursuant to the preceding Section 2.02(g)(i) and (B) the Average Parent Stock Price.

Section 2.03. *Treatment of Options and Other Equity-Based Awards*. (a) *Unvested Incentive Stock Options*. The terms of outstanding options to purchase shares of Company Stock granted or issued under incentive option agreements or similar arrangements with directors, employees or consultants of the Company or under the HeartWare International, Inc. Incentive Option Terms: Non-Executive Directors or the HeartWare International, Inc. 2008 Stock Incentive Plan (each, a "**Company Incentive Option**") shall be adjusted as necessary to provide that, at the Effective Time, each Company Incentive Option that is unvested and outstanding immediately prior to the Effective Time, including each Company Incentive Option issued prior to the Effective Time in accordance with Section 6.01(c)(i)(B), shall cease to represent the right to acquire shares of Company Stock and shall instead be converted into, and deemed to constitute, an option to acquire, on the same terms and conditions as were applicable under such Company Incentive Option, a number of shares of Parent Stock (each, a "**Parent Incentive Option**") equal to the product of (a) the number of shares of Company Stock represented by such unvested Company Incentive Option and (b) the Company Stock Award Exchange Ratio, rounded down, if necessary, to the nearest whole share of Parent Stock and such Parent Incentive Option shall have an exercise price per share (rounded up to the nearest cent) equal to (x) the per

share exercise price specified in such Company Incentive Option divided by (y) the Company Stock Award Exchange Ratio; *provided*, *however*, that the exercise price and the number of shares of Parent Stock subject to each Parent Incentive Option shall be determined in a manner consistent with the requirements of Section 409A of the Code, and to the extent necessary to avoid treating the assumption of such Company Incentive Options as a grant of a new stock option under Section 409A of the Code, the exercise price of Parent Incentive Options shall be increased. For purposes of this Section 2.03(a), any exercise price for a Parent Incentive Option that is measured in Australian dollars shall be deemed to be converted to U.S. dollars for all purposes hereunder at an exchange rate of 1.5265 Australian dollars for each U.S. dollar.

(b) *Vested Incentive Stock Options and Employee Stock Options*. The terms of each outstanding vested Company Incentive Option and each outstanding option to purchase shares of Company Stock issued under the HeartWare International, Inc. Employee Stock Option Plan (each, a "**Company ESOP**" and, together with the Company Incentive Options, each, a "**Company Option**") shall be adjusted as necessary to provide that, at or immediately prior to the Effective Time, each such Company Option, whether or not exercisable or vested, that is outstanding immediately prior to the Effective Time (each, a "**Cancelled Company Option**") shall be cancelled and will convert into the right to receive a cash payment, without interest, equal to (i) the excess, if any, of the Company Stock Award Amount over the applicable exercise price per share of Company Stock of such Cancelled Company Option multiplied by (ii) the number of shares of Company Stock such holder could have purchased (assuming full vesting of each outstanding option to purchase shares of Company Stock issued under the HeartWare International, Inc. Employee Stock Option Plan) had such holder exercised such Cancelled Company Option in full immediately prior to the Effective Time. For purposes of this Section 2.03(b), any exercise price for a Company ESOP that is measured in Australian dollars shall be deemed to be converted to U.S. dollars for all purposes hereunder at an exchange rate of 1.5265 Australian dollars for each U.S. dollar.

(c) *Stock-Based Awards*. The terms of each right of any kind, contingent or accrued, to receive shares of Company Stock or benefits measured by the value of a number of shares of Company Stock, and each award of any kind consisting of shares of Company Stock, issued under the HeartWare International, Inc. Restricted Stock Unit Plan, the HeartWare International, Inc. 2008 Stock Incentive Plan or the HeartWare International, Inc. Employee Stock Option Plan (including restricted stock, restricted stock units, deferred stock units and dividend equivalents), other than Company Incentive Options and Company ESOPs (each, a "**Company Stock-Based Award**" and, together with the Company Incentive Options and Company ESOPs, the "**Company Stock Awards**") shall be adjusted as necessary to provide that, at or immediately prior to the Effective Time, each such Company Stock-Based Award, whether or not exercisable or vested, that is outstanding immediately prior to the Effective Time shall be cancelled and will convert into the right to receive a cash payment, without interest, equal to the Company Stock Award Amount multiplied by the number of shares of Company Stock the holder of such Company Stock-Based Award would have received had such Company Stock-Based Award been fully earned, vested and exercisable and been exercised or settled immediately prior to the Effective Time.

(d) *Stock Award Consents*. Prior to the Effective Time, the Company shall (i) use its commercially reasonable efforts to obtain any consents from holders of Company Stock Awards

and (ii) make any amendments to the terms of any Company Stock Plans that are necessary to give effect to the transactions contemplated by this Section 2.03. Notwithstanding any other provision of this Section 2.03, payment may be withheld in respect of any Company Stock Awards until any necessary consents are obtained.

(e) *Stock Award Notices*. Prior to the Effective Time, the Company shall deliver all required notices (which notices shall have been approved by Parent, in its reasonable discretion) to each holder of Company Stock Awards setting forth each holder's rights pursuant to the respective Company Stock Plan, stating that such Company Stock Awards shall be treated in the manner set forth in this Section 2.03.

(f) *Termination of Company Stock Plans*. The Company shall take such actions as are necessary to implement the provisions of this Section 2.03 and to ensure that, as of the Effective Time, (i) the HeartWare International, Inc. 2008 Stock Incentive Plan, HeartWare International, Inc. Incentive Option Terms: Non-Executive Directors, HeartWare International, Inc. Employee Stock Option Plan, the HeartWare International, Inc. Restricted Stock Unit Plan and each other employee, director or consultant stock option, stock purchase or equity compensation plan, arrangement or agreement of the Company (each, a "**Company Stock Plan**") shall terminate and (ii) no holder of a Company Stock Award or any participant in any Company Stock Plan or any other employee incentive or benefit plan, program or arrangement or any non-employee director plan maintained by the Company shall have any rights to acquire, or other rights in respect of, the capital stock of the Company, either Surviving Corporation or any of their Subsidiaries, except the right of holders of (x) Company Incentive Options to receive Parent Incentive Options in cancellation and settlement thereof accordance with Section 2.03(a) and (y) other Company Stock Awards to receive the applicable payment contemplated by this Section 2.03 in cancellation and settlement thereof.

(g) *Assumption of Incentive Options*. Parent shall take such actions as are necessary for the assumption of the Company Incentive Options pursuant to Section 2.03(a), including the reservation, issuance and listing of Parent Stock as necessary to effectuate the transactions contemplated by Section 2.03(a). Parent shall prepare and file with the SEC a registration statement on an appropriate form, or a post-effective amendment to a registration statement previously filed under the Securities Act, with respect to the shares of Parent Stock subject to the Parent Incentive Options and, where applicable, shall use its commercially reasonable efforts to have such registration statement declared effective as soon as practicable following the Effective Time and to maintain the effectiveness of such registration statement covering such Parent Incentive Options (and to maintain the current status of the prospectus contained therein) for so long as such Parent Incentive Options remain outstanding. With respect to those individuals, if any, who, subsequent to the Effective Time, will be subject to the reporting requirements under Section 16(a) of the Exchange Act, where applicable, Parent shall use all reasonable efforts to administer the stock plan governing such Parent Incentive Options in a manner that complies with Rule 16b-3 promulgated under the Exchange Act to the extent the Company Option Plan governing the Company Incentive Options complied with such rule prior to the Merger.

Section 2.04. *Exchange of Certificates* Prior to the Effective Time, Parent shall appoint an agent of recognized standing reasonably satisfactory to the Company to act as exchange agent (the "**Exchange Agent**") for the payment of Merger Consideration. At the Effective Time,

Parent shall deposit or cause to be deposited, with the Exchange Agent for the benefit of holders of certificates representing outstanding Shares (each a "**Certificate**") or uncertificated Shares represented by book-entry (including CDIs held on an issuer-sponsored subregister or CHESS subsregister, the "**Book-Entry Shares**") certificates or, at Parent's option, evidence of shares in book-entry form representing shares of Parent Stock and cash in an amount sufficient to pay the aggregate Merger Consideration paid pursuant to Section 2.02. In addition, Parent shall deposit with the Exchange Agent, as necessary from time to time after the Effective Time, any dividends or distributions payable pursuant to Section 2.05(g). All shares of Parent Stock, cash, dividends and other distributions deposited with the Exchange Agent pursuant to this Section 2.04 shall hereinafter be referred to as the "**Exchange Fund**".

Section 2.05. *Exchange Procedures; Surrender and Payment*. Promptly following the Effective Time, Parent shall send, or shall cause the Exchange Agent to send, to each Company Stockholder of record at the Effective Time (x) a letter of transmittal in customary form (which shall specify that delivery shall be effected, and risk of loss and title to a Certificate or Book Entry Share shall pass, only upon proper delivery of the completed letter of transmittal and any Certificate to the Exchange Agent) and (y) instructions for use in effecting the surrender of Certificates (or affidavits of loss in lieu thereof) or Book-Entry Shares in exchange for the Merger Consideration.

(a) *Surrender of Certificates*. Following the Effective Time, upon surrender of Certificates (or affidavits of loss in lieu thereof), or in the case of Book-Entry Shares, in adherence with the applicable procedures set forth in the letter of transmittal, for cancellation to the Exchange Agent together with such letter of transmittal, properly completed and signed in accordance with the instructions thereto, and such other documents as may be reasonably required by the Exchange Agent or pursuant to such instructions, the holder of such Certificates or Book-Entry Shares shall be entitled to receive in exchange therefor the Merger Consideration which such holder has the right to receive in respect of the Shares formerly represented by such Certificates or Book-Entry Shares, and the Certificates or Book-Entry Shares so surrendered shall forthwith be cancelled. No interest will be paid or accrued on any Merger Consideration payable to holders of Certificates or Book-Entry Shares. The shares of Parent Stock constituting part of such Merger Consideration, at Parent's option, shall be in uncertificated book-entry form, unless a physical certificate is requested by a holder of Shares or is otherwise required under Applicable Law.

(b) *Certificates Only Represent Right to Receive Merger Consideration*. Each Certificate and each Book-Entry Share shall be deemed at any time after the Effective Time to represent only the right to receive upon surrender the Merger Consideration, without interest, or the right to demand to be paid the "fair value" of the Shares represented thereby as contemplated by Section 2.06. All Merger Consideration paid in accordance with the terms hereof shall be deemed to have been paid in full satisfaction of all rights pertaining to such Shares.

(c) *Stock Transfer Books; Share Transfers*. At the Effective Time, the stock transfer books of the Company shall be closed and there shall be no further registration of transfers on the stock transfer books of either Surviving Corporation of any Shares that were outstanding immediately prior to the Effective Time. If, after the Effective Time, Certificates are presented to either Surviving Corporation or the Exchange Agent for transfer or transfer is sought for

Book-Entry Shares, such Certificates or Book-Entry Shares shall be cancelled and exchanged as provided in this Article 2. In the event of a transfer of ownership of Shares (including Book-Entry Shares) which is not registered in the transfer records of the Company, the Merger Consideration may be issued to a transferee if the Certificate representing such Shares is presented to the Exchange Agent (or in the case of Book-Entry Shares, upon adherence to the applicable procedures set forth in the letter of transmittal), accompanied by all documents required to evidence and effect such transfer and by evidence that any applicable stock transfer Taxes have been paid.

(d) *Investment of Exchange Fund*. The Exchange Agent shall invest any cash included in the Exchange Fund in Permitted Investments as directed by Parent on a daily basis from time to time. Any interest or other income resulting from such investments shall be paid to Parent, upon demand. 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 under this Article 2, Parent shall promptly deposit cash into the Exchange Fund in an amount that is equal to the deficiency in the amount of cash required to fully satisfy such payment obligations.

(e) *Return of Exchange Fund*. Any portion of the Exchange Fund (and any interest or other income earned thereon) that remains undistributed to the holders of Certificates or Book-Entry Shares six (6) months after the Effective Time shall be delivered to Parent upon demand, and any holders of Shares who have not theretofore complied with this Section 2.05 shall thereafter look only to Parent (subject to abandoned property, escheat or other similar laws), as general creditors thereof, for payment of the Merger Consideration with respect to Shares formerly represented by such Certificate or Book-Entry Share, without interest. None of Parent, the Surviving Corporations, the Exchange Agent or any other Person shall be liable to any Person in respect of cash from the Exchange Fund properly delivered to a public official pursuant to any applicable abandoned property, escheat or similar Applicable Law.

(f) *Lost Certificates*. If any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit, in form and substance reasonably acceptable to Parent, of that fact by the Person claiming such Certificate to be lost, stolen or destroyed and, if required by Parent or the Exchange Agent, the posting by such Person of a bond in such amount as Parent or the Exchange Agent may determine is reasonably necessary as indemnity against any claim that may be made against it or either Surviving Corporation with respect to such Certificate, and upon the delivery to the Exchange Agent of a duly completed letter of transmittal in accordance with this Section 2.05, following the Effective Time the Exchange Agent will deliver in exchange for such lost, stolen or destroyed Certificate the Merger Consideration payable in respect thereof pursuant to this Agreement, without interest.

(g) *Dividends on Parent Stock*. No dividends or other distributions with respect to shares of Parent Stock constituting part of the Merger Consideration, and no cash payment in lieu of fractional shares as provided in Section 2.02(e), shall be paid to the holder of any Certificates not surrendered or of any Book-Entry Shares not transferred until such Certificates or Book-Entry Shares are surrendered or transferred, as the case may be, as provided in this Section 2.05. Following such surrender or transfer, there shall be paid, without interest, to the Person in whose name such shares of Parent Stock have been registered, (i) promptly following such surrender or transfer, the amount of any cash payable in lieu of fractional shares to which such Person is

entitled pursuant to Section 2.02(e) and the amount of all dividends or other distributions with a record date after the Effective Time previously paid or payable on the date of such surrender with respect to such shares of Parent Stock and (ii) at the appropriate payment date, the amount of dividends or other distributions with a record date after the Effective Time and prior to surrender or transfer and with a payment date subsequent to surrender or transfer payable with respect to such shares of Parent Stock.

(h) *Withholding*. Parent, Merger Subsidiary, Merger Subsidiary Two, the Surviving Corporations and the Exchange Agent shall be entitled to deduct and withhold from the consideration otherwise payable to any holder of Shares, Company Stock Awards or otherwise pursuant to this Agreement such amounts as Parent, Merger Subsidiary, Merger Subsidiary Two, such Surviving Corporation or the Exchange Agent is required to deduct and withhold with respect to the making of such payment under the Code, or any provision of state, local or foreign Tax law. To the extent that amounts are so deducted and withheld, such amounts shall be paid over to the appropriate Governmental Authority in accordance with applicable Tax law and, such withheld amounts shall be treated for all purposes of this Agreement as having been paid to the Person in respect of which such deduction and withholding was made.

Section 2.06. *Dissenters' Rights*. Notwithstanding anything in this Agreement to the contrary, if any Dissenting Stockholder shall demand to be paid the "fair value" of its Dissenting Shares, as provided in Section 262 of the Delaware Law, such Dissenting Shares shall not be converted into or exchangeable for the right to receive the Merger Consideration (except as provided in this Section 2.06) and shall entitle such Dissenting Stockholder only to be paid the "fair value" of such Dissenting Shares, in accordance with Section 262 of the Delaware Law, unless and until such Dissenting Stockholder (a) withdraws (in accordance with Delaware Law) or (b) effectively loses the right to dissent and receive the "fair value" of such Dissenting Shares under Section 262 of the Delaware Law. The Company shall not, except with the prior written consent of Parent, voluntarily make any payment with respect to, or settle or offer to settle, any such demand for payment of "fair value" of Dissenting Shares prior to the Effective Time. The Company shall give Parent notice of any demand by a Dissenting Stockholder to be paid the "fair value" of its Dissenting Shares prior to the Effective Time, and Parent shall have the right to participate at its own expense in all negotiations and proceedings with respect to any such demands. If any Dissenting Stockholder shall have effectively withdrawn (in accordance with Delaware Law) or otherwise lost its right to dissent and receive the "fair value" of its Dissenting Shares, then as of the later of the Effective Time or the occurrence of such event, the Dissenting Shares held by such Dissenting Stockholder shall be cancelled and converted into and represent solely the right to receive the Merger Consideration pursuant to this Article 2, without interest.

Section 2.07. *Conversion of Shares in the Second Merger*. In the event the Continuity Percentage equals or exceeds the Reorganization Threshold, at the Second Merger Effective Time, by virtue of the Second Merger and without any action on the part of Parent, the Intermediate Surviving Corporation or Merger Subsidiary Two or the holders of any shares of capital stock of Parent, the Intermediate Surviving Corporation or Merger Subsidiary Two, each share of common stock of the Intermediate Surviving Corporation and each share of common stock of Merger Subsidiary Two outstanding immediately prior to the Effective Time shall be converted into and become one (1) share of common stock of the Surviving Corporation, with

the same rights, powers and privileges as the shares so converted, and such shares shall constitute the only outstanding shares of capital stock of the Surviving Corporation.

ARTICLE 3
THE SURVIVING CORPORATIONS

Section 3.01. *Certificates of Incorporation*. (a) *Certificate of Incorporation of the Intermediate Surviving Corporation*. The Certificate of Incorporation of the Company shall be amended and restated as of the Effective Time to read in its entirety as set forth on Exhibit A hereto, and, as so amended, shall be the Certificate of Incorporation of the Intermediate Surviving Corporation, until thereafter amended in accordance with Applicable Law.

(b) *Certificate of Incorporation of the Surviving Corporation*. In the event the Continuity Percentage equals or exceeds the Reorganization Threshold, and subject to Section 6.10(a), the Certificate of Incorporation of Merger Subsidiary Two shall be amended and restated as of the Second Merger Effective Time to read in its entirety as set forth on Exhibit A hereto, and, as so amended, shall be the Certificate of Incorporation of the Surviving Corporation, until thereafter amended in accordance with Applicable Law.

Section 3.02. *Bylaws*. (a) *Bylaws of the Intermediate Surviving Corporation*. The Bylaws of the Intermediate Surviving Corporation shall be amended and restated as of the Effective Time to be identical to the Bylaws of Merger Subsidiary as in effect immediately prior to the Effective Time.

(b) *Bylaws of the Surviving Corporation*. In the event the Continuity Percentage equals or exceeds the Reorganization Threshold, subject to Section 6.10(a), the Bylaws of the Surviving Corporation shall be amended and restated as of the Second Merger Effective Time to be identical to the Bylaws of Intermediate Surviving Corporation as in effect immediately prior to the Second Merger Effective Time.

Section 3.03. *Directors and Officers*. (a) *Directors and Officers of the Intermediate Surviving Corporation*. From and after the Effective Time, until successors are duly elected or appointed and qualified in accordance with Applicable Law, (i) the directors of Merger Subsidiary at the Effective Time shall be the directors of the Surviving Corporation and (ii) the officers of Merger Subsidiary at the Effective Time shall be the officers of the Surviving Corporation.

(b) *Directors and Officers of the Surviving Corporation*. In the event the Continuity Percentage equals or exceeds the Reorganization Threshold, from and after the Second Merger Effective Time, until successors are duly elected or appointed and qualified in accordance with Applicable Law, (i) the directors of Intermediate Surviving Corporation at the Second Merger Effective Time shall be the directors of the Surviving Corporation and (ii) the officers of Intermediate Surviving Corporation at the Second Merger Effective Time shall be the officers of the Surviving Corporation.

ARTICLE 4
REPRESENTATIONS AND WARRANTIES OF THE COMPANY

Except as set forth in the Company Disclosure Schedule (which sets forth in each section or subsection thereof a specific reference to the particular Section or subsection of this Agreement to which the information set forth in such section or subsection relates and which contains, among other things, items the disclosure of which is necessary or appropriate either in response to an express disclosure requirement contained in a provision hereof or as an exception to one or more representations or warranties contained in this Article 4, or to one or more of the of the Company's covenants contained herein; *provided*, that any information set forth in one section or subsection of the Company Disclosure Schedule shall be deemed to apply to each other section or subsection thereof to which its relevance is reasonably apparent on its face; *provided*, *further*, that notwithstanding anything in this Agreement to the contrary, the mere inclusion of an item in the Company Disclosure Schedule as an exception to a representation or warranty shall not be deemed an admission that such item represents a material exception or material fact, event or circumstance or that such item has had or would be reasonably likely to have a Company Material Adverse Effect), the Company represents and warrants to Parent that:

Section 4.01. *Corporate Existence and Power*. The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. The Company has the requisite corporate power and authority to own, lease and operate its properties and to carry on its business as it is now being conducted. The Company is duly qualified to do business, and, where such concept is recognized, is in good standing, in each jurisdiction where the character of the properties owned, leased or operated by it or the nature of its business makes such qualification or good standing necessary, except for such failures to be so qualified or in good standing that would not have a Company Material Adverse Effect. The Company has heretofore made available to Parent complete and correct copies of its Certificate of Incorporation and Bylaws, and all amendments thereto, as currently in effect. The Company is not in violation of its Certificate of Incorporation or Bylaws.

Section 4.02. *Corporate Authorization*. (a) The Company has all necessary corporate power and authority to execute and deliver this Agreement, to perform its obligations hereunder and, subject to receipt of the Company Stockholder Approval, to consummate the transactions contemplated hereby. The execution and delivery of this Agreement by the Company, the performance by the Company of its obligations hereunder and the consummation by the Company of the transactions contemplated hereby have been duly and validly 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 consummate the transactions contemplated hereby, other than (a) the affirmative vote of holders of a majority of the outstanding shares of Company Stock in favor of the adoption of this Agreement (the "**Company Stockholder Approval**") and (b) the filing of the Certificate of Merger with the Secretary of State of the State of Delaware in accordance with Delaware Law. This Agreement has been duly authorized and validly executed and delivered by the Company and, assuming the due authorization, execution and delivery by each of Parent, Merger Subsidiary and Merger Subsidiary Two, this Agreement constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, subject to the effect of bankruptcy, insolvency (including all Applicable Laws relating to fraudulent transfers),

reorganization, moratorium and similar Applicable Laws relating to or affecting creditors' rights or remedies and the effect of general principles of equity, whether considered in a proceeding in equity or at law and subject to general principles of equity (the "**Bankruptcy and Equity Exceptions**").

(b) (i) The Board of Directors of the Company, by resolutions duly adopted at a meeting duly called and held, has by unanimous vote of those present (i) determined that this Agreement and the transactions provided for herein are fair to and in the best interests of the Company and the Company Stockholders, (ii) approved this Agreement and declared its advisability and approved the transactions contemplated hereby and (iii) resolved (subject to Section 6.04(b)) to recommend in accordance with Applicable Law that the holders of Company Stock vote in favor of the adoption of this Agreement (the "**Company Board Recommendation**").

Section 4.03. *Governmental Authorization*. The execution and delivery of this Agreement by the Company do not, and the performance by the Company of its obligations hereunder and the consummation of the transactions contemplated hereby will not, require the Company to obtain any consent, approval, license, permit, order or authorization of, or make any filing with or notification to, any Governmental Authority except (a) under (i) the applicable requirements of the Exchange Act (including the filing of the Company Proxy Statement), (ii) any applicable state securities, takeover or "blue sky" laws, (iii) applicable requirements of the Corporations Act or ASIC, (iv) applicable requirements of the official listing rules of ASX (the "**ASX Listing Rules**") and (v) to the extent applicable, the rules and regulations of NASDAQ, (b) pursuant to the pre-merger notification requirements of the HSR Act, (c) the filing and recordation of the Certificate of Merger and the Second Merger Certificate of Merger as required by Delaware Law or (d) where the failure to obtain such consents, approvals, licenses, permits, orders or authorizations, or to make such filings or notifications would not have a Company Material Adverse Effect.

Section 4.04. *Non-contravention*. The execution and delivery by the Company of this Agreement do not, and the performance by the Company of its obligations hereunder and the consummation by the Company of the transactions contemplated hereby will not, (a) conflict with or violate any provision of the Certificate of Incorporation or Bylaws of the Company, as in effect on the date hereof, or any equivalent organizational or governing documents of any of its Subsidiaries as in effect on the date hereof, (b) assuming that all consents, approvals authorizations and other actions described in Section 4.03 have been obtained prior to the Effective Time and all filings and notifications described in Section 4.03 have been made and any waiting periods thereunder have terminated or expired prior to the Effective Time, conflict with or violate any Applicable Law applicable to the Company or of its Subsidiaries or by which any property or asset of the Company or any of its Subsidiaries is bound or (c) require any consent or approval under, result in any breach of or any loss of any benefit under, or constitute a default (or an event which with notice or lapse of time or both would become a default) under, or give to others any right of termination, amendment, acceleration or cancellation of, or result in the creation of any Liens on any property or asset of the Company or any of its Subsidiaries pursuant to, any note, bond, mortgage, indenture, lease, license, permit, franchise, contract, agreement or other instrument or obligation (each, a "**Contract**") to which the Company or any of its Subsidiaries is a party or by which any of their respective properties or assets are bound,

except, with respect to clauses (b) and (c), for such conflicts, violations, breaches, defaults or other occurrences that would not have a Company Material Adverse Effect.

Section 4.05. *Capitalization*. (a) The authorized capital stock of the Company consists of 25,000,000 shares of Company Stock and 5,000,000 shares of preferred stock, par value $0.001 per share (the "**Company Preferred Stock**"). As of February 11, 2009 there are (i) 8,866,702 shares of Company Stock issued and outstanding, (ii) no shares of Company Stock held in the treasury of the Company or owned by any Subsidiary of the Company, (iii) 52,850 shares of Company Stock issuable upon exercise of outstanding Company Incentive Options, (iv) 645,524 shares of Company Stock issuable upon exercise of outstanding Company ESOPs, (v) 179,381 shares of Company Stock issuable pursuant to Company Stock-Based Awards and (vi) no shares of Company Preferred Stock issued and outstanding. As of the date of this Agreement, 1,984,703 shares of Company Stock are reserved for issuance pursuant to the Loan Agreement. Section 4.05(a) of the Company Disclosure Schedule contains a complete and correct list as of February 11, 2009 of each outstanding Company Option and Company Stock-Based Award, including, to the extent applicable, the holder thereof, date of grant, exercise price, vesting schedule, expiration date and number of shares of Company Stock subject thereto (the "**Company Schedule of Options**").

(b) All of the outstanding shares of capital stock of the Company have been duly authorized and validly issued and are fully paid and nonassessable and free of preemptive rights. Except as set forth in Section 4.05(a), there are no (i) shares of capital stock, voting securities or other Equity Interests of the Company, (ii) options, warrants or other rights, agreements, arrangements or commitments of any character to which the Company or any of its Subsidiaries is a party or by which the Company or any of its Subsidiaries is bound relating to the issued or unissued Equity Interests of the Company, (iii) securities convertible into or exchangeable for such Equity Interests, or obligating the Company to issue or sell any shares of its capital stock or other Equity Interests or (iv) securities convertible into or exchangeable for such capital stock of, or other Equity Interests in, the Company (the items in clauses (i), (ii), (iii) and (iv) are referred to collectively as the "**Company Securities**"). There are no outstanding contractual obligations of the Company or any of its Subsidiaries affecting the voting rights of or requiring the repurchase, redemption or disposition of, any Company Securities. Except as set forth in Section 4.05(b) of the Company Disclosure Schedule, from December 31, 2008 through the date of this Agreement, the Company has not issued any Company Securities.

(c) As of the date of this Agreement, the aggregate Indebtedness of the Company and its Subsidiaries is less than $150,000. For purposes of this Agreement, "**Indebtedness**" means, without duplication, any (i) indebtedness of the Company and its Subsidiaries for borrowed money, (ii) obligations under any note, bond or other debt security, (iii) capitalized lease obligations of the Company and its Subsidiaries as determined in accordance with GAAP, (iv) outstanding obligations (e.g., unreimbursed draws) of the Company and its Subsidiaries with respect to letters of credit of the Company and its Subsidiaries, (v) obligations relating to interest, currency, and other hedging contracts and arrangements and (vi) guarantees of the Company and its Subsidiaries with respect to any of the foregoing.

Section 4.06. *Subsidiaries*. (a) Each Subsidiary of the Company has been duly organized and is validly existing and, where such concept is recognized, in good standing under

the Applicable Laws of the jurisdiction of its incorporation or organization. Each Subsidiary of the Company has the requisite corporate or similar power and authority to own, lease and operate its properties and to carry on its business as it is now being conducted. Each Subsidiary of the Company is duly qualified to do business, and, where such concept is recognized, is in good standing, in each jurisdiction where the character of the properties owned, leased or operated by it or the nature of its business makes such qualification or good standing necessary, except for such failures to be so qualified or in good standing that would not have a Company Material Adverse Effect. The Company has heretofore made available to Parent complete and correct copies of the certificate of incorporation and bylaws or similar organizational or governing documents of each of its Subsidiaries, and all amendments thereto, as currently in effect. None of the Subsidiaries of the Company is in violation of its organizational or governing documents. Section 4.06(a) of the Company Disclosure Schedule contains a complete list of all of the Subsidiaries of the Company.

(b) Except as set forth in Section 4.06(b) of the Disclosure Schedule, all of the outstanding Equity Interests in each Subsidiary of the Company are owned by the Company, directly or indirectly, free and clear of any Lien, and free of any other limitation or restriction (including any restriction on the right to vote, sell or otherwise dispose of such capital stock or other voting securities or ownership interests). There are no outstanding (i) securities of the Company or any of its Subsidiaries convertible into or exchangeable for shares of capital stock or other voting securities or ownership interests in any Subsidiary of the Company or (ii) subscriptions, options, warrants, rights, calls, contracts or other rights to acquire from the Company or any of its Subsidiaries, or other obligation of the Company or any of its Subsidiaries to issue, any Equity Interests in, or any securities convertible into or exchangeable for any Equity Interests in, any Subsidiary of the Company (the items in clauses (i) and (ii) are referred to collectively as the "**Company Subsidiary Securities**"). There are no outstanding obligations of the Company or any of its Subsidiaries to repurchase, redeem or otherwise acquire any of the Company Subsidiary Securities.

Section 4.07. *ASX Filings, SEC Filings and the Sarbanes-Oxley Act*. (a) The Australian Company Subsidiary, and since the Redomicile, the Company has filed all reports, schedules, forms, statements or other documents required to be filed by it under (i) the Corporations Act and the ASX Listing Rules (including the continuous disclosure requirements) and neither the Australian Company Subsidiary nor the Company, as applicable, has failed to make disclosure required by Rule 3.1 and/or 3.1B of the ASX Listing Rules since January 1, 2007 (collectively, the "**Company ASX Documents**") and (ii) the Securities Act or the Exchange Act, as the case may be, since January 1, 2007 (collectively, the "**Company SEC Documents**", and together with the Company ASX Documents, the "**Company Public Documents**"). Each Company Public Document (i) as of its date, complied as to form in all material respects with the applicable requirements of the Corporations Act, the ASX Listing Rules, the Securities Act or the Exchange Act, as the case may be, as in effect on the date so filed and (ii) did not, at the time it was filed (or, if subsequently amended or supplemented, at the time of such amendment or supplement), (A) in relation to the Company ASX Documents omit material required by the ASX Listing Rules or contravene Division 2 of Part 7.10 of the Corporations Act and (B) in relation to the Company SEC Documents, contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading. As

of the date of this Agreement, no Subsidiary of the Company is separately subject to the periodic reporting requirements of the Exchange Act. As of the date hereof, there are no outstanding or unresolved comments received by the Company from the SEC staff with respect to any of the Company SEC Documents.

(b) Since January 1, 2007, the Australian Company Subsidiary, and since the Redomicile, the Company has disclosed, based on its most recent evaluation prior to the date hereof, to the Company's auditors and the audit committee of its Board of Directors (i) any significant deficiencies and material weaknesses in the design or operation of its internal control over financial reporting that are reasonably likely to adversely affect in any material respect the Company's ability to record, process, summarize and report financial information and (ii) any fraud, or to the knowledge of the Company, alleged fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal controls over financial reporting. The Company has established and maintains disclosure controls and procedures and internal control over financial reporting (as such terms are defined in paragraph (e) and (f) of Rule 13a-15 under the Exchange Act) as required by Rule 13a-15 under the Exchange Act. Such controls and procedures are designed to ensure that all material information concerning the Company and the Subsidiaries of the Company that is required to be disclosed in the Company's SEC filings and other public disclosures is made known on a timely basis to the individuals responsible for the preparation of the Company's SEC filings and other public disclosure documents. Since December 31, 2008, the Company has been in compliance in all material respects with the applicable provisions of the Sarbanes-Oxley Act, and the Company has timely filed all certifications and statements required by (x) Rule 13a-14 or Rule 15d-14 under the Exchange Act or (y) 18 U.S.C. Section 1350 (Section 906 of the Sarbanes-Oxley Act of 2002) with respect to any Company SEC Document. Since January 1, 2007, the Australian Company Subsidiary, and since the Redomicile, the Company has been in compliance in all material respects with the applicable listing and corporate governance rules and regulations of ASX.

(c) Since January 1, 2007, neither the Company nor any Subsidiary of the Company nor, to the Company's knowledge, any Representatives of the Company or any Subsidiary of the Company has received or otherwise had or obtained knowledge of any material complaint, allegation, assertion or claim, whether written or oral, regarding the accounting or auditing practices, procedures, methodologies or methods of the Company or any Subsidiary of the Company or their respective internal accounting controls, including any complaint, allegation, assertion or claim that the Company or any Subsidiary of the Company has engaged in questionable accounting or auditing practices.

Section 4.08. *Financial Statements*. Each of the consolidated financial statements (including, in each case, any notes and Form 10-K schedules thereto) of the Australian Company Subsidiary and the Company contained in the Company Public Documents (collectively, the "**Company Financial Statements**") was prepared in accordance with GAAP, applied on a consistent basis during the periods indicated (except as may be indicated in the notes thereto and, in the case of unaudited quarterly financial statements, as permitted by Form 10-Q under the Exchange Act), and each of the Company Financial Statements presents fairly, in all material respects, the consolidated financial position of the Australian Company Subsidiary or the Company, as applicable, as of the respective dates thereof and the consolidated statements of

operations, comprehensive loss, shareholders' equity, and cash flows of the Australian Company Subsidiary or the Company, as applicable, for the respective periods indicated therein (subject, in the case of unaudited financial statements, to normal period end adjustments).

Section 4.09. *No Undisclosed Liabilities*. Neither the Company nor any of its Subsidiaries has any liabilities or obligations of a nature (whether accrued, absolute, contingent or otherwise) that would be required by GAAP to be reflected on a consolidated balance sheet of the Company (or in the notes thereto), except for liabilities or obligations (a) that were incurred after September 30, 2008 in the ordinary course of business, (b) that were incurred under this Agreement or in connection with the transactions contemplated hereby, (c) that were disclosed or reserved against in the most recent Company Financial Statements (including the notes thereto) included in the Company SEC Documents filed prior to the date of this Agreement or (d) that are not material to the Company and its Subsidiaries, taken as a whole.

Section 4.10. *Disclosure Documents*. (a) The proxy statement to be filed with the SEC and ASX and sent to the Company Stockholders in connection with the Company Stockholder Meeting (as amended or supplemented from time to time, the "**Company Proxy Statement**") and any amendments or supplements thereto, at the date the Company Proxy Statement or any such amendment or supplement thereto is first mailed to the Company Stockholders and at the time of the Company Stockholder Meeting, will not (i) contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein in light of the circumstances under which they are made not misleading or (ii) contravene the Corporations Act, including Division 2 of Part 7.10, or any ASIC class orders, policies and requirements, including any ASIC relief or "no action" letter issued by ASIC. The Proxy Statement will comply as to form in all material respects with the applicable provisions of the Exchange Act and the Corporations Act. Notwithstanding the foregoing, the Company makes no representation or warranty with respect to any information supplied or required to be supplied by Parent, Merger Subsidiary or Merger Subsidiary Two and contained in or omitted from any of the foregoing documents.

(b) None of the information supplied or to be supplied by the Company for inclusion or incorporation by reference in (i) the Registration Statement or any amendment or supplement thereto will, at the time it becomes effective under the Securities Act, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading or (ii) the Australian Prospectus or any amendment or supplement thereto will, at the time lodged with ASIC and at all times on or before the Effective Time, contain a misleading or deceptive statement or omit material required by the Corporations Act or any relevant ASIC class orders, policies and requirements, including any ASIC relief or "no action" letter (except that the Company will not be in breach of this Section 4.10(b)(ii), if the Company, after becoming aware of a misleading or deceptive statement, omission or new circumstance that is materially adverse from the point of view of an investor, promptly supplies information to Parent for inclusion or incorporation by reference in a supplementary or replacement prospectus which corrects the deficiency).

Section 4.11. *Absence of Certain Changes*. Since December 31, 2007, except for transactions contemplated by this Agreement or related hereto, (a) the Company and its Subsidiaries have conducted their business in the ordinary course and in a manner consistent

with past practice (except as otherwise set forth in the Company SEC Documents filed prior to the date of this Agreement, but excluding any "forward looking statements" or "risk factors" contained therein), (b) there has not been any Company Material Adverse Effect, (c) neither the Company nor any of its Subsidiaries has adopted or amended any material Company Benefit Plan and (d) neither the Company nor any of its Subsidiaries has taken any action of a type set forth in Sections 6.01(a), (b), (d) or (e).

Section 4.12. *Compliance with Applicable Laws; Permits*. (a) The Company and its Subsidiaries are and since January 1, 2007, have been in possession and operating in material compliance with all franchises, grants, authorizations, licenses, permits, easements, variances, exceptions, consents, certificates, approvals and orders of any Governmental Authority material to the Company or any of its Subsidiaries in the ownership, lease or operation of its properties or the operation of its business as it is now being conducted (the "**Company Permits**"). As of the date of this Agreement, no suspension or cancellation of any of the Company Permits is pending or, to the knowledge of the Company, threatened. Neither the Company nor any of its Subsidiaries has been in violation of (i) any Company Permits or (ii) any Applicable Law, including any consumer protection, equal opportunity, customs, export control, foreign trade, foreign corrupt practices (including the Foreign Corrupt Practices Act), patient confidentiality, health, health care industry regulation and third-party reimbursement laws including under any Federal Health Care Program (as defined in Section 1128B(f) of the U.S. Federal Social Security Act, the "**SSA**"), the Australian National Health Act 1953 (Cth) ("**NHA**") or the Australian Private Health Insurance Act 2007 (Cth) ("**PHIA**"), except in the case of clauses (i) or (ii) as would not have a Company Material Adverse Effect.

(b) None of the Company or any of its Subsidiaries (i) is subject to any order or consent decree from any Governmental Authority, (ii) has received any Form 483s, shutdown or import or export prohibition, warning letter or untitled letters from the United States Food and Drug Administration (the "**FDA**") or the Australian Therapeutic Goods Administration (the "**TGA**") or similar correspondence or notices or actions from any other Governmental Authority asserting noncompliance with any Applicable Law, Company Permit or other requests or requirements of a Governmental Authority during the last three years or (iii) has received any communication from any Governmental Authority or been notified during the last three (3) years that any product exemption, approval or clearance or other Company Permit is withdrawn or modified or that such an action is under consideration except, in each case, as would not have a Company Material Adverse Effect, and the Company has not received any requests or requirements to make changes to any product or proposed product that, if not complied with, would have a Company Material Adverse Effect.

(c) The clinical tests conducted by or on behalf of or sponsored by the Company or its Subsidiaries or in which the Company or its products or product candidates or its Subsidiaries or its Subsidiaries' products or product candidates have participated were and, if still pending, are being conducted in all material respect in accordance with the relevant clinical trial protocol, generally accepted medical and scientific research procedures and all applicable local, state, federal and foreign laws, rules, regulations, including the Federal Food, Drug and Cosmetic Act and its applicable implementing regulations at 21 C.F.R. Parts 50, 54, 56, 58 and 812 and the Declaration of Helsinki. No investigational device exemption filed by or on behalf of the Company or any of its Subsidiaries with the FDA has been terminated or suspended by the FDA,

and neither the FDA nor any applicable foreign regulatory agency (including the TGA) has commenced, or, to the knowledge of the Company, threatened to initiate, any action to place a clinical hold order on, or otherwise terminate, delay or suspend, any proposed or ongoing clinical investigation conducted or proposed to be conducted by or on behalf of the Company or its Subsidiaries.

(d) All applications, notifications, submissions, information, claims, reports and statistics, and other data and conclusions derived therefrom, utilized as the basis for or submitted in connection with any and all requests for a Company Permit from a Governmental Authority relating to the Company and its Subsidiaries, its business and the Company and its Subsidiaries products and proposed products, when submitted to the FDA or other Governmental Authority (including the TGA) were true, complete and correct in all material respects as of the date of submission and any necessary or required updates, changes, corrections or modification to such applications, submissions, information and data have been submitted to the FDA or other Governmental Authority (including the TGA).

(e) Neither the Company nor any of its Subsidiaries is the subject of any pending or, to the knowledge of the Company, threatened investigation in respect of the Company or Company products or proposed products, by the FDA pursuant to its "Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities" Final Policy set forth in 56 Fed. Reg. 46191 (September 10 1991) and any amendments thereto.

Section 4.13. *Litigation*. There is no investigation of which the Company has received notice and no action, suit or proceeding pending against, or, to the knowledge of the Company, threatened against or affecting, the Company, any of its Subsidiaries, or, to the knowledge of the Company, any of the directors or officers of the Company, before any court or arbitrator or before or by any Governmental Authority, that, if determined or resolved adversely in accordance with the plaintiff's demands, would have a Company Material Adverse Effect or that in any manner challenges or seeks to prevent, enjoin, alter or materially delay the Mergers or any of the other transactions contemplated hereby. To the Company's knowledge, none of the Company or any of its Subsidiaries is subject to any material outstanding order, judgment, writ, award, injunction (whether temporary, preliminary, permanent or otherwise), decree or arbitration award of any Governmental Authority.

Section 4.14. *Material Contracts*. (a) Neither the Company nor any of its Subsidiary is a party to or bound by any Contract:

(i) which, as of the date hereof, and except as filed with the Company SEC Documents, is a "material contract" (as such term is defined in Item 601(b)(10) of Regulation S-K promulgated by the SEC);

(ii) that is reasonably expected to require the payment by the Company of a dollar amount in excess of $500,000 or extends for a period of 12 months or more (other than any contract or commitment that is terminable on 90 days or less notice without penalty or any confidentiality or non disclosure agreement);

(iii) with employees and contracts with other consultants, which are reasonably expected to involve payments by the Company or any Subsidiary of more than annual compensation of $150,000;

(iv) with respect to any joint venture or partnership arrangements, or with respect to any license or distribution agreement involving a sharing of profits, losses, costs or liabilities by the Company or any Subsidiary with any Third Party and relating to any product or planned product of the Company;

(v) pursuant to which any Indebtedness of the Company or any of its Subsidiaries greater than $25,000 is or may be incurred other than the Loan Documents and any Contract between or among the Company and/or wholly-owned Subsidiaries of the Company, or pursuant to which the Company guarantees the performance of the obligations of any Third Party;

(vi) relating to any pending acquisition or disposition by the Company or any of its Subsidiaries of properties or assets, except for acquisitions and dispositions of properties, assets and inventory in the ordinary course of business;

(vii) limiting the ability of the Company or any of its Subsidiaries or their respective successors and assigns to compete in any line of business or with any Person or in any geographic area, or restricting the right of the Company and its Subsidiaries or their respective successors and assignes from selling or purchasing from any Person or hiring any Person or that provides for any standstill or similar obligations restricting the ability of the Company to purchase securities of any other entity;

(viii) for the sale of goods or services to any Governmental Authority;

(ix) providing for any contingent payments by the Company or any of its Subsidiaries exceeding $250,000 in any one case;

(x) not entered into in the ordinary course of business between the Company or any of its Subsidiaries, on the one hand, and any Affiliate thereof other than any Subsidiary of the Company; or

(xi) requiring a consent to, or otherwise containing a provision restricting a "change of control," or that would reasonably be expected to prevent, delay or impair the consummation of the transactions contemplated by this Agreement.

(b) Each Contract of the type described in Section 4.14(a), whether or not set forth in Section 4.14(a) of the Company Disclosure Schedule (including Contracts which would be required to be set forth in Section 4.14(a) of the Company Disclosure Schedule if such Contracts were not filed as exhibits to the Company SEC Documents), is referred to herein as a "**Material Contract**."

(c) Except for matters that would not have a Company Material Adverse Effect, (i) each Material Contract is a valid and binding obligation of the Company or a Subsidiary of the Company, as applicable, in full force and effect and enforceable against the Company or such

Subsidiary in accordance with its terms, subject to the Bankruptcy and Equity Exceptions, and there is no breach, violation or default by the Company or any of its Subsidiaries under any of the Material Contracts, (ii) no Material Contract has been canceled by any other party thereto, (iii) to the knowledge of the Company, no other party is in breach or violation of, or default under, any Material Contract and (iv) neither the Company nor any of its Subsidiaries has received written notice of a default under any Material Contract or of any event or condition which, after notice or lapse of time or both, will constitute a default on the part of the Company or any of its Subsidiaries under any Material Contract. As of the date hereof, true and correct copies of all Material Contracts (as amended or modified) are either publicly filed with the SEC or the Company has made available to Parent copies of such Contracts.

Section 4.15. *Taxes*. (a) All material Tax Returns required to be filed by or with respect to the Company or any of its Subsidiaries have been timely filed (taking into account any extension of time within which to file) and all such Tax Returns are true, correct, and complete in all material respects and have been completed in accordance with Applicable Law. Neither Company nor any of its Subsidiaries is currently the beneficiary of any extension of time within which to file any Tax Return (other than extensions of time to file Tax Returns obtained in the ordinary course of business consistent with past practice).

(b) All material Taxes of the Company and its Subsidiaries (whether or not shown to be due and payable on any Tax Return) have been timely paid (other than Taxes being contested in good faith by appropriate proceedings and for which adequate reserves have been established in accordance with GAAP). Neither the Company nor any of its Subsidiaries has incurred any material liability for Taxes since the date of the most recent Company Financial Statements other than in the ordinary course of business.

(c) No deficiency for any material amount of Taxes has been proposed, asserted or assessed in writing by any Governmental Authority against the Company or any of its Subsidiaries that remains unpaid. There are no material audits, suits, proceedings, investigations, claims, examinations or other administrative or judicial proceedings ongoing or pending with respect to any Taxes of the Company or any of its Subsidiaries. There are no waivers or extensions of any statute of limitations currently in effect with respect to Taxes of the Company or any of its Subsidiaries. No claim has ever been made in writing by any Governmental Authority in a jurisdiction where the Company and its Subsidiaries do not file Tax Returns that the Company or any of its Subsidiaries is or may be subject to Tax in that jurisdiction.

(d) Subject to such exceptions as would not be material, all Taxes required to be withheld or collected by the Company and each of its Subsidiaries have been withheld and collected and, to the extent required by Applicable Law, timely paid to the appropriate Governmental Authority.

(e) There are no Liens for Taxes upon any property or assets of the Company or any of its Subsidiaries, except for Liens for current Taxes not yet due and payable, and Liens for Taxes being contested in good faith by appropriate proceedings and for which adequate reserves have been established on the Company Financial Statements in accordance with GAAP.

(f) Neither the Company nor any of its Subsidiaries has been a party to any transaction treated by the parties as a distribution to which Code Section 355 applies.

(g) Neither the Company nor any of its Subsidiaries (i) has been a member of an affiliated group (within the meaning of Code Section 1504 (a)) filing a consolidated federal income Tax Return or (ii) is liable for the Taxes of any other Person (other than the Company or any of its Subsidiaries) under Treasury Regulation Section 1.1502-6 or any similar provision of state, local or foreign Tax law or as a transferee or successor, or pursuant to any indemnification, allocation or sharing agreement (other than customary Tax indemnifications contained in credit or other commercial agreements the primary purpose of which agreements does not relate to Taxes).

(h) Neither the Company nor any of its Subsidiaries has "participated" in a "reportable transaction" within the meaning of Treasury Regulation Section 1.6011-4.

(i) Neither the Company nor any of its Subsidiaries (i) has realized a material amount of Tax liability as a result of the application of Section 7874(b) of the Code; and (ii) was created or organized both in the United States and in a foreign jurisdiction such that such entity would be taxable in the United States as a domestic entity pursuant to Treasury Regulations Section 301.7701-5(a).

(j) Neither the Company nor any of its Subsidiaries has been a United States real property holding corporation within the meaning of Code Section 897(c)(2) during the applicable period described in Code Section 897(c)(1)(A)(ii).

(k) The election on Form 8832 to treat the Australian Company Subsidiary as an entity that is disregarded as separate from the Company for U.S. Federal Tax purposes that was filed with the IRS is valid and has not been withdrawn.

(l) As of the date hereof, and, provided that the Continuity Percentage is greater than or equal to the Reorganization Threshold, as of the Closing Date: (i) none of the Company or any of its Subsidiaries or, to the knowledge of the Company, any of the Company's Affiliates has taken or agreed to take any action that would prevent the Mergers, taken together, from qualifying as a reorganization within the meaning of Section 368(a) of the Code and (ii) the Company is not aware of any agreement, plan or other circumstance that would prevent the Mergers, taken together, from qualifying as a reorganization within the meaning of Section 368(a) of the Code.

(m) As used in this Agreement, (i) "**Taxes**" shall mean any and all taxes, assessments, levies, duties, tariffs, imposts and other charges in the nature of a tax (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority, including income, estimated franchise, windfall or other profits, gross receipts, property, sales, use, net worth, capital stock, payroll, employment, social security, workers' compensation, unemployment compensation, excise, withholding, ad valorem, stamp, custom duties, escheat, environmental, alternative or add-on minimum, transfer and value-added taxes and any liability for any of the foregoing as a successor or a Subsidiary, and (ii) "**Tax Return**" shall mean any return (including any information return), report, statement, schedule,

notice, form, election, estimated Tax filing, claim for refund or other document (including any attachments thereto and amendments thereof) filed or required to be filed with any Governmental Authority with respect to any Tax, including any schedule or attachment thereto, and including any amendment thereof.

Section 4.16. *Employee Benefit Plans; Employees and Employment Practices*. (a) Section 4.16 of the Company Disclosure Schedule contains a true, correct and complete list of each "employee benefit plan" as defined in Section 3(3) of ERISA and each other material employment, consulting, severance, termination, retirement, profit sharing, bonus, incentive or deferred compensation, retention or transaction bonus or change in control agreement, pension, stock option, restricted stock or other equity-based benefit, profit sharing, savings, retirement, life, health, disability, accident, medical, dental, insurance, vacation, paid time off, long term care, perquisite, fringe benefit, death benefit or other material compensation or benefit plan, program, arrangement, agreement, fund or commitment (i) for the benefit or welfare of any director, officer or employee of the Company or any of its Subsidiaries and maintained or contributed to by the Company or any of its Subsidiaries or (ii) with respect to which the Company or any of its Subsidiaries has any material liability or obligation (each such plan or agreement, a "**Company Benefit Plan**"). The Company has made available to Parent or its Representatives copies of (a) each Company Benefit Plan other than any Company Benefit Plan that is maintained on behalf of employees outside of the United States and Australia, (b) the most recent annual report (Form 5500), if any, filed with the U.S. Department of Labor with respect to each such Company Benefit Plan, including schedules and financial statements attached thereto, (c) the most recent summary plan description for each such Company Benefit Plan for which a summary plan description is required, together with any summary of material modifications thereto, (d) each trust agreement and any other material agreement relating to a Company Benefit Plan and (e) the most recent determination letter issued by the U.S. Internal Revenue Service ("**IRS**") with respect to any such Company Benefit Plan that is intended to be qualified under Section 401(a) of the Code. No condition or circumstance since the date of the documents provided in accordance with this Section 4.16(a) above would materially affect the information contained therein and, in particular, and without limiting the generality of the foregoing, no promises or commitments have been made by the Company or any of its Subsidiaries and no plans exist to materially amend any Company Benefit Plan or to provide material increased benefits thereunder to any employee, except as required by Applicable Law.

(b) Each Company Benefit Plan has been maintained, funded and administered in material compliance with its terms, any applicable provisions of ERISA and/or the Code and any other Applicable Laws. There are no audits, claims, suits, investigations, inquiries or proceedings pending or, to the knowledge of the Company, threatened by the IRS or any other Governmental Authority or any other Person with respect to any Company Benefit Plan (other than routine claims for benefits in the ordinary course of business) nor to the knowledge of the Company is there any basis for any such audits, claims, suits, investigations, inquiries or proceedings. To the knowledge of the Company, there has been no non-exempt "prohibited transaction" (as defined in Section 4975 of the Code or Section 406 of ERISA) with respect to any Company Benefit Plan.

(c) Each Company Benefit Plan that is intended to be qualified under Section 401(a) of the Code has received a determination letter from the IRS that it is so qualified, and, to the

Company's knowledge, no fact or event has occurred that would reasonably be expected to adversely affect the qualified status of any such Company Benefit Plan.

(d) None of the Company, any of its Subsidiaries or any trade or business that, together with the Company or any of its Subsidiaries, would be deemed a single employer within the meaning of Section 4001 of ERISA (an "**ERISA Affiliate**") maintains or contributes, or has been required to contribute, to any "multiemployer plan" (within the meaning of Section 3(37) or 4001(a)(3) of ERISA) or any "defined benefit plan" (within the meaning of Section 3(35) of ERISA) subject to Title IV of ERISA or Section 412 of the Code, and neither the Company nor any of its Subsidiaries has any current or potential liability or obligation under Title IV of ERISA or Section 412 of the Code.

(e) Neither the Company nor any of its Subsidiaries maintains, contributes to or has any obligation or liability with respect to, the provision of any health or life insurance or other welfare-type benefits for current or future retired or terminated directors, officers, employees or contractors (or any spouse or other dependent thereof) other than in accordance with Part 6 of Subtitle B of Title I of ERISA and Section 4980B of the Code ("**COBRA**"). The Company, its Subsidiaries and the ERISA Affiliates have complied and are in compliance in all material respects with the requirements of COBRA.

(f) None of the Company Benefit Plans that is an "employee welfare benefit plan" (as defined in Section 3(1) of ERISA) is self-insured. Except as has not had and would not have a Company Material Adverse Effect, each such employee welfare benefit plan may be amended or terminated (including with respect to benefits provided to retirees and other former employees) without material liability (other than benefits then payable under such plan without regard to such amendment or termination) to the Company or any of its Subsidiaries at any time after the Effective Time.

(g) Neither the Company nor any of its Subsidiaries is a party to any collective bargaining or other labor union contracts and no collective bargaining agreement is being negotiated by the Company or any of its Subsidiaries. There is no pending labor dispute, strike or work stoppage, slowdowns, lockouts, material arbitrations or material grievances, or other material labor disputes against the Company or any of its Subsidiaries, and no such disputes have occurred or, to the knowledge of the Company or any of its Subsidiaries, been threatened, during the past three years. None of the Company or any of its Subsidiaries is subject to any outstanding labor or employment-related order, settlement, judgment, writ, stipulation, award, injunction, decree, arbitration award or finding of any Governmental Authority. There is no pending charge or complaint against the Company or any of its Subsidiaries by the National Labor Relations Board or any comparable state agency, and no material charges or complaints have been brought, or, to the knowledge of the Company and any of its Subsidiaries, been threatened, against the Company during the past three years. Each of the Company and its Subsidiaries is in compliance with all Applicable Laws respecting labor, employment, fair employment practices, human rights, employment standards, 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 Authority, with respect to unemployment compensation benefits, social security or other benefits premiums, remittances or obligations for employees (other than

routine payments to be made in the ordinary course of business and consistent with past practice). There are no controversies pending or 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 Authority or any court of competent jurisdiction. To the knowledge of the Company, no employee of the Company or any of its Subsidiaries is 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. Within the past three years, to the extent that the Company or any of its Subsidiaries has implemented any plant closing or layoff of employees that implicated the Worker Adjustment and Retraining Notification Act of 1988, as amended, or any similar foreign, state or local law, regulation or ordinance (collectively, the "**WARN Act**"), such plant closing or layoff of employees complied with the WARN Act in all material respects.

(h) Except for amounts payable under the terms of the Incentive Agreements, neither the execution, delivery or performance of this Agreement or the consummation of the transactions contemplated hereby, will result in any bonus, golden parachute, severance or other payment or obligation to any current or former employee or director of any of the Company or its Subsidiaries (whether or not under any Company Benefit Plan), or materially increase the benefits payable or provided under any Company Benefit Plan, or result in any acceleration of the time of payment or vesting of any such benefits. The Company has made available to Parent any and all copies (or accurate and complete descriptions thereof if unwritten) of Company Benefit Plans, together with, as applicable, accurate and complete copies of any and all Contracts, for Parent to make a good faith estimate of the total amount of all payments and the fair market value of all non-cash benefits that may become payable or provided to any director, officer, employee or consultant of the Company or any of its Subsidiaries under the Company Benefit Plans.

(i) No deduction by the Company or any of its Subsidiaries in respect of any "applicable employee remuneration" (within the meaning of Section 162(m) of the Code) has been disallowed or is subject to disallowance by reason of Section 162(m) of the Code. No amount or other entitlement that could be received as a result of the transactions contemplated hereby (alone or in conjunction with any other event) by any "disqualified individual" (as defined in Section 280G of the Code) with respect to the Company will constitute an "excess parachute payment" (as defined in Section 280G of the Code). No director, officer, employee or independent contractor of the Company is entitled to receive any gross-up or additional payment by reason of the tax required by Section 4999 of the Code being imposed on such person.

(j) Each Person who is an independent contractor is properly classified as an independent contractor for purposes of all employment-related Applicable Law and all Applicable Law concerning the status of independent contractors. Neither the Company nor any of its Subsidiaries has any liability, whether absolute or contingent, including any obligations under any Company Benefit Plan, with respect to any misclassification of a Person performing services for the Company or any of its Subsidiaries as an independent contractor rather than as an employee.

(k) Neither the Company nor any of its Subsidiaries maintains, or sponsors any nonqualified deferred compensation plan subject to Section 409A of the Code. With respect to any such nonqualified deferred compensation plan listed in Section 4.16(k) of the Company Disclosure Schedule, (i) such plan has been operated in good faith compliance with Section 409A of the Code and the guidance issued thereunder, (ii) such plan complies in form with Section 409A of the Code and the guidance issued thereunder as of December 31, 2008 and (iii) the transaction contemplated by this Agreement will not result in Section 409A of the Code imposing any tax consequences to the participants in such plan (including the inclusion in income of deferred amounts, or any additional tax pursuant to Section 409A(a)(1)(B) of the Code).

(l) All Company Stock Awards have been appropriately authorized by the Company's Board of Directors or a duly authorized committee thereof, including approval of the exercise or purchase price or the methodology for determining the exercise or purchase price and the substantive terms of the Company Stock Awards. All Company Options granted to employees and directors reflect the fair market value of the Company Stock as determined under Section 409A of the Code on the date the option was granted. No Company Stock Awards have been retroactively granted, or the exercise or purchase price of any Company Stock Award determined retroactively.

(m) The Company has registered all Company Stock Awards, whether or not currently outstanding, pursuant to one or more S-8 Registration Statements that the Company is required to register under Applicable Law, and the Company has maintained the effectiveness of such S-8 Registration Statements.

Section 4.17. *Intellectual Property Matters*. (a) As used in this Agreement, the term "**Intellectual Property**" means all of the following forms of intellectual property and all intellectual property rights arising under the laws of the United States and Australia or any other jurisdiction with respect thereto: (i) trade names, trademarks and service marks, domain names, trade dress and similar brand identifiers and applications to register any of the foregoing, together with the goodwill associated exclusively therewith (collectively, "**Marks**"), (ii) inventions, methods, processes, utility models, industrial designs and any patents and patent applications with respect to the foregoing (collectively, "**Patents**"), (iii) works of authorship and any copyrights, copyright registrations and applications therefor (collectively, "**Copyrights**") and (iv) trade secrets, know-how, and proprietary and confidential information (including, to the extent protectable, inventions, discoveries, methods, processes, technical data, specifications, research and development information, technology, databases, and customer lists), in each case that derives economic value (actual or potential) from not being generally known, but excluding any Copyrights or Patents that cover or protect any of the foregoing (collectively, "**Trade Secrets**").

(b) Section 4.17(b)(1) of the Company Disclosure Schedule sets forth an accurate and complete list of all Marks that are Registered IP owned by the Company or any of its Subsidiaries (collectively, "**Company Registered Marks**"); Section 4.17(b)(2) of the Company Disclosure Schedule sets forth an accurate and complete list of all Patents that are Registered IP owned by the Company or any of its Subsidiaries (collectively, the "**Company Registered Patents**"); and Section 4.17(b)(3) of the Company Disclosure Schedule sets forth an accurate

and complete list of all Copyrights that are Registered IP owned by the Company or any of its Subsidiaries (collectively, the "**Company Registered Copyrights**" and, together with the Company Registered Marks and the Company Registered Patents, the "**Company Registered IP**"). To the knowledge of the Company, the Company Registered IP is valid and enforceable. No written notice or claim challenging the validity, enforceability or scope of, or alleging the misuse of, any of the Company Registered IP has been received by the Company or any of its Subsidiaries. The Company or a Subsidiary has taken all reasonable actions necessary to record, maintain and perfect its rights in each item of Company Registered IP that is material to the conduct of the businesses of the Company or its Subsidiaries as currently conducted.

(c) The Company and its Subsidiaries have taken reasonable steps to maintain the confidentiality of all of the Trade Secrets of the Company and its Subsidiaries. The Company and its Subsidiaries have entered into a written agreement with all current or former employees, consultants, contractors and to the knowledge of the Company, other Persons who have directly participated in the conception or creation of any material Intellectual Property owned by the Company (the "**Company Intellectual Property**") (each such Person a "**Company Contributor**") that assigns to the Company or its Subsidiaries all such Company Contributor's right, title and interest in such Company Contributor's contribution to the Company Intellectual Property.

(d) Except as set forth in Section 4.17(d) of the Company Disclosure Schedule, the Company and its Subsidiaries exclusively own all Company Intellectual Property free and clear of any Liens (other than non-exclusive licenses of Company Intellectual Property granted by the Company or its Subsidiaries in the ordinary course of business). Neither the Company nor any of its Subsidiaries has granted exclusive rights under any Company Intellectual Property to a Third Party. None of the Company Intellectual Property is subject to any outstanding order, judgment, or stipulation by or before a Governmental Authority restricting the use thereof by the Company or its Subsidiaries.

(e) The Company or its Subsidiaries own, and/or possess adequate licenses or other valid rights to use, all of the Intellectual Property (excluding Patents owned by Third Parties) that is necessary for the conduct of the businesses of the Company and its Subsidiaries, as currently conducted, and, to the knowledge of the Company, the Company or its Subsidiaries own, and/or possess adequate licenses or other valid rights to use, all Patents owned by Third Parties that are necessary for the conduct of the businesses of the Company and its Subsidiaries, as currently conducted.

(f) The consummation of the transactions contemplated by this Agreement shall not (i) result in the loss of material rights granted under or adversely impact the effectiveness of any material licenses of Intellectual Property to the Company or any of its Subsidiaries from any Third Party or any material written covenants not to sue in favor of the Company or any of its Subsidiaries with respect to Intellectual Property of a Third Party (collectively, "**In Licensed Company IP Agreement**") or (ii) cause or require the Company or any of its Subsidiaries to grant to a Third Party a license, a written covenant not to sue, or other right to any Company Intellectual Property. Neither the Company nor any of its Subsidiaries is in material breach of or default under any In Licensed Company IP Agreement nor, to the knowledge of the Company, is

any other party to any In Licensed Company IP Agreement in breach of or default under such In Licensed Company IP Agreement.

(g) To the knowledge of the Company, the conduct of the businesses of the Company and its Subsidiaries does not, in any material respect, infringe upon, misappropriate or violate any Intellectual Property of any Third Party. Except as set forth in Section 4.17(g) of the Company Disclosure Schedule, neither the Company nor any of its Subsidiaries has received any written notice or claim alleging that any such infringement, misappropriation, or violation has occurred. To the knowledge of the Company, (i) no Third Party is, in any material respect, misappropriating or infringing any material Company Intellectual Property and (ii) no Third Party has made any unauthorized disclosure of any Trade Secrets of the Company or its Subsidiaries.

Section 4.18. *Environmental Matters*. (a) For purposes of this Agreement, the following terms shall have the following meanings: (i) "**Hazardous Substances**" means (A) petroleum and petroleum products, by-products or breakdown products, radioactive materials, asbestos-containing materials and polychlorinated biphenyls and (B) any other chemicals, materials or substances regulated as toxic or hazardous or as a pollutant, contaminant or waste under any applicable Environmental Law, (ii) "**Environmental Law**" means any Applicable Law (as of the date of this Agreement) and as amended, and any judicial or administrative interpretation thereof, including any judicial or administrative order, consent decree or judgment, or common law, relating to pollution or protection of the environment, health or safety or natural resources, including those relating to the use, handling, transportation, treatment, storage, disposal, release or discharge of Hazardous Substances and (iii) "**Environmental Permit**" means any permit, approval, identification number, license or other authorization required under any applicable Environmental Law.

(b) To the Company's knowledge, the Company and its Subsidiaries are and have been in compliance with all applicable Environmental Laws, have obtained all Environmental Permits and are in compliance with their requirements, and have resolved all past non-compliance with Environmental Laws and Environmental Permits without any pending, on-going or future obligation, cost or liability.

(c) Neither the Company nor any of its Subsidiaries has (i) to the Company's knowledge, placed, held, located, released, transported or disposed of any Hazardous Substances on, under, from or at any of their respective properties or any other properties other than in compliance with Applicable Law, (ii) any knowledge or reason to know of the presence of any Hazardous Substances on, under, emanating from, or at any of their respective properties or any other property but arising from the Company's or any of its Subsidiaries' current or former properties or operations or (iii) any knowledge or reason to know, nor has it received any written notice (A) of any violation of, or liability of, the Company or any of its Subsidiaries under any Environmental Laws, (B) of the institution or pendency of any action, suit, investigation or proceeding by any Governmental Authority or any Third Party in connection with any such violation or liability, (C) of any requirement to investigate, respond to or remediate Hazardous Substances at or arising from any of the Company's or any of its Subsidiaries' current or former properties, (D) of any allegation of noncompliance by the Company or any of its Subsidiaries with the terms of any Environmental Permit in any manner reasonably likely to require

significant expenditures or to result in significant liability or (E) of any demand for payment for response to or remediation of Hazardous Substances at or arising from any of the Company's or any of its Subsidiaries' current or former properties or operations or of any demand for payment by the Company or any of its Subsidiaries for response to or remediation of Hazardous Substances at any other properties.

(d) There are no environmental assessments or audit reports or other similar studies or analyses in the possession or control of the Company or any of its Subsidiaries relating to any real property formerly owned, or currently or formerly occupied by the Company or any of its Subsidiaries which have not been made available to Parent.

(e) To the Company's knowledge, no underground storage tanks, asbestos-containing material, or polychlorinated biphenyls have ever been located on property or properties presently or formerly owned or operated by the Company or any of its Subsidiaries.

(f) Neither the Company nor any of its Subsidiaries has agreed to assume, undertake or provide indemnification for any liability of any other person under any Environmental Law, including any obligation for corrective or remedial action.

(g) Neither the Company nor any of its Subsidiaries has received written notice that they are required to make any capital or other expenditures to comply with any Environmental Law nor, to the Company's knowledge, is there any reasonable basis on which any Governmental Authority could take action that would require such capital or other expenditures.

Section 4.19. *Products*. Since January 1, 2005, neither the Company nor any of its Subsidiaries has been a party to any material litigation, arbitration or proceeding based upon a breach of warranty or guaranty or similar claim, strict liability in tort, negligent design of product, negligent provision of services or any other allegation of liability arising from the manufacture or sale of its products.

Section 4.20. *Insurance*. Section 4.20 of the Company Disclosure Schedule contains a list of all policies of title, property, fire, casualty, liability, life, business interruption, product liability, workmen's compensation and other forms of insurance relating to the business and operations of the Company or any of its Subsidiaries in each case which are in force as of the date hereof (the "**Insurance Policies**"). The Company or a Subsidiary of the Company has made any and all payments required to maintain all of the material Insurance Policies in full force and effect. Neither the Company nor any of its Subsidiaries has received notice of default under any Insurance Policy, and has not received written notice or, to the knowledge of the Company, oral notice of any pending or threatened termination or cancellation, coverage limitation or reduction or premium increase with respect to any Insurance Policy.

Section 4.21. *Title to and Sufficiency of Assets*.

(a) Set forth in Section 4.21(a) of the Company Disclosure Schedule is a description of each lease of real property under which the Company or any of its Subsidiaries is a lessee, lessor, sublessee or sublessor (the "**Leased Property**"). Neither the Company nor any of its Subsidiaries own any real property.

(b) The Company has good and marketable leasehold title to the Leased Property and to all plants, buildings, fixtures and improvements thereon, free and clear of any Liens, other than Permitted Liens. True and complete copies of all leases to which the Company is a party respecting any real property and all other instruments granting such leasehold interests, rights, options or other interests (the "**Property Leases**") (including all amendments, modifications and supplements thereto) have been made available to Parent. All of the Property Leases are in full force and effect and are valid and enforceable against the Company or its Subsidiary as the case may be, in accordance with their terms.

(c) As used herein, "**Permitted Liens**" means Liens, whether or not of record, which in the aggregate do not materially affect the continued use of the Company's assets or properties for the purposes for which they are currently being used.

Section 4.22. *Certain Business Practices*. None of the Company, any of its Subsidiaries or, to the Company's knowledge, any directors or officers, agents or employees of the Company or any of its Subsidiaries, has (i) used any funds for unlawful contributions, gifts, entertainment or other unlawful expenses related to political activity, (ii) made any unlawful payment to foreign or domestic government officials or employees or to foreign or domestic political parties or campaigns or violated any provision of the Foreign Corrupt Practices Act of 1977, as amended, or similar Applicable Laws or (iii) made any payment in the nature of criminal bribery.

Section 4.23. *Affiliate Transactions*. No executive officer or director of the Company or any of its Subsidiaries or any Person who beneficially owns five percent or more of the Company Stock is a party to any Contract with or binding upon the Company or any of its Subsidiaries or any of their respective properties or assets or has any material interest in any material property owned by the Company or any of its Subsidiaries or has engaged in any material transaction with any of the foregoing within the twelve (12) month period preceding the date of this Agreement, in each case, that is of the type that would be required to be disclosed under Item 404 of Regulation S-K under the Securities Act.

Section 4.24. *Brokers*. Except for J.P. Morgan Securities Inc., and the fees and expenses of which will be paid by the Company, no broker, finder, financial advisor, investment banker or other Person is entitled to any brokerage, finder's, financial advisor's or other similar fee or commission in connection with the Mergers or the other transactions contemplated by this Agreement based upon arrangements made by or on behalf of the Company or any of its Subsidiaries. Prior to the date of this Agreement, the Company has made available a true, correct and complete copy of its engagement letter with J.P. Morgan Securities Inc. to Parent.

Section 4.25. *Opinion of Financial Advisor*. The Company has received the written opinion (or an oral opinion to be confirmed in writing) of J.P. Morgan Securities Inc., financial advisor to the Company, to the effect that the Merger Consideration is fair, from a financial point of view, to the holders of Company Stock.

Section 4.26. *Antitakeover Statutes; No Rights Plan*.

(a) The Board of Directors of the Company has taken all necessary action so that no "fair price," "moratorium," "control share acquisition" or other anti-takeover law or similar

statute or regulation (including the interested stockholder provisions codified in Section 203 of the Delaware Law) or any anti-takeover provision in the Certificate of Incorporation or Bylaws of the Company is applicable to Parent, Merger Subsidiary or Merger Subsidiary Two in connection with this Agreement, the Mergers, the Support Agreements or the other transactions contemplated by this Agreement, and, accordingly, no such anti-takeover law or similar statute or regulation and no such provision applies or purports to apply to any such transactions.

(b) There is no shareholder rights plan, "poison pill" anti-takeover plan or other similar device in effect to which the Company is a party or is otherwise bound.

ARTICLE 5
REPRESENTATIONS AND WARRANTIES OF PARENT

Except as set forth in the Parent Disclosure Schedule (which sets forth in each section or subsection thereof a specific reference to the particular Section or subsection of this Agreement to which the information set forth in such section or subsection relates and which contains, among other things, items the disclosure of which is necessary or appropriate either in response to an express disclosure requirement contained in a provision hereof or as an exception to one or more representations or warranties contained in this Article 5, or to one or more of the of the covenants of Parent, Merger Subsidiary and Merger Subsidiary Two contained herein; *provided*, that any information set forth in one section or subsection of the Parent Disclosure Schedule shall be deemed to apply to each other section or subsection thereof to which its relevance is reasonably apparent on its face; *provided*, *further*, that notwithstanding anything in this Agreement to the contrary, the mere inclusion of an item in the Parent Disclosure Schedule as an exception to a representation or warranty shall not be deemed an admission that such item represents a material exception or material fact, event or circumstance or that such item has had or would be reasonably likely to have a Parent Material Adverse Effect), Parent represents and warrants to the Company that:

Section 5.01. *Corporate Existence and Power*. Parent is a corporation duly organized, validly existing and in good standing under the laws of the State of California. Each of Merger Subsidiary and Merger Subsidiary Two is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Each of Parent, Merger Subsidiary and Merger Subsidiary Two has the requisite corporate power and authority to own, lease and operate its properties and to carry on its business as it is now being conducted. Each of Parent, Merger Subsidiary and Merger Subsidiary Two is duly qualified to do business, and is in good standing, in each jurisdiction where the character of the properties owned, leased or operated by it or the nature of its business makes such qualification or good standing necessary, except for such failures to be so qualified or in good standing that would not have a Parent Material Adverse Effect. Parent has heretofore made available to the Company complete and correct copies of its Articles of Incorporation and Bylaws, and all amendments thereto, as currently in effect. Parent is not in violation of its Articles of Incorporation or Bylaws.

Section 5.02. *Corporate Authorization*.

Each of Parent, Merger Subsidiary and Merger Subsidiary Two has all necessary corporate power and authority to execute and deliver this Agreement, to perform its obligations

hereunder and to consummate the transactions contemplated hereby. The execution and delivery of this Agreement by each of Parent, Merger Subsidiary and Merger Subsidiary Two, the performance by each of Parent, Merger Subsidiary and Merger Subsidiary Two of its obligations hereunder and the consummation by each of Parent, Merger Subsidiary and Merger Subsidiary Two of the transactions contemplated hereby have been duly and validly authorized by all necessary corporate action on the part of each of them, and no other corporate proceedings on the part of any of them are necessary to authorize this Agreement or to consummate the transactions contemplated hereby, other than the filing of the Certificate of Merger and the Second Merger Certificate of Merger with the Secretary of State of the State of Delaware in accordance with Delaware Law. This Agreement has been duly authorized and validly executed and delivered by each of Parent, Merger Subsidiary and Merger Subsidiary Two and, assuming the due authorization, execution and delivery by the Company, this Agreement constitutes a legal, valid and binding obligation of each of Parent, Merger Subsidiary and Merger Subsidiary Two, enforceable against it in accordance with its terms, subject to the Bankruptcy and Equity Exceptions.

Section 5.03. *Governmental Authorization*. The execution and delivery of this Agreement by each of Parent, Merger Subsidiary and Merger Subsidiary Two do not, and the performance by each of Parent, Merger Subsidiary and Merger Subsidiary Two of its obligations hereunder and the consummation of the transactions contemplated hereby will not, require Parent, Merger Subsidiary or Merger Subsidiary Two to obtain any consent, approval or authorization of, or make any filing with or notification to, any Governmental Authority except (a) under the Exchange Act (including the filing of the Registration Statement) and the Corporations Act (including the filing of the Australian Prospectus), any applicable state securities, takeover or "blue sky" laws and the rules and regulations of NASDAQ, (b) pursuant to the pre-merger notification requirements of the HSR Act, (c) the filing and recordation of the Certificate of Merger and the Second Merger Certificate of Merger as required by Delaware Law or (d) where the failure to obtain such consents, approvals, licenses, permits, orders or authorizations, or to make such filings or notifications would not have a Parent Material Adverse Effect.

Section 5.04. *Non-contravention*. The execution and delivery by each of Parent, Merger Subsidiary and Merger Subsidiary Two of this Agreement do not, and the performance by each of Parent, Merger Subsidiary and Merger Subsidiary Two of its obligations hereunder and the consummation by each of Parent, Merger Subsidiary and Merger Subsidiary Two of the transactions contemplated hereby will not, (a) conflict with or violate any provision of the Articles of Incorporation or Bylaws of Parent as in effect on the date hereof, or any equivalent organizational or governing documents of any Subsidiaries of Parent, as in effect on the date hereof, (b) assuming that all consents, approvals, authorizations and other actions described in Section 5.03 have been obtained prior to the Effective Time and all filings and notifications described in Section 5.03 have been made and any waiting periods thereunder have terminated or expired prior to the Effective Time, conflict with or violate any Applicable Law applicable to Parent, Merger Subsidiary or Merger Subsidiary Two or by which any of their properties or assets are bound or (c) require any consent or approval under, result in any breach of or any loss of any benefit under, or constitute a default (or an event which with notice or lapse of time or both would become a default) under, or give to others any right of termination, amendment, acceleration or cancellation of, or result in the creation of any Liens on any property or asset of

Parent or any of its Subsidiaries pursuant to, any Contract to which Parent or any of its Subsidiaries is a party or by which any of their respective properties or assets are bound, except, with respect to clauses (b) and (c), for such conflicts, violations, breaches, defaults or other occurrences that would not have a Parent Material Adverse Effect.

Section 5.05. *Capitalization*. The authorized capital stock of the Parent consists of 100,000,000 shares of Parent Stock and 5,000,000 shares of preferred stock, no par value (the "**Parent Preferred Stock**"), of which 540,541 shares have been designated Series A, 500,000 shares have been designated Series B and 100,000 shares have been designated Series RP. As of February 11, 2009 there are (a) 56,417,263 shares of Parent Stock issued and outstanding, (b) 7,589,427 shares of Parent Stock reserved for issuance under employee or director stock option, stock purchase or equity compensation plans, arrangements or agreements of Parent, of which 4,257,031 shares were subject to outstanding options or other rights, (c) 7,290,486 shares of Parent Stock reserved for issuance upon conversion of outstanding Indebtedness and (d) no shares of Parent Preferred Stock issued and outstanding. The shares of Parent Stock to be issued pursuant to the Merger will be duly authorized and validly issued and, at the Effective Time, all such shares will be fully paid, nonassessable and free of preemptive rights.

Section 5.06. *SEC Filings*. (a) Parent has filed all reports, schedules, forms, statements or other documents required to be filed by it under the Securities Act or the Exchange Act, as the case may be, since January 1, 2007 (collectively, the "**Parent SEC Documents**"). Each Parent SEC Document (a) as of its date, complied as to form in all material respects with the applicable requirements of the Securities Act or the Exchange Act, as the case may be, as in effect on the date so filed and (b) did not, at the time it was filed (or, if subsequently amended or supplemented, at the time of such amendment or supplement), contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading. As of the date of this Agreement, no Subsidiary of Parent is separately subject to the reporting requirements of the Exchange Act. As of the date hereof, there are no unresolved comments received by the Parent from the SEC staff with respect to any Parent SEC documents.

(b) Since January 1, 2007, Parent has disclosed, based on its most recent evaluation prior to the date hereof, to Parent's auditors and the audit committee of its Board of Directors (i) any significant deficiencies and material weaknesses in the design or operation of its internal control over financial reporting that are reasonably likely to adversely affect in any material respect Parent's ability to record, process, summarize and report financial information and (ii) any fraud, or to the knowledge of Parent, alleged fraud, whether or not material, that involves management or other employees who have a significant role in Parent's internal controls over financial reporting. Parent has established and maintains disclosure controls and procedures and internal control over financial reporting (as such terms are defined in paragraph (e) and (f) of Rule 13a-15 under the Exchange Act) as required by Rule 13a-15 under the Exchange Act. Such controls and procedures are designed to ensure that all material information concerning Parent and its Subsidiaries that is required to be disclosed in the Parent SEC Documents and other public disclosures is made known on a timely basis to the individuals responsible for the preparation of the Parent's SEC filings and other public disclosure documents. Since December 31, 2007, Parent has been in compliance in all material respects with the applicable provisions of the Sarbanes-Oxley Act, and Parent has timely filed all certifications and statements required by

(x) Rule 13a-14 or Rule 15d-14 under the Exchange Act or (y) 18 U.S.C. Section 1350 (Section 906 of the Sarbanes-Oxley Act of 2002) with respect to any Parent SEC Document. Since January 1, 2007, Parent has been in compliance in all material respects with the applicable listing and corporate governance rules and regulations of NASDAQ.

(c) Since January 1, 2007, neither Parent nor any Subsidiary of Parent nor, to Parent's knowledge, any Representatives of Parent or any Subsidiary of Parent has received or otherwise had or obtained knowledge of any material complaint, allegation, assertion or claim, whether written or oral, regarding the accounting or auditing practices, procedures, methodologies or methods of Parent or any Subsidiary of Parent or their respective internal accounting controls, including any complaint, allegation, assertion or claim that Parent or any Subsidiary of Parent has engaged in questionable accounting or auditing practices.

Section 5.07. *Financial Statements*. Each of the consolidated financial statements (including, in each case, any notes and Form 10-K schedules thereto) of Parent contained in the Parent SEC Documents (collectively, the "**Parent Financial Statements**") was prepared in accordance with GAAP, applied on a consistent basis during the periods indicated (except as may be indicated in the notes thereto and, in the case of unaudited quarterly financial statements, as permitted by Form 10-Q under the Exchange Act), and each of the Parent Financial Statements presents fairly, in all material respects, the consolidated financial position of Parent as of the respective dates thereof and the consolidated statements of income, shareholder's equity and cash flows of Parent for the respective periods indicated therein (subject, in the case of unaudited financial statements, to normal period end adjustments).

Section 5.08. *Disclosure Documents*. (a) None of (i) the registration statement on Form S-4 to be filed with the SEC by Parent in connection with the issuance of shares of Parent Stock in connection with the Merger (the "**Registration Statement**"), or any amendments or supplements thereto, at the time it becomes effective under the Securities Act will contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading and (ii) the Australian Prospectus (as amended or supplemented) at the time it is lodged with ASIC and at all times on or before the Effective Time, will contain a misleading or deceptive statement or omit material required by the Corporations Act or any relevant ASIC class orders, policies and requirements (except that Parent will not be in breach of this Section 5.08(a)(ii), if Parent, after becoming aware of a misleading or deceptive statement, omission or new circumstance that is materially adverse from the point of view of an investor, promptly lodges a supplementary or replacement prospectus with ASIC which corrects the deficiency). The Registration Statement (except for such portions thereof that relate to the Company or any of its Subsidiaries) will comply as to form in all material respects with the applicable provisions of the Exchange Act, and the Australian Prospectus (except for such portions thereof that relate to the Company or any of its Subsidiaries) will comply as to form in all material respects with the applicable provisions of the Corporations Act. Notwithstanding the foregoing, none of Parent, Merger Subsidiary or Merger Subsidiary Two makes any representation or warranty with respect to any information (i) supplied or required to be supplied by the Company and contained in or omitted from any of the foregoing documents or (ii) contained in or omitted from the Company Proxy Statement, except to the extent set forth in Section 5.08(b).

(b) None of the information supplied or to be supplied by Parent, Merger Subsidiary or Merger Subsidiary Two for inclusion or incorporation by reference in the Company Proxy Statement or any amendment or supplement thereto will, at the date the Company Proxy Statement or any such amendment or supplement thereto is first mailed to stockholders of the Company or at the time of the Company Stockholder Meeting, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein in light of the circumstances under which they are made not misleading.

Section 5.09. *Compliance with Applicable Laws; Permits*. (a) Parent and its Subsidiaries are and since January 1, 2007, have been, in possession and operating in material compliance with all franchises, grants, authorizations, licenses, permits, easements, variances, exceptions, consents, certificates, approvals and orders of any Governmental Authority material to Parent or any of its Subsidiaries in the ownership, lease or operation of its properties or the operation of its business as it is now being conducted (the "**Parent Permits**"). As of the date of this Agreement, no suspension or cancellation of any of the Parent Permits is pending or, to the knowledge of Parent, threatened. Neither Parent nor any of its Subsidiaries has been in violation of (i) any Parent Permits or (ii) any Applicable Law, including any consumer protection, equal opportunity, customs, export control, foreign trade, foreign corrupt practices (including the Foreign Corrupt Practices Act), patient confidentiality, health, health care industry regulation and third-party reimbursement laws, including under any Federal Health Care Program (as defined in Section 1128B(f) of the SSA), except in the case of clauses (i) or (ii) as would not have a Parent Material Adverse Effect.

(b) None of Parent or any of its Subsidiaries (i) is subject to any order or consent decree from any Governmental Authority, (ii) has received any Form 483s, shutdown or import or export prohibition, warning letter or untitled letters from the FDA or similar correspondence or notices or actions from any other Governmental Authority asserting noncompliance with any Applicable Law, Parent Permit or other requests or requirements of a Governmental Authority during the last three years or (iii) has received any communication from any Governmental Authority or been notified during the last three (3) years that any product exemption, approval or clearance or other Parent Permit is withdrawn or modified or that such an action is under consideration except, in each case, as would not have a Parent Material Adverse Effect, and Parent has not received any requests or requirements to make changes to any product or proposed product that, if not complied with, would have a Parent Material Adverse Effect.

(c) The clinical tests conducted by or on behalf of or sponsored by Parent or its Subsidiaries or in which Parent or its products or product candidates or its Subsidiaries or its Subsidiaries' products or product candidates have participated were and, if still pending, are being conducted in all material respect in accordance with the relevant clinical trial protocol, generally accepted medical and scientific research procedures and all applicable local, state, federal and foreign laws, rules, regulations, including the Federal Food, Drug and Cosmetic Act and its applicable implementing regulations at 21 C.F.R. Parts 50, 54, 56, 58 and 812 and the Declaration of Helsinki. No investigational device exemption filed by or on behalf of Parent or any of its Subsidiaries with the FDA has been terminated or suspended by the FDA, and neither the FDA nor any applicable foreign regulatory agency has commenced, or, to the knowledge of Parent, threatened to initiate, any action to place a clinical hold order on, or otherwise terminate,

delay or suspend, any proposed or ongoing clinical investigation conducted or proposed to be conducted by or on behalf of Parent or its Subsidiaries.

(d) All applications, notifications, submissions, information, claims, reports and statistics, and other data and conclusions derived therefrom, utilized as the basis for or submitted in connection with any and all requests for a Parent Permit from a Governmental Authority relating to Parent and its Subsidiaries, its business and Parent and its Subsidiaries products and proposed products, when submitted to the FDA or other Governmental Authority were true, complete and correct in all material respects as of the date of submission and any necessary or required updates, changes, corrections or modification to such applications, submissions, information and data have been submitted to the FDA or other Governmental Authority.

(e) Neither Parent nor any of its Subsidiaries is the subject of any pending or, to the knowledge of Parent, threatened investigation in respect of Parent or Parent products or proposed products, by the FDA pursuant to its "Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities" Final Policy set forth in 56 Fed. Reg. 46191 (September 10 1991) and any amendments thereto.

Section 5.10. *Litigation*. There is no investigation of which any of Parent, Merger Subsidiary and Merger Subsidiary Two has received notice and no action, suit, or proceeding pending against, or, to the knowledge of Parent, threatened against or affecting Parent or any of its Subsidiaries, or, to the knowledge of Parent, any directors or officers of Parent, before or by any Governmental Authority, that, if determined or resolved adversely in accordance with the plaintiff's demands, would have a Parent Material Adverse Effect.

Section 5.11. *Brokers*. Except for Banc of America Securities, LLC, the fees and expenses of which will be paid by Parent, no broker, finder, financial advisor, investment banker or other Person is entitled to any brokerage, finder's, financial advisor's or other similar fee or commission in connection with the Mergers or the other transactions contemplated by this Agreement based upon arrangements made by or on behalf of Parent or any of its Subsidiaries.

Section 5.12. *Merger Subsidiary and Merger Subsidiary Two*. Merger Subsidiary and Merger Subsidiary Two were formed solely for the purpose of engaging in the transactions contemplated hereby and have engaged in no business other than in connection with the transactions contemplated by this Agreement. All of the issued and outstanding capital stock of Merger Subsidiary and Merger Subsidiary Two is owned directly by Parent.

Section 5.13. *Tax Treatment*. As of the date hereof, and, provided that the Continuity Percentage is greater than or equal to the Reorganization Threshold, as of the Closing Date: (a) none of Parent, Merger Subsidiary or Merger Subsidiary Two or, to the knowledge of Parent, any of Parent's Affiliates has taken or agreed to take any action that would prevent the Mergers, taken together, from qualifying as a reorganization within the meaning of Section 368(a) of the Code and (b) Parent is not aware of any agreement, plan or other circumstance that would prevent the Mergers, taken together, from qualifying as a reorganization within the meaning of Section 368(a) of the Code.

Section 5.14. *Capital Resources*. Parent has, or will have prior to the Effective Time, sufficient cash, available lines of credit or other sources of immediately available funds to enable it to deposit the aggregate Cash Consideration payable pursuant to Section 2.02 with the Exchange Agent in accordance with Section 2.04.

Section 5.15. *FIRPTA*. Parent has not been a United States real property holding corporation within the meaning of Code Section 897(c)(2) during the applicable period described in Code Section 897(c)(1)(A)(ii).

ARTICLE 6
COVENANTS

Section 6.01. *Conduct of the Company*. From the date hereof until the Effective Time, except as expressly contemplated in this Agreement, as set forth in Section 6.01 of the Company Disclosure Schedule or with prior written consent of Parent, the Company shall, and shall cause each of its Subsidiaries to, conduct its business in the ordinary course consistent with past practice and use its commercially reasonable efforts to (i) preserve intact its present business organization, (ii) maintain in effect all of the Company Permits, (iii) keep available the services of its current officers and key employees and (iv) maintain satisfactory relationships with its customers, suppliers and others having material business relationships with it. Without limiting the generality of the foregoing, except as expressly contemplated by this Agreement or as set forth in Section 6.01 of the Company Disclosure Schedule or with the prior written consent of Parent (which consent Parent shall not, acting from Parent's own point of view, unreasonably withhold or delay), the Company shall not, and shall not permit any of its Subsidiaries to:

(a) amend its Certificate of Incorporation, Bylaws or other similar organizational documents (whether by merger, consolidation or otherwise);

(b) split, combine or reclassify any shares of capital stock of the Company or any of its Subsidiaries or declare, set aside or pay any dividend or other distribution (whether in cash, stock or property or any combination thereof) in respect of the capital stock of the Company or its Subsidiaries (except for dividends paid by any of its wholly-owned Subsidiaries the Company or to any other wholly-owned Subsidiary), or redeem, repurchase or otherwise acquire or offer to redeem, repurchase, or otherwise acquire, directly or indirectly, any Company Securities or any Company Subsidiary Securities;

(c) (i) issue, deliver or sell, or authorize the issuance, delivery or sale of, any Company Securities or Company Subsidiary Securities, other than the issuance of shares of Company Stock upon the vesting and/or exercise of Company Stock Awards that are outstanding on the date of this Agreement in accordance with the terms of those Company Stock Awards as in effect on the date of this Agreement or (ii) amend any term of any Company Security or any Company Subsidiary Security (in each case, whether by merger, consolidation or otherwise);

(d) (i) acquire (including by merger, consolidation, or acquisition of stock or assets) or make any loans, advances or capital contributions to, or investments in, any Equity Interests or equity securities in any Person or any assets, loans or debt securities thereof other than in wholly-owned Subsidiaries of the Company or in the ordinary course of business consistent with

past practice, (ii) sell, lease or otherwise dispose of (whether by merger, consolidation, or acquisition of stock or assets or otherwise), or create or incur any Lien on, any business organization or division thereof or any assets or securities, other than sales or dispositions of inventory and other assets in the ordinary course of business or pursuant to existing Contracts, (iii) abandon, fail to maintain or allow to expire (other than in the ordinary course of business consistent with past practice), or sell or exclusively license to any Person, any material Company Intellectual Property, (iv) authorize any material new capital expenditures, in the aggregate, in excess of one hundred ten percent (110%) of the capital expenditures set forth in the Capital Expenditure and Loan Proceeds Budget or (v) use any of the proceeds from loans drawn under the Loan Documents other than in accordance with Section 6.02 of the Loan Agreement included in the Loan Documents;

(e) adopt or enter into a plan of complete or partial liquidation, dissolution, merger, consolidation, restructuring, recapitalization or other reorganization of the Company or any of its Subsidiaries (other than the Merger or among wholly-owned Subsidiaries);

(f) create, incur, assume, suffer to exist or otherwise be liable with respect to any Indebtedness, or issue any debt securities or assume, guarantee or endorse, or otherwise as an accommodation become responsible for, the Indebtedness of any other Person, other than, in each case, Indebtedness arising under the Loan Documents;

(g) (i) renew or enter into any Contract or other arrangement that limits or otherwise restricts in any material respect the Company, any of its Subsidiaries or any of their respective Affiliates or any successor thereto from, in each case, engaging or competing in any line of business, in any location or with any Person, (ii) enter into any new line of business outside of its existing business segments or (iii) enter into or, except as in the ordinary course of business consistent with past practice, amend or modify in any material respect or terminate any Material Contract or otherwise waive, release or assign any material rights, claims or benefits of the Company or any of its Subsidiaries;

(h) (i) enter into any exclusive license, distribution, marketing or sales Contracts or (ii) grant “most favored nation” or similar pricing to any Person;

(i) pay, discharge, settle or satisfy any material claims, liabilities or obligations (absolute, accrued, contingent or otherwise) to Third Parties, other than (i) performance of contractual obligations in accordance with their terms, (ii) payment, discharge, settlement or satisfaction in the ordinary course of business or (iii) payment, discharge, settlement or satisfaction in accordance with their terms, of claims, liabilities or obligations that have been (A) disclosed in the most recent Company Financial Statements or (B) incurred since the date of the most recent Company Financial Statements in the ordinary course of business or in connection with the transactions contemplated by this Agreement;

(j) settle, or offer or propose to settle (i) any material litigation, investigation, arbitration, proceeding or other claim involving or against the Company or any of its Subsidiaries, or (ii) any material litigation, arbitration, proceeding or dispute that relates to the transactions contemplated hereby, or commence any material litigation, investigation, arbitration or proceeding against any Third Party;

(k) fail to keep in force insurance policies or replacement or revised provisions regarding insurance coverage with respect to the assets, products, operations and activities of the Company and its Subsidiaries substantially equal to those currently in effect;

(l) (i) grant or increase any severance or termination pay to (or amend any existing arrangement with) any director or officer of the Company or any of its Subsidiaries, (ii) increase benefits payable under any existing severance or termination pay policies or employment agreements, (iii) enter into any employment, deferred compensation or other similar agreement (or amend any such existing agreement) with any director, officer or employee of the Company or any of its Subsidiaries (except with respect to employees who are not directors or officers of the Company or any of its Subsidiaries in the ordinary course of business consistent with past practice), (iv) terminate, establish, adopt or amend (except as reasonably necessary to comply with Applicable Law) any Company Benefit Plan covering any director, officer or employee of the Company or any of its Subsidiaries or (v) increase compensation, bonus or other benefits payable to any director, officer or employee of the Company or any of its Subsidiaries, or pay any benefit not provided for by any existing Company Benefit Plan;

(m) change the Company's methods of accounting, except as required by concurrent changes in GAAP;

(n) except as required by Applicable Law, make or change or rescind any material Tax election, change any annual Tax accounting period, adopt or change any material accounting method for Taxes, file any material amended Tax Return, enter into any closing agreement related to a material amount of Taxes, settle any material Tax claim or assessment relating to the Company or any of its Subsidiaries, surrender any right to claim a refund of a material amount of Taxes or consent to any extension or waiver of the limitation period applicable to any material Tax claim or assessment relating to the Company or any of its Subsidiaries;

(o) agree, resolve or commit to do any of the foregoing or take any action which would reasonably be expected to result in any of the conditions to the Mergers set forth in Article 7 not being satisfied; or

(p) fail to make disclosure as required under the Corporations Act and the ASX Listing Rules (including the continuous disclosure requirements).

Section 6.02. *Conduct of Parent*. From the date hereof until the Effective Time, except as expressly contemplated by this Agreement or with prior written consent of the Company, (a) Parent shall not amend its Articles of Incorporation or Bylaws (whether by merger, consolidation or otherwise) in any manner that would have a disparate effect on the Company Stockholders, as holders of Parent Stock at and following the Effective Time, relative to other holders of Parent Stock, and (b) Parent shall not amend its Articles of Incorporation to provide for any class of capital stock with rights to distributions or upon a liquidation (including upon a merger, consolidation, asset sale or similar transaction) that are superior to those of the Parent Stock, other than an amendment in connection with a shareholder rights plan, "poison pill" anti-takeover plan or other similar device.

Section 6.03. *Proxy Statement and Registration Statement; Company Stockholder Meeting*. (a) *Proxy Statement and Registration Statement*. Subject to the terms and conditions of this Agreement, as promptly as reasonably practicable after the date hereof (i) the Company shall prepare and file with the SEC the Company Proxy Statement, (ii) Parent shall prepare and file with the SEC the Registration Statement in which the Company Proxy Statement will be included as a prospectus and (iii) Parent shall prepare and file a prospectus (the "**Australian Prospectus**") with ASIC in connection with the issuance of shares of Parent Stock in connection with the Merger which will be mailed by the Company to Company Stockholders. The Company and Parent, after consultation with each other, will use their respective commercially reasonable efforts to respond promptly to any comments made by the SEC with respect to the Company Proxy Statement or the Registration Statement and to any comments made by ASIC with respect to the Australian Prospectus. The Company shall use commercially reasonable efforts to have the Proxy Statement cleared by the SEC and each of Parent and the Company shall use commercially reasonable efforts to have the Registration Statement become effective under the Securities Act, in each case, as promptly as practicable after such filing.

(b) Each of Parent and the Company shall furnish all information as may be reasonably requested or may be required by the other in connection with the preparation, filing and distribution of the Company Proxy Statement, the Registration Statement and the Australian Prospectus. No filing of, or amendment or supplement to, the Registration Statement or the Australian Prospectus will be made by Parent, and no filing of, or amendment or supplement to, the Company Proxy Statement will be made by the Company, in each case without providing the other party a reasonable opportunity to review and comment thereon and including therein any comments reasonably proposed. If at any time prior to the Effective Time any information relating to the Company or Parent, or any of their respective Affiliates, directors or officers, is discovered by the Company or Parent which should be set forth in an amendment or supplement to the Registration Statement, the Australian Prospectus or the Company Proxy Statement as required by Applicable Law, the Party that discovers such information shall promptly notify the other Parties hereto and an appropriate amendment or supplement describing such information shall be promptly filed with the SEC or ASIC, as applicable, and, to the extent required by Applicable Law, disseminated to the stockholders of the Company. The Parties shall notify each other promptly of the time when the Registration Statement has become effective and of the time when the Australian Prospectus is lodged with ASIC, of the issuance of any stop order, interim stop order or suspension of the qualification of the Parent Stock issuable in connection with the Merger for offering or sale in any jurisdiction, of the receipt of any comments from the SEC or ASIC or the staff of the SEC or ASIC and of any request by the SEC or ASIC or the staff of the SEC or ASIC for amendments or supplements to the Company Proxy Statement, the Registration Statement or the Australian Prospectus, as applicable, or for additional information, and shall supply each other with copies of all formal correspondence between it or any of its Representatives, on the one hand, and the SEC or ASIC or the staff of the SEC or ASIC, on the other hand, with respect to the Company Proxy Statement, the Registration Statement, the Australian Prospectus or the Merger.

(c) As promptly as practicable after Parent has filed with the SEC the Registration Statement or any amendments or supplements thereto, the Company shall cause a copy to be filed with ASX. As promptly as practicable after the Registration Statement has become effective and the Australian Prospectus has been lodged with ASIC, the Company shall cause the

Company Proxy Statement, Registration Statement and Australian Prospectus to be filed with ASX in accordance with Applicable Law and its obligations under Section 6.03(d). Subject to and without limiting the rights of the Board of Directors of the Company pursuant to Section 6.04 (b), the Company Proxy Statement shall include the Company Board Recommendation.

(d) *Stockholder Meeting*. Unless this Agreement has been terminated in accordance with Section 8.01, (i) the Company shall establish a record date for, duly call, give notice of, convene and hold either (A) a special meeting of the Company Stockholders solely for the purpose of obtaining the Company Stockholder Approval or (B) the Company's annual meeting of the Company Stockholders solely for the purpose of obtaining the Company Stockholder Approval, electing directors of the Company, ratifying the selection of the Company's independent public accountants, authorizing the compensation arrangements to the Persons and in the amounts as set forth in Schedule 6.03(d) and voting on any stockholder proposals properly brought before such meeting (any such meeting held for the purpose of obtaining the Company Stockholder Approval, the "**Company Stockholder Meeting**"), on or prior to the date that is, subject to the Registration Statement having become effective, the earlier of (x) forty-five (45) days after the applicable waiting period (including any extensions thereof) under the HSR Act shall have expired or been terminated and (y) October 15, 2009 (or, if the Registration Statement has not become effective by the earlier of such dates, within forty-five (45) days after such date on which the Registration Statement becomes effective), (ii) without limiting the foregoing, prior to any such Company Stockholders Meeting and with sufficient time to allow the Company to comply with its obligations pursuant to Section 6.03(d)(i) in accordance with Applicable Law and the provisions of its Certificate of Incorporation and Bylaws, the Company shall cause the Company Proxy Statement, Registration Statement and Australian Prospectus to be mailed to the Company Stockholders in accordance with Applicable Law and the Company's obligations under Section 6.03(c), (iii) use its commercially reasonable efforts to obtain the Company Stockholder Approval and (iv) comply with all legal requirements applicable to such meeting. Provided this Agreement has not otherwise been terminated pursuant to Section 8.01, the Company's obligations pursuant to this Section 6.03(d) shall not be affected by the public announcement or public disclosure of, or the communication to the Company of, any Acquisition Proposal, or by an Adverse Recommendation Change.

Section 6.04. *No Solicitation; Other Offers*. (a) Subject to Section 6.04(b), the Company shall not, and the Company shall cause its Subsidiaries and its and their officers, directors, employees, investment bankers, attorneys, accountants, consultants and other agents and advisors (collectively, "**Representatives**") not to, directly or indirectly, (i) solicit, initiate or knowingly take any action to facilitate or encourage any inquiries regarding, or the making or submission of any proposal or offer that constitutes, or could reasonably be expected to result in, an Acquisition Proposal, (ii) enter into or participate in any discussions or negotiations regarding any Acquisition Proposal, or furnish or disclose any information relating to the Company or any of its Subsidiaries or knowingly cooperate in any way with, or knowingly take any action to facilitate or encourage any effort by, any Third Party that is seeking to make, or has made, any Acquisition Proposal, (iii) fail to make, withdraw or modify in a manner adverse to Parent, the Company Board Recommendation (or publicly recommend any Acquisition Proposal or take any public action or make any public statement inconsistent with the Company Board Recommendation, including any failure to include the Company Board Recommendation in the

Company Proxy Statement) (any of the foregoing in this clause (iii), an "**Adverse Recommendation Change**") or (iv) enter into any agreement, agreement in principle, letter of intent, or other similar instrument relating to any Acquisition Proposal. The Company shall, and shall cause each of its Subsidiaries and its and their Representatives to, immediately cease and cause to be terminated any discussions or negotiations with any Third Party (other than Parent and its Representatives) that may be ongoing as of the date hereof with respect to any actual or potential Acquisition Proposal. The Company shall use its commercially reasonable efforts to obtain, in accordance with the terms of any applicable confidentiality agreement, the return or destruction of any confidential information previously furnished to any such Person by the Company, any of its Subsidiaries or any of its or their Representatives.

(b) Notwithstanding the foregoing, at any time prior to obtaining the Stockholder Approval (x) in response to a written Acquisition Proposal received by the Company after the date hereof that was not solicited in violation of Section 6.04(a) and with respect to which the Board of Directors of the Company determines in good faith (after consultation with its outside legal counsel and financial advisors) (i) that such Acquisition Proposal constitutes, or could reasonably be expected to lead to, a Superior Proposal and (ii) that its failure to take the applicable action set forth in clauses (A), (B) or (C) below with respect to such Acquisition Proposal would reasonably be expected to be inconsistent with its fiduciary duties to the Company Stockholders under Applicable Law, the Board of Directors of the Company, directly or indirectly through advisors, agents or other intermediaries, may, in response to such Acquisition Proposal, and subject to compliance with Section 6.04(c) and Section 6.04(d), (A) provide access to its properties, Contracts, personnel, books and records and furnish information, data and/or draft agreements with respect to the Company and its Subsidiaries to the Person making such Acquisition Proposal and its Representatives, (B) participate in discussions or negotiations with the Person making such Acquisition Proposal and its Representatives regarding such Acquisition Proposal or (C) in the event that the Board of Directors of the Company determines in good faith (after consultation with its outside legal counsel and financial advisors) that such Acquisition Proposal constitutes a Superior Proposal, make an Adverse Recommendation Change and/or enter into an agreement (or any letter of intent, acquisition agreement or similar agreement with respect to such Superior Proposal) regarding such Superior Proposal or (y) other than in connection with an Acquisition Proposal, if the Board of Directors of the Company determines in good faith (after consultation with its outside legal counsel and financial advisors) that its failure to make an Adverse Recommendation Change would reasonably be expected to be inconsistent with its fiduciary duties to the Company Stockholders under Applicable Law, then the Board of Directors of the Company may make an Adverse Recommendation Change; *provided*, *however*, that the Board of Directors of the Company shall not make an Adverse Recommendation Change or enter into an agreement, in each case, with respect to any Superior Proposal unless (1) the Company has given Parent three (3) Business Days prior written notice of its intention to take such action (it being understood and agreed that, in connection with either of the foregoing relating to a Superior Proposal, any change to the consideration offered or other material terms of any Superior Proposal shall require an additional notice to Parent and a new two (2) Business Day notice period), (2) the Board of Directors of the Company shall have considered in good faith (after consultation with its outside legal counsel and financial advisors) any changes or revisions to this Agreement proposed by Parent and shall (x) not have determined that the Superior Proposal would no longer constitute a Superior Proposal if such changes were to be given effect or (y) have determined to make such Adverse

Recommendation Change even if such changes were to be given effect and (3)(x) the Company has complied in all material respects with its obligations under this Section 6.04 and (y) in the event that the Board of Directors of the Company has determined to enter into an agreement regarding such Superior Proposal, the Company shall have terminated this Agreement in accordance with the provisions of Section 8.01(d)(ii) hereof and the Company pays Parent the Company Termination Fee in accordance with Section 8.03.

(c) The Company shall promptly (and in any event within two (2) Business Days) advise Parent orally and in writing of (i) the receipt of any indication in writing that a Third Party is considering or may be considering making an Acquisition Proposal or (ii) the receipt of any Acquisition Proposal, in each case, along with the identity of the Person making any such Acquisition Proposal, and, to the extent available, the Company shall provide Parent with a copy or a written summary of the material terms of any such Acquisition Proposal. The Company shall keep Parent reasonably informed of the status on a current basis (including any change to the material terms) of any such Acquisition Proposal, potential Acquisition Proposal or information request. Following a determination by the Board of Directors of the Company that an Acquisition Proposal constitutes a Superior Proposal, the Company shall deliver to Parent a written notice advising it that the Board of Directors of the Company has made such determination together with a copy of any written summary or any draft or definitive agreements related to such Superior Proposal and a summary of the material terms of such Superior Proposal. The Company agrees that it shall not, and shall cause its Subsidiaries not to, enter into any confidentiality agreement or other agreement with any Person subsequent to the date of this Agreement which prohibits the Company from providing such information to Parent.

(d) Prior to furnishing any information to or entering into discussions or negotiations with any Person making an Acquisition Proposal pursuant to Section 6.04(b), the Company shall receive from such Person an executed confidentiality agreement, the terms of which shall be no less favorable to the Company than, in the aggregate, those contained in the Confidentiality Agreement dated as of November 14, 2008 between the Company and Parent (the "**Confidentiality Agreement**") (a copy of which shall be provided for informational purposes only to Parent). The Company shall promptly provide to Parent any non-public information concerning the Company or any of its Subsidiaries not previously provided to Parent or the Parent Representatives that is provided to any Person making an Acquisition Proposal. The Company agrees that neither it nor any of its Subsidiaries shall terminate, waive, amend or modify any provision or any existing standstill or confidentiality agreement to which it or any of its Subsidiaries is a party, or enter into any confidentiality agreement pursuant to this Section 6.04(d) that contains a standstill provision that is less favorable to the Company than the standstill provision contained in the Confidentiality Agreement (or that does not include any standstill provision), unless the failure to take such action by the Board of Directors of the Company would be reasonably expected to be inconsistent with its fiduciary duties to Company Stockholders under Applicable Law (in which case, such termination, waiver, amendment or modification, or the terms of any standstill provision contained in any confidentiality agreement entered into pursuant to this Section 6.04(d) that is less favorable to the Company than the standstill provision contained in the Confidentiality Agreement (or the absence of any such standstill provision), shall also apply to the Confidentiality Agreement, to the extent applicable).

(e) Notwithstanding anything to the contrary contained herein, nothing contained in this Agreement shall prohibit or restrict the Company or the Board of Directors of the Company from (a) taking and/or disclosing to the Company Stockholders a position contemplated by Rule 14d-9 or Rule 14e-2 promulgated under the Exchange Act or (b) making any disclosure to the stockholders of the Company if, the Board of Directors of the Company, determines in good faith (after consultation with its outside legal counsel and financial advisors) that it is required to do so under Applicable Law (including Rule 14d-9 and Rule 14e-2 promulgated under the Exchange Act); *provided*, *however*, that in no event shall this Section 6.04(e) affect the obligations of the Company specified in Section 6.04(b).

Section 6.05. *Access to Company Information*. (a) Subject to Section 6.05(b), from the date of this Agreement to the Effective Time or the earlier termination of this Agreement pursuant to Section 8.01, the Company shall, and shall cause each of its Subsidiaries and each of its and their Representatives to: (a) provide to Parent and each of its respective Representatives reasonable access during normal business hours and upon reasonable prior notice to the Company and its Subsidiaries, to the officers, employees, agents, Contracts, properties, assets, offices and other facilities of the Company and its Subsidiaries and to the books and records thereof and (b) furnish, or cause to be furnished, (i) such reasonably available information concerning the business, properties, Contracts, assets, liabilities, personnel and other aspects of or information concerning the Company and its Subsidiaries as Parent or its respective Representatives may reasonably request and (ii) to Parent, with respect to each fiscal month ending after the date of this Agreement, unaudited monthly consolidated balance sheets of the Company and its Subsidiaries for each fiscal month then ended and related consolidated statements of operations and cash flows (which the Company shall furnish to Parent promptly following the end of each such month); *provided*, *however*, that the foregoing shall not require the Company to disclose any information to the extent such disclosure would (a) contravene Applicable Law or (b) jeopardize the attorney-client privilege or any similar applicable privilege of the Company or its Subsidiaries; *provided* that the Parties shall use their respective commercially reasonable efforts to cause such information to be provided in a manner that does contravene Applicable Law or jeopardize any such privilege. No investigation made or information provided, made available or delivered to Parent, Merger Subsidiary, Merger Subsidiary Two or any of their respective Representatives pursuant to this Section 6.05 shall affect any of the representations, warranties, covenants, rights or remedies, or the conditions to the obligations of, the Parties hereunder.

(b) *Confidentiality and Restrictions*. Any information provided, made available or delivered by the Company or any of their respective Subsidiaries or any of their respective Representatives to Parent or any of its Representatives pursuant to this Section 6.05 shall be held in confidence in accordance with the terms of the Confidentiality Agreement. The Confidentiality Agreement shall continue in full force and effect in accordance with its terms until the earlier of (a) the Effective Time or (b) the expiration of the Confidentiality Agreement according to its terms, and shall survive any termination of this Agreement.

Section 6.06. *Further Action; Reasonable Best Efforts*. (a) Subject to the terms and conditions of this Agreement, each Party shall use its reasonable best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other Parties in doing, all things necessary, proper or advisable under Applicable Law to consummate

and make effective the Mergers and the other transactions contemplated hereby. Without limiting the generality of the foregoing, the Parties will use their respective reasonable best efforts to (a) prepare and file as soon as practicable all forms, registrations and notices relating to antitrust, competition, trade or other regulatory matters that are required by Applicable Law to be filed in order to consummate the Merger and the other transactions contemplated hereby, and take such actions as are reasonably necessary to obtain any requisite approvals, consents, orders, exemptions or waivers by, or to avoid an action or proceeding by, any Governmental Authority relating to antitrust, competition, trade or other regulatory matters (collectively, "**Regulatory Approvals**"), including (i) any Notification and Report Forms and related material required in connection with the HSR Act with the United States Federal Trade Commission ("**FTC**") and with the Antitrust Division of the United States Department of Justice ("**Antitrust Division**") in connection with the HSR Act (which shall be filed no later than ten (10) Business Days following the date of this Agreement) and (ii) any form or report required by any other Governmental Authority relating to any other Regulatory Approval, (b) take all actions necessary to cause all conditions set forth in Article 7 (including the prompt termination of any waiting period under the HSR Act (including any extension of the initial thirty (30) day waiting period thereunder)) to be satisfied as soon as practicable and (c) execute and deliver any additional instruments necessary to consummate the Mergers and to fully carry out the purposes of this Agreement; *provided*, *however*, that the Parties hereto understand and agree that the reasonable best efforts of any Party hereto shall not require any Party or its Affiliates or Subsidiaries to: (i) agree to or effect any divestiture or hold-separate order, or enter into any license or similar agreement with respect to, or agree to restrict its ownership or operation of, any business or assets of any Party or any of its Affiliates or Subsidiaries, (ii) enter into, amend, or agree to enter into or amend, any contracts of any Party or any of its Affiliates or Subsidiaries or (iii) otherwise waive, abandon or alter any material rights or obligations of any Party or any of its Subsidiaries or Affiliates.

(b) Each Party shall furnish all information required to be included in any application or other filing to be made pursuant to the rules and regulations of any Governmental Authority in connection with the Mergers and the other transactions contemplated hereby. Subject to Applicable Law and the attorney-client and similar applicable privileges, Parent and the Company shall have the right to review in advance, and, to the extent reasonably practicable, each will consult the other on, all the information relating to the other and each of their respective Subsidiaries and Affiliates that appears in any filing made with, or written materials submitted to, any Governmental Authority in connection with the Mergers and the other transactions contemplated hereby.

(c) Each Party shall (a) subject to Section 6.06(d) below, respond as promptly as reasonably practicable to any inquiries or requests for additional information and documentary material received from the FTC or the Antitrust Division and to all inquiries and requests received from any State Attorney General or other Governmental Authority in connection with Regulatory Approvals and antitrust matters, (b) not extend any waiting period or agree to refile under the HSR Act (except with the prior written consent of the other Parties hereto, which consent shall not be unreasonably withheld, conditioned or delayed) and (c) not enter into any agreement with the FTC or the Antitrust Division agreeing not to consummate the Mergers or the other transactions contemplated by this Agreement. Except for the Mergers and without limiting the Parties' other obligations under this Agreement, none of the Parties shall enter into or

consummate any merger or other acquisition of a business or any similar transaction (other than a license of Intellectual Property entered into in the ordinary course of business), that would reasonably be expected to make it less likely that the conditions set forth in Section 7.01(b) and Section 7.01(c) would be satisfied in a timely manner.

(d) In connection with and without limiting the foregoing, each Party shall, subject to Applicable Law and except as prohibited by any applicable representative of any applicable Governmental Authority: (a) promptly notify the other Parties of any material written communication to that Party from the FTC, the Antitrust Division, any State Attorney General or any other regulatory Governmental Authority concerning this Agreement, the Mergers or the other transactions contemplated hereby, and permit the other Parties to review in advance (and to consider any comments made by the other Parties in relation to) any proposed written communication to any of the foregoing, (b) not participate in or agree to participate in any substantive meeting, telephone call or discussion with any Governmental Authority in respect of any filings, investigation or inquiry concerning this Agreement, the Mergers or the other transactions contemplated hereby unless it consults with the other Parties in advance and, to the extent permitted by such Governmental Authority, gives the other Parties the opportunity to attend and participate in such meeting, telephone call or discussion and (c) subject to the attorney-client and similar applicable privileges, furnish outside legal counsel for the other Parties with copies of all correspondence, filings, and written communications (and memoranda setting forth the substance thereof) between such Party and its Affiliates and their respective Representatives on the one hand, and any Governmental Authority, including any regulatory authority, or its members or their respective staffs on the other hand, with respect to this Agreement, the Mergers and the other transactions contemplated hereby.

Section 6.07. *Notices of Certain Events*. From and after the date of this Agreement until the earlier of the Effective Time or the termination of this Agreement pursuant to Section 8.01, the Company shall give prompt written notice to Parent, and Parent shall give prompt written notice the Company, of (a) any material notice or other material communication received by such Party from any Governmental Authority in connection with this Agreement, the Mergers or the other transactions contemplated hereby or from any Person alleging that the consent of such Person is or may be required in connection with this Agreement, the Mergers or the other transactions contemplated hereby, (b) any material claims, actions, suits, proceedings or investigations commenced or, to such Party's knowledge, threatened against, relating to or involving or otherwise affecting such Party or any of its Subsidiaries which relate to this Agreement, the Mergers or the other transactions contemplated hereby and (c) any fact, event or circumstance known to such Party that would cause or constitute, or would reasonably be expected to cause or constitute, a breach in any material respect of any such Party's representations, warranties, covenants or agreements contained herein or would prevent, materially delay or impede, or would reasonably be expected to prevent, materially delay or impede, the consummation of the Merger or any other transaction contemplated by this Agreement; *provided*, *however*, that the delivery of any notice pursuant to this Section 6.07 shall not limit or otherwise affect any remedies available to the Party receiving such notice or prevent or cure any misrepresentations, breach of warranty or breach of covenant or failure to satisfy the conditions to the obligations of the Parties under this Agreement; *provided, further, however,* that a failure to comply with this Section 6.07 prior to the Closing Date in and of itself will not constitute the failure of any condition set forth in Article 7 or Article 8 to be satisfied unless (i)

such failure materially prejudices another Party's ability to exercise its rights or remedies hereunder prior to the Effective Time or (ii) the underlying event would independently result in the failure of a condition set forth in Article 7 or Article 8 to be satisfied.

Section 6.08. *Public Announcements*. The initial press release with respect to this Agreement, the Mergers and the other transactions contemplated hereby shall be a joint release mutually agreed upon by the Company and Parent. Thereafter, none of the Parties shall (and each of the Parties shall cause its Subsidiaries and Representatives not to) issue any press release or make any public announcement concerning this Agreement, the Mergers or the other transactions contemplated hereby without obtaining the prior written consent of (a) the Company, in the event the disclosing party is Parent or any of its Subsidiaries or their respective Representatives or (b) Parent, in the event the disclosing party is the Company or any of its Subsidiaries or their respective Representatives, in each case, with such consent not to be unreasonably conditioned, delayed or withheld; *provided*, *however*, that if a Party determines, based upon advice of counsel, that a press release or public announcement is required by, or reasonably necessary in order to comply with, Applicable Law or the rules or regulations of NASDAQ, ASX or any other securities exchange on which the Company Stock or the Parent Stock is listed, such Party may make such press release or public announcement, in which case the disclosing Party shall use its commercially reasonable efforts to provide the other Parties reasonable time to comment on such release or announcement in advance of such issuance.

Section 6.09. *Obligations with Respect to Continuing Employees and Benefit Matters*. (a) For a period of twelve (12) months following the Effective Time, subject to compliance with Applicable Law and Parent's applicable benefit plans, the employees of the Company who remain in the employment of the Surviving Corporations (the "**Continuing Employees**") shall receive employee benefits that, in the aggregate, are substantially similar to those received by similarly situated employees of Parent; *provided* that neither Parent nor either Surviving Corporation shall have any obligation to issue, or adopt any plans or arrangements providing for the issuance of, shares of capital stock, warrants, options, stock appreciation rights or other rights in respect of any shares of capital stock of any entity or any securities convertible or exchangeable into such shares pursuant to any such plans or arrangements. In addition, on or prior to the date of this Agreement, the Company shall enter into Incentive Agreements, in the form attached hereto as Exhibit B with such modifications or revisions thereto as may be agreed upon by Parent, for the benefit of certain employees of the Company designated on Schedule 6.09(a) hereto, pursuant to which such employees will receive cash payments in the amounts, at the times and on the terms and conditions set forth in the Incentive Agreements. With the prior written notice of the names of the employees and the amounts and terms of the retention bonuses to Parent and prior consultation thereof with Parent, the Company also shall be permitted to award additional cash retention bonuses to other employees of the Company, payable on or following the Closing; *provided* that the maximum aggregate amount payable (inclusive of any and all payments, reimbursements and tax gross ups) pursuant to such bonuses and the Incentive Agreements shall be $8,000,000. Any amounts pursuant to such retention bonuses and the Incentive Agreements that are forfeited shall be returned to the Company. To the extent reasonably requested by Parent, the Company will use its commercially reasonable efforts to obtain confirmatory assignments of Intellectual Property from current and former employees and independent contractors and consultants, in each case in a form that is reasonably acceptable to Parent. With respect to matters described in this Section 6.09, the Company will consult with

Parent (and will consider in good faith the advice of Parent) prior to sending any notices or other communication materials to its employees.

(b) Nothing contained herein shall be construed as requiring, and the Company shall take no action that would have the effect of requiring, Parent or either Surviving Corporation to continue any specific employee benefit plans of the Company or to continue the employment of any specific individual or group of individuals.

(c) Subject to compliance with Applicable Law and Parent's applicable benefit plans, Parent shall cause the Surviving Corporations to recognize the service of each Continuing Employee as if such service had been performed with Parent with respect to any plans or programs in which Continuing Employees are eligible to participate after the Effective Time (i) for purposes of eligibility for vacation, (ii) for purposes of eligibility and participation under any health or welfare plan (other than any post-employment health or post-employment welfare plan), (iii) for purposes of eligibility for any vesting of any matching contributions under a cash or deferred arrangement intended to qualify under Section 401(k) of the Code and (iv) for the purpose of determining the amount of any severance payable under any severance plan of general application, except, in each case, to the extent such treatment would result in duplicative benefits. Parent shall cause the Surviving Corporations to recognize any vacation time of Continuing Employees that has accrued and has not been used as of the Effective Time; *provided*, *however*, that, beginning on the first anniversary of the Effective Time, Continuing Employees will be subject to the maximum vacation accruals applicable to Parent employees generally, such that any amounts of accrued vacation time in excess of applicable maximums will be forfeited on and after such date.

(d) With respect to any group health plan maintained by Parent in which Continuing Employees are eligible to participate after the Effective Time, and subject to compliance with Applicable Law and any such group health plan, Parent shall, and shall cause the Surviving Corporations to, use all commercially reasonable efforts to waive limitations as to preexisting conditions and exclusions with respect to participation and coverage requirements applicable to such Continuing Employees to the extent such conditions and exclusions were satisfied or did not apply to such Continuing Employees under the applicable group health plans maintained by the Company prior to the Effective Time.

(e) The provisions of this Section 6.09 are for the sole benefit of the Parties and nothing in this Section 6.09, expressed or implied, is intended or shall be construed to (i) constitute an amendment to any of the compensation and benefits plans, programs or arrangements maintained for or provided to Continuing Employees or any other employees of Parent prior to or following the Effective Time, or of either Surviving Corporation following the Effective Time, or impose an obligation on any of the Company, Parent or, on or after the Effective Time, either Surviving Corporation, to establish, amend, terminate or otherwise take any action with respect to any compensation or benefits plan, program or arrangement or (ii) confer upon or give to any Person (including any current or former employees, directors, or independent contractors of any of the Company, Parent, or, on or after the Effective Time, either Surviving Corporation), other than the Parties hereto, any legal or equitable or other rights or remedies (with respect to the matters provided for in this Section 6.09). For the avoidance of doubt, no provision of this Agreement shall create any third party beneficiary rights in any

employee, any beneficiary or dependents thereof, or any collective bargaining representative thereof, with respect to the compensation, terms and conditions of employment and benefits that may be provided to any employee by Company or Parent or under any benefit plan which Company or Parent may maintain.

(f) Upon Parent's request at least five (5) Business Days prior to the Closing Date, the Company shall take any and all actions required to terminate the Company's 401(k) Plan prior to the Closing Date. Such actions shall include providing to Parent executed resolutions of the Company's Board of Directors terminating the Company's 401(k) Plan.

Section 6.10. *Indemnification and Insurance*. (a) The Certificate of Incorporation and Bylaws of the Surviving Corporation shall contain provisions no less favorable with respect to indemnification than those set forth in the Certificate of Incorporation and Bylaws of the Company, which provisions shall not be amended, repealed or otherwise modified for a period of seven (7) years from the Effective Time in any manner that would adversely affect the rights thereunder of individuals who, at or prior to the Effective Time were directors, officers or employees of the Company, unless such modifications shall be required by Applicable Law.

(b) For a period of seven (7) years following the Effective Time, Parent shall maintain officers' and directors' liability insurance in respect of acts or omissions occurring prior to the Effective Time covering those persons who are currently covered on the date of this Agreement by the Company's directors' and officers' liability insurance policy or who becomes covered prior to the Effective Time on terms with respect to coverage and amount no less favorable than those in the current directors' and officers' liability insurance policy maintained by the Company and in effect on the date hereof; *provided*, that, in satisfying its obligation under this Section 6.10(b), Parent shall not be obligated to pay an aggregate premium in excess of two hundred fifty percent (250%) of the amount per annum the Company paid in its last full fiscal year with respect to its current directors' and officers' liability insurance policy, which amount Company has disclosed to Parent prior to the date hereof. Alternatively, in full satisfaction of its obligations under this Section 6.10(b), Parent may purchase a seven (7) year prepaid (or "tail") policy on terms with respect to coverage and amount no less favorable than those in the current directors' and officers' liability insurance policy maintained by the Company and in effect on the date hereof; *provided*, *however*, that the cost of any such policy need not exceed two hundred fifty percent (250%) of the annual premium currently paid by the Company for such insurance.

(c) The rights of each current or former director or officer of the Company (each an "**Indemnified Person**") under this Section 6.10 shall be in addition to any rights such Person may have under the Certificate of Incorporation or Bylaws of the Company or any of its Subsidiaries, or under Delaware Law or any other Applicable Law or under any agreement of any Indemnified Person with the Company or any of its Subsidiaries. These rights shall survive consummation of the Mergers and are intended to benefit, and shall be enforceable by, each Indemnified Person.

Section 6.11. *Tax Treatment as Reorganization*. (a) If, and only if, the Continuity Percentage is greater than or equal to the Reorganization Threshold:

(i) Each of Parent, Merger Subsidiary, Merger Subsidiary Two and the Company intends, and shall use its reasonable best efforts to cause, the Mergers, taken together, to qualify as a "reorganization" within the meaning of Section 368(a) of the Code, within the manner described in Revenue Ruling 2001-46, and the parties hereto adopt this Agreement as a "plan of reorganization" within the meaning of Treasury Regulations Section 1.368-2(g) of the regulations promulgated under the Code. Parent shall not make an election under Section 338 of the Code with respect to the Company in connection with the transactions contemplated by this Agreement.

(ii) Unless otherwise required pursuant to a "determination" within the meaning of Section 1313(a) of the Code, each of Parent, Merger Subsidiary, Merger Subsidiary Two and the Company shall report the Mergers, taken together, as a "reorganization" within the meaning of Section 368(a) of the Code and shall not take any inconsistent position therewith in any Tax Return.

(iii) The Parties shall cooperate and use their commercially reasonable efforts in order for (i) the Company to obtain the opinion of Shearman & Sterling LLP, in form and substance reasonably acceptable to the Company, dated as of the Closing Date and (ii) Parent to obtain the opinion of Latham & Watkins LLP, in form and substance reasonably acceptable to Parent, dated as of the Closing Date, each to the effect that, on the basis of the facts, representations and assumptions set forth or referred to in such opinion, for federal income tax purposes, the Mergers, taken together, will constitute a "reorganization" within the meaning of Section 368(a) of the Code. As a condition precedent to the rendering of such opinions, Parent (and Merger Subsidiary and Merger Subsidiary Two) and the Company shall, as of the Closing Date, execute and deliver to Latham & Watkins LLP and Shearman & Sterling LLP tax representation letters ("**Tax Representation Letters**"), dated and executed as of the dates of such opinions, in substantially the forms attached to this Agreement as Exhibit C and Exhibit D, respectively. Parent (and Merger Subsidiary and Merger Subsidiary Two) and the Company shall, as of the date for filing the Registration Statement and the Australian Prospectus, as the case may be, execute and deliver to Latham & Watkins LLP and Shearman & Sterling LLP Tax Representation Letters, dated and executed as of the applicable filing date, in substantially the forms attached to this Agreement as Exhibit C and Exhibit D, respectively. Notwithstanding anything in Section 7.02 or Section 7.03 to the contrary, the obligation to deliver the opinions referred to in this Section 6.11 shall not be waivable after receipt of any Company stockholder approval required by Applicable Law, unless further stockholder approval is obtained with appropriate disclosure.

(b) The following terms shall have the following meanings:

(i) "**Aggregate Reorganization Consideration Closing Value**" shall mean the sum of (1) the Aggregate Stock Consideration Closing Value, (2) the amount of cash consideration to be paid to holders of Shares as Merger Consideration, (3) the amount of any cash and the fair market value of any property that is distributed, transferred or paid by the Company to its stockholders (whether in a redemption transaction or as a dividend distribution) in connection with the Merger, (4) the amount of any cash payable pursuant

to Section 2.03(c) (relating to Company Stock Based Awards) and (5) the product of (x) the number of Dissenting Shares as of the Closing Date and (y) the sum of (I) the Cash Consideration and (II) the product of the Stock Consideration (subject to adjustment as provided herein) and the Parent Stock Closing Price.

(ii) "**Aggregate Stock Consideration Closing Value**" shall mean the product of (1) the number of shares of Parent Stock to be issued as Merger Consideration in the Merger and (2) the Parent Stock Closing Price.

(iii) "**Continuity Percentage**" shall mean the amount, expressed as a percentage, obtained by dividing the Aggregate Stock Consideration Closing Value by the Aggregate Reorganization Consideration Closing Value.

(iv) "**Parent Stock Closing Price**" shall mean the mean between the high and low selling prices of a share of Parent Stock, each as reported on NASDAQ for the last trading session closing prior to the Effective Time.

(v) "**Reorganization Threshold**" shall mean forty-one percent (41%).

Section 6.12. *Takeover Statutes*. No Party will take any action that would cause the transactions contemplated hereby to be subject to the requirements of, or imposed by any state takeover statute or similar law or regulation. If any state takeover statute or similar law becomes applicable to this Agreement (including the Mergers and the other transactions contemplated hereby), each of Parent, Merger Subsidiary, Merger Subsidiary Two, the Company and their respective Boards of Directors shall take all commercially reasonable action necessary to exempt the transactions from, or to eliminate or minimize the effect on this Agreement and the transactions contemplated hereby of, such statute or regulation.

Section 6.13. *Section 16 Matters*. Prior to the Effective Time, the Company shall, and shall be permitted to, take all such steps as may reasonably be necessary to cause the transactions contemplated by this Agreement, including any dispositions of Shares (including any derivative securities with respect to such Shares) by each Person who is or will be subject to the reporting requirements of Section 16(a) of the Exchange Act with respect to the Company, to be exempt under Rule 16b-3 promulgated under the Exchange Act.

Section 6.14. *Resignation of Directors*. Prior to the Effective Time, the Company shall deliver to Parent evidence satisfactory to Parent of the resignations of each of the directors of the Company from the Board of Directors of the Company and all committees thereof, such resignations to be effective as of the Effective Time.

Section 6.15. *Stock Exchange Listing*.

(a) The Company shall use its commercially reasonable efforts to cause all of the outstanding shares of Company Stock to be approved for listing on NASDAQ promptly following the date of this Agreement. If the Company Stock is listed on NASDAQ at any time following the date of this Agreement, at all times following the listing of the Company Stock on NASDAQ, the Company will comply in all material respects with the applicable listing and corporate governance rules and regulations of NASDAQ.

(b) Parent shall use its reasonable best efforts to cause the shares of Parent Stock to be issued in connection with the Merger to be approved for listing on NASDAQ upon the occurrence of the Effective Time, subject to official notice of issuance.

Section 6.16. *Chess Depositary Interests*. Prior to the Closing Date, the Company will take all actions that are reasonably necessary to provide that the CDIs will, on the Effective Time or such other time as the parties agree with ASX and CDN (as applicable), be (i) suspended from quotation on ASX and (ii) cancelled or transmuted into the underlying shares of Company Stock in accordance with the operating rules of the ASTC, and that the shares of Company Stock underlying the CDIs will be exchanged for their applicable share of the Merger Consideration in accordance with Article 2 hereof. As soon as practicable after the Closing Date, the Surviving Corporation will apply to ASX to delist the Company.

Section 6.17. *ASIC Registrations*. As soon as practicable after the Closing, the Surviving Corporation will notify ASIC of the Second Merger and either deregister the Company as a foreign registered company under the Corporations Act, or register the Surviving Corporation as a as a foreign registered company under the Corporations Act, if applicable.

Section 6.18. *Stockholder Litigation*. The Company shall give Parent and its counsel the opportunity to consult with the Company in connection with the defense or settlement of any stockholders litigation against the Company and/or its directors relating to the transactions contemplated by this Agreement.

ARTICLE 7
CONDITIONS TO THE MERGERS

Section 7.01. *Conditions to the Obligations of Each Party to Consummate the Merger*. The respective obligations of the Company, Parent and Merger Subsidiary to consummate the Merger are subject to the satisfaction, or waiver, at or prior to the Closing of the following conditions:

(a) *Stockholder Approval*. The Company Stockholder Approval shall have been obtained in accordance with Delaware Law.

(b) *Regulatory Approvals*. The applicable waiting period (including any extensions thereof) to the consummation of the Merger under the HSR Act shall have expired or shall have been terminated.

(c) *No Injunctions or Restraints*. No Applicable Law preventing or making illegal the consummation of the Merger or any other transaction contemplated by this Agreement shall be in effect.

(d) *Registration Statement and Australian Prospectus*. The Registration Statement shall have become effective under the Securities Act and the Australian Prospectus shall have been lodged with ASIC. No stop order or interim stop order suspending the effectiveness of the Registration Statement or the Australian Prospectus shall be in effect and no proceedings for such purpose shall have been initiated by the SEC or ASIC, respectively, that has not been concluded or withdrawn.

Section 7.02. *Conditions to the Obligations of Parent and Merger Subsidiary to Consummate the Merger*. The obligations of Parent and Merger Subsidiary to consummate the Merger and the other transactions contemplated hereby are also subject to the satisfaction, or waiver, at or prior to the Closing of the following conditions:

(a) *Representations and Warranties*. (i) The representations and warranties of the Company set forth in Section 4.01, Section 4.02 and Section 4.05 (disregarding any exception in such representations and warranties relating to materiality or a Company Material Adverse Effect) shall be true and correct in all material respects as of the date of this Agreement and as of the Closing as if made at and as of the Closing (except for any such representations and warranties which address matters only as of an earlier date which shall be true and correct in all material respects as of such earlier date) and (ii) all of the other representations and warranties of the Company set forth in Article 4 (disregarding for these purposes any exception in such representations and warranties relating to materiality or a Company Material Adverse Effect) shall be true and correct as of the date of this Agreement and as of the Closing as if made at and as of the Closing (except for those representations and warranties which address matters only as of an earlier date which shall have been true and correct as of such earlier date), except for such failures to be true and correct which do not have a Company Material Adverse Effect.

(b) *Agreements and Covenants*. The Company shall have performed or complied in all material respects with all agreements and covenants required by this Agreement to be performed or complied with by the Company at or prior to the Closing.

(c) *No Company Material Adverse Effect*. Since the date of this Agreement, no Company Material Adverse Effect shall have occurred.

(d) *Officer's Certificate*. Parent shall have received a certificate of an officer of the Company confirming the satisfaction of the conditions set forth in Sections 7.02(a) and 7.02(b).

(e) *Legal Opinion of Counsel*. If, and only if, the Continuity Percentage is greater than or equal to the Reorganization Threshold, Parent shall have received the written opinion of Latham & Watkins LLP, counsel to Parent, referred to in Section 6.11(a), and such opinion shall not have been withdrawn; *provided*, *however*, that if Latham & Watkins LLP fails to deliver such opinion or such opinion is withdrawn, then Shearman & Sterling LLP, counsel to the Company, may deliver such opinion in satisfaction of the condition set forth in this Section 7.02(e), and any such opinion may rely on representations as such counsel reasonably deems appropriate and on typical assumptions.

(f) *FIRPTA Affidavit*. If the Company Stock is not listed on NASDAQ immediately prior to the Closing Date, the Company shall deliver to Parent an affidavit stating, under penalty of perjury, that the Company is not, and has not been during the applicable period described in Section 897(c)(1)(A)(ii) of the Code, a "United States real property holding corporation", dated as of the Closing Date and in form and substance as required under Treasury Regulation Section 1.897-2(h), and proof reasonably satisfactory to Parent that the Company has provided notice of such statement to the Internal Revenue Service in accordance with the provisions of Treasury Regulations Section 1.897-2 (h)(2), such affidavit and certificate in substantially the forms attached to this Agreement as Exhibit E.

Section 7.03. *Conditions to the Obligations of the Company to Consummate the Merger*. The obligations of the Company to consummate the Merger and the other transactions contemplated hereby are also subject to the satisfaction, or waiver, at or prior to the Closing of the following conditions:

(a) *Representations and Warranties*. (i) The representations and warranties of Parent, Merger Subsidiary and Merger Subsidiary Two set forth in Sections 5.01, 5.02 and 5.05 (disregarding any exception in such representations and warranties relating to materiality or a Parent Material Adverse Effect) shall be true and correct in all material respects as of the date of this Agreement and as of the Closing (except for any such representations and warranties which address matters only as of an earlier date which shall be true and correct in all material respects as of such earlier date), and (ii) all of the other representations and warranties of Parent, Merger Subsidiary and Merger Subsidiary Two set forth in Article 5 (disregarding for these purposes any exception in such representations and warranties relating to materiality or a Parent Material Adverse Effect) shall be true and correct as of the date of this Agreement and as of the Closing as if made at and as of the Closing (except for those representations and warranties which address matters only as of an earlier date which shall have been true and correct as of such earlier date), except for such failures to be true and correct which do not prevent Parent, Merger Subsidiary or Merger Subsidiary Two from consummating, or materially delay, the Merger.

(b) *Agreements and Covenants*. Parent, Merger Subsidiary and Merger Subsidiary Two shall have performed or complied in all material respects with all agreements and covenants required by this Agreement to be performed or complied with by Parent, Merger Subsidiary and/or Merger Subsidiary Two, as applicable, at or prior to the Closing.

(c) *Officer's Certificate*. The Company shall have received a certificate of an officer of Parent confirming the satisfaction of the conditions set forth in Sections 7.03(a) and 7.03(b).

(d) *Legal Opinion of Counsel*. If, and only if, the Continuity Percentage is greater than or equal to the Reorganization Threshold, the Company shall have received the written opinion of Shearman & Sterling LLP, counsel to the Company, referred to in Section 6.11(a), and such opinion shall not have been withdrawn; *provided*, *however*, that if Shearman & Sterling LLP fails to deliver such opinion or such opinion is withdrawn, then Latham & Watkins LLP, counsel to the Parent, may deliver such opinion in satisfaction of the condition set forth in this Section 7.03(d), and any such opinion may rely on representations as such counsel reasonably deems appropriate and on typical assumptions.

Section 7.04. *Conditions to the Obligations of Each Party to Consummate the Second Merger*. The obligations of Parent, the Intermediate Surviving Corporation and Merger Subsidiary Two to consummate the Second Merger are subject to (i) prior consummation of the Merger in accordance with the terms of this Agreement and (ii) the Continuity Percentage equaling or exceeding the Reorganization Threshold.

Section 7.05. *Frustration of Closing Conditions*. No Party may rely on the failure of any condition set forth in this Article 7 to be satisfied if such failure was caused by the failure of such Party to comply with its obligations set forth in this Agreement, including its obligations set forth in Section 6.05.

ARTICLE 8
TERMINATION

Section 8.01. *Termination*. This Agreement may be terminated and the Mergers may be abandoned at any time prior to the Effective Time (except as otherwise specified below):

(a) by mutual written agreement of the Company and Parent;

(b) by either the Company or Parent, if:

(i) the Merger shall not have been consummated by July 31, 2009 (the "**Outside Date**"); *provided*, *however*, that

(A) in the event that (1) all of the conditions set forth in Article 7 have been satisfied other than (x) either or both of the conditions set forth in Section 7.01(a) and Section 7.01(b), (y) those conditions that are waived in accordance with the terms of this Agreement by the Party or Parties for whose benefit such conditions exist and (z) any such conditions that, by their terms, are not capable of being satisfied until the Closing and (2) the Board of Directors of the Company or the Board of Directors of Parent determines, in good faith, that it is reasonably likely that the condition set forth in Section 7.01(b) can be satisfied prior to October 31, 2009, then either the Company or Parent may, at its option and at any time prior to the termination hereof, extend the Outside Date and the right to terminate this Agreement under this Section 8.01(b)(i) until October 31, 2009 (and, if so extended, the term "Outside Date" as used in this Agreement shall mean the "Outside Date" as so extended); and

(B) in the event that (1) the Outside Date has previously been extended pursuant to the foregoing Section 8.01(b)(i)(A), (2) all of the conditions set forth in Article 7 have been satisfied other than (x) the condition set forth in Section 7.01(b), (y) those conditions that are waived in accordance with the terms of this Agreement by the Party or Parties for whose benefit such conditions exist and (z) any such conditions that, by their terms, are not capable of being satisfied until the Closing and (3) the Board of Directors of Parent determines, in good faith and after consultation with outside legal counsel, that it is reasonably likely that the condition set forth in Section 7.01(b) can be satisfied prior to January 31, 2010, then Parent may, at its option prior to the termination hereof, extend the Outside Date and the right to terminate this Agreement under this Section 8.01(b)(i) until January 31, 2010 (and, if so extended, the term "Outside Date" as used in this Agreement shall be the "Outside Date" as so extended); *provided*, that Parent shall not be entitled to exercise its option to extend the Outside Date pursuant to this Section 8.01(b)(i)(B) unless Parent, prior to or concurrently with such exercise, funds $8,000,000 into the Escrow Account (as defined in the Loan Agreement included in the Loan Documents) pursuant to Section 2.02(b) of such Loan Agreement;

and *provided*, *further*, that the right to terminate this Agreement under this Section 8.1(b)(i) shall not be available to any Party if any action of such Party or the failure by such Party to perform its obligations under this Agreement has been the cause of, or resulted in, the failure of the Mergers and the other transactions contemplated by this Agreement to be consummated on or before the Outside Date;

(ii) any Applicable Law (A) prohibits or makes illegal the consummation of the Merger or (B) enjoins the consummation of the Merger and such injunction has become final and nonappealable; or

(iii) the Stockholder Approval is not obtained at the Company Stockholder Meeting or any adjournment or postponement thereof at which adoption of this Agreement is voted upon;

(c) by Parent, if:

(i) (A) there exists a breach of any representation or warranty of the Company contained in this Agreement such that the condition set forth in Section 7.02(a) would not then be satisfied or (B) the Company shall have breached any of the agreements or covenants contained in this Agreement to be performed or complied with by the Company such that the condition set forth in Section 7.02(b) would not then be satisfied, and, in the case of clause (A) or clause (B), such breach is incapable of being cured or, if capable of being cured, shall not have been cured prior to the earlier of (x) the Outside Date and (y) twenty (20) Business Days after the Company receives written notice of such breach from Parent; *provided*, *however*, that Parent shall not have the right to terminate this Agreement pursuant to this Section 8.01(c)(i) if Parent, Merger Subsidiary or Merger Subsidiary Two is then in material breach of any of its agreements or covenants contained in this Agreement; or

(ii) (A) an Adverse Recommendation Change shall have occurred, (B) the Board of Directors of the Company approves, recommends or adopts, or publicly proposes to approve, recommend or adopt, an Acquisition Proposal or approves or recommends that holders of Company Stock tender their shares of Company Stock in any tender offer or exchange offer that constitutes an Acquisition Proposal or (C) the Company shall have materially breached any of its obligations under Section 6.03(d)(i); or

(d) by the Company, if:

(i) (A) there exists a breach of any representation or warranty of Parent, Merger Subsidiary or Merger Subsidiary Two contained in this Agreement such that the condition set forth in Section 7.03(a) would not then be satisfied or (B) Parent, Merger Subsidiary or Merger Subsidiary Two shall have breached any of the agreements or covenants contained in this Agreement to be performed or complied with by it such that the condition set forth in Section 7.03(b) would not then be satisfied, and, in the case of clause (A) or clause (B), such breach is incapable of being cured or, if capable of being cured, shall not have been cured prior to the earlier of (x) the Outside Date and

(y) twenty (20) Business Days after Parent receives written notice of such breach from the Company; *provided*, *however*, that the Company shall not have the right to terminate this Agreement pursuant to this Section 8.01(d)(i) if the Company is then in material breach of any of its agreements or covenants contained in this Agreement;

(ii) prior to obtaining the Stockholder Approval, (A) the Board of Directors of the Company has received a Superior Proposal, (B) the Board of Directors of the Company has determined in good faith (after consultation with its outside legal counsel and financial advisors) that the failure to accept such Superior Proposal would reasonably be expected to be inconsistent with its fiduciary duties under Applicable Law, (C) the Company has complied in all material respects with Section 6.04 and (D) the Company has paid the Company Termination Fee to Parent in accordance with Section 8.03; or

(iii) if the Company delivers a timely Walk-Away Notice in accordance with Section 2.02(c)(i) and Parent does not deliver a timely Top-Up Notice in accordance with Section 2.02(c)(i).

The Party desiring to terminate this Agreement pursuant to this Section 8.01 (other than pursuant to Section 8.01(a)) shall give notice of such termination to the other Parties in accordance with Section 9.01.

Section 8.02. *Effect of Termination*. Except as otherwise set forth in this Section 8.02, in the event of a termination of this Agreement by either the Company or Parent as provided in Section 8.01, this Agreement shall forthwith become void and of no effect and there shall be no liability or obligation on the part of Parent, Merger Subsidiary, Merger Subsidiary Two or the Company (or their respective Affiliates or Representatives) hereunder; *provided*, *however*, that the provisions of this Section 8.02, Sections 6.05(b) and 8.03, Article 9 and the Confidentiality Agreement shall remain in full force and effect and survive any termination of this Agreement; and *provided*, *further*, that no such termination (or any provision of this Agreement) shall relieve or release any Party from liability for any damages for a knowing, intentional and material breach of any provision of this Agreement. In no event shall any Party be liable for punitive damages.

Section 8.03. *Termination Fee*. (a)(i) If this Agreement is terminated pursuant to Section 8.01(d)(ii) then the Company shall pay to Parent (or as directed by Parent), by wire transfer of same day funds, $11,300,000 (the "**Company Termination Fee**"); *provided*, *however*, that such termination shall not be effective until the Company pays the Company Termination Fee.

(ii) If this Agreement is terminated pursuant to Section 8.01(c)(ii)(A) in connection with any Superior Proposal or pursuant to Section 8.01(c)(ii)(B) or (C), the Company shall pay to Parent (or as directed by Parent), by wire transfer of same day funds, the Company Termination Fee as promptly as reasonably practicable (and in any event within two (2) Business Days following such termination).

(iii) If this Agreement is terminated pursuant to Section 8.01(c)(ii)(A) other than in connection with any Superior Proposal, (A) the Company shall pay to Parent (or

as directed by Parent), by wire transfer of same day funds, $5,000,000 (the "**Adverse Recommendation Change Fee**") as promptly as reasonably practicable (and in any event within two (2) Business Days following such termination) and (B) in the event that within twelve (12) months of the termination of this Agreement, the Company or any of its Subsidiaries enters into a definitive agreement with respect to an Acquisition Proposal or any Acquisition Proposal is consummated, then the Company shall pay, or cause to be paid, to Parent, by wire transfer of same day funds, an amount equal to (x) the Company Termination Fee minus (y) the Adverse Recommendation Change Fee, such payment to be made upon the earlier to occur of the execution of a definitive agreement relating to, or consummation of, such Acquisition Proposal.

(iv) If this Agreement is terminated pursuant to Section 8.01(b)(iii) or Section 8.01(c)(i), then, in the event that, (A) at any time after the date of this Agreement and prior to such termination any Third Party shall have publicly made, proposed, communicated or disclosed an intention to make a bona fide Acquisition Proposal, which bona fide Acquisition Proposal was not retracted or rescinded prior to such termination and (B) within twelve (12) months of the termination of this Agreement, the Company or any of its Subsidiaries enters into a definitive agreement with respect to an Acquisition Proposal or any Acquisition Proposal is consummated, then the Company shall pay, or cause to be paid, to Parent, by wire transfer of same day funds, the Company Termination Fee, such payment to be made upon the earlier to occur of the execution of a definitive agreement relating to, or consummation of, such Acquisition Proposal.

For purposes of this Section 8.03(a), each reference in the definition of Acquisition Proposal to "twenty percent (20%)" will be deemed to be a reference to "fifty percent (50%)."

(b) The Company acknowledges that the agreements contained in this Section 8.03 are an integral part of the transactions contemplated by this Agreement and that, without these agreements, Parent, Merger Subsidiary and Merger Subsidiary Two would not enter into this Agreement. If the Company fails to pay the Company Termination Fee or the Adverse Recommendation Change Fee when due, and, in order to obtain such payment Parent commences a legal action which results in a judgment against the Company for all or any portion of the Company Termination Fee or the Adverse Recommendation Change Fee, the Company shall pay to Parent its reasonable out-of-pocket costs, fees and expenses (including reasonable attorneys' fees) in connection with such action.

ARTICLE 9
MISCELLANEOUS

Section 9.01. *Notices*. Any notices or other communications required or permitted under, or otherwise made in connection with this Agreement, shall be in writing and shall be deemed to have been duly given (a) when delivered in person, (b) upon confirmation of receipt when transmitted by facsimile transmission or by electronic mail, (c) upon receipt after dispatch by registered or certified mail, postage prepaid or (d) on the next Business Day if transmitted by national overnight courier (with confirmation of delivery), in each case, addressed as follows:

if to Parent, Merger Subsidiary or Merger Subsidiary Two, to:

Thoratec Corporation
6035 Stoneridge Drive
Pleasanton, CA 94588
Attention: Gary Burbach
Legal Department
Facsimile No.:(925) 264-4341
E-mail: gary.burbach@thortec.com
david.lehman@thortec.com

with a copy to:

Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626
Attention: Charles K. Ruck
Tad J. Freese
Facsimile No.:(714) 755-8290
E-mail:charles.ruck@lw.com
tad.freese@lw.com

if to the Company, to:

HeartWare International, Inc.
14000-14050 NW 57th Court
Miami Lakes, FL 33014
Attention: David McIntyre
Facsimile No.:(305) 818-4123
E-mail: dmcintyre@heartwareinc.com

with a copy to:

Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022
Attention: Clare O'Brien
Robert M. Katz
Facsimile No.: (212) 848-7179
E-mail: cobrien@shearman.com
rkatz@shearman.com

or to such other address, facsimile number or electronic mail as such Party may hereafter specify for such purpose by notice to the other Parties hereto. All such notices, requests and other communications shall be deemed received on the date of receipt by the recipient thereof if

received prior to 5:00 p.m. on a Business Day in the place of receipt. Otherwise, any such notice, request or communication shall be deemed to have been received on the next succeeding Business Day in the place of receipt.

Section 9.02. *Survival of Representations and Warranties*. None of the representations and warranties of the Parties in this Agreement or in any instrument delivered pursuant to this Agreement (or the Schedules of Exhibits attached hereto) shall survive the Effective Time. None of the covenants or agreements of the Parties in this Agreement shall survive the Effective Time, other than (a) the covenants and agreements of the Parties contained in this Article 9, in Article 2 and in Sections 6.10 and 6.11 and (b) those other covenants and agreements contained herein that by their terms apply, or that are to be performed in whole or in part, after the Effective Time, in each case which shall survive the consummation of the Mergers until fully performed.

Section 9.03. *Amendments and Waivers*. (a) Any provision of this Agreement may be amended prior to the Effective Time if, but only if, such amendment or waiver is in writing and is signed, in the case of an amendment, by each Party; *provided*, *however*, that, after approval of the Agreement by the stockholders of the Company, no amendment that, by Applicable Law or in accordance with the rules of any relevant stock exchange, requires further approval by such stockholders may be made without such stockholder approval.

(b) At any time prior to the Effective Time, Parent, Merger Subsidiary and Merger Subsidiary Two, on the one hand, or the Company, on the other hand, may, to the extent permitted by Applicable Law, (a) extend the time for the performance of any of the obligations or other acts of the other Parties under this Agreement, (b) waive any inaccuracies in the representations and warranties of the other Parties contained herein or in any instrument delivered pursuant hereto or (c) waive compliance with any of the covenants or agreements of the other Parties or conditions to the obligations of the waiving Parties contained herein; *provided*, *however*, that after any approval of this Agreement by the stockholders of the Company, no extension or waiver that, by Applicable Law or in accordance with the rules of any relevant stock exchange, requires further approval by such stockholders may be made without such stockholder approval. Any agreement on the part of a Party to any such extension or waiver shall be valid only if set forth in a written instrument signed by such Party. The failure or delay of any Party to assert any of its rights under this Agreement or otherwise shall not constitute a waiver of those rights, nor shall any single or partial exercise of any right under this Agreement preclude any other or further exercise of any rights hereunder.

Section 9.04. *Expenses*. Except as otherwise expressly set forth in this Agreement, all Expenses incurred in connection herewith and the transactions contemplated hereby shall be paid by the Party incurring, or required to incur, such Expenses, whether or not the Mergers are consummated.

Section 9.05. *Mutual Drafting; Headings*. Each Party has participated in the drafting of this Agreement, which each Party acknowledges is the result of extensive negotiations between the Parties. The captions, headings and table of contents contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 9.06. *Assignment; Binding Effect; Parties in Interests*. (a) Neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by any of the Parties (whether by operation of law or otherwise) without the prior written consent of the other Parties, and any such assignment shall be null and void; *provided*, *however*, that Parent, Merger Subsidiary and Merger Subsidiary Two may assign all or any of their rights (but not their obligations) hereunder to one or more of their wholly-owned Affiliates upon written notice to the Company, and Parent, the Intermediate Surviving Corporation and the Surviving Corporation may assign all or any of their rights or obligations hereunder after the Second Merger Effective Time to any Person so long as any such assignment would not reasonably be expected to cause the Mergers, taken together, to fail to qualify as a "reorganization" within the meaning of Section 368(a) of the Code. Subject to the foregoing, this Agreement will be binding upon, inure to the benefit of and be enforceable by the Parties and their respective successors and permitted assigns.

(b) Nothing in this Agreement, express or implied, shall confer upon any Person other than the Parties hereto any rights, benefits or remedies of any nature whatsoever under or by reason of this Agreement; *provided* that the provisions of Section 6.10 shall inure to the benefit of the Indemnified Person benefiting therefrom who are intended third-party beneficiaries thereof.

Section 9.07. *Governing Law*. This Agreement, and all claims and causes of action arising out of, based upon, or related to this Agreement or the negotiation, execution or performance hereof, shall be governed by, and construed, interpreted and enforced in accordance with, the laws of the State of Delaware, without regard to choice or conflict of law principles that would result in the application of any laws other than the laws of the State of Delaware.

Section 9.08. *Jurisdiction*. Any legal action, suit or proceeding arising out of, based upon or relating to this Agreement or the transactions contemplated hereby shall be brought solely in the Chancery Court of the State of Delaware and any state appellate court therefrom within the State of Delaware (or, if the Chancery Court of the State of Delaware declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware and any direct appellate court therefrom). Each Party hereby irrevocably submits to the exclusive jurisdiction of such courts in respect of any legal action, suit or proceeding arising out of, based upon or relating to this Agreement and the rights and obligations arising hereunder and agrees that it will not bring any action arising out of, based upon or related to this Agreement in any other court. Each Party hereby irrevocably waives, and agrees not to assert as a defense, counterclaim or otherwise, in any legal action, suit or proceeding arising out of, based upon or relating to this Agreement, (a) any claim that it is not personally subject to the jurisdiction of the above named courts for any reason other than the failure to serve process in accordance with Section 9.01, (b) any claim that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise) and (c) to the fullest extent permitted by Applicable Law, any claim that (i) the suit, action or proceeding in such court is brought in an inconvenient forum, (ii) the venue of such suit, action or proceeding is improper or (iii) this Agreement, or the subject mater hereof, may not be enforced in or by such courts. Each Party agrees that notice or the service of process in any action, suit or proceeding arising out of, based upon or relating to this Agreement or the

rights and obligations arising hereunder shall be properly served or delivered if delivered in the manner contemplated by Section 9.01.

Section 9.09. *WAIVER OF JURY TRIAL*. EACH OF THE PARTIES HERETO IRREVOCABLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY AND ALL RIGHT SUCH PARTY MAY HAVE TO TRIAL BY JURY IN ANY LEGAL ACTION, SUIT OR PROCEEDING BETWEEN THE PARTIES HERETO ARISING OUT OF, BASED UPON OR RELATING TO THIS AGREEMENT OR THE NEGOTIATION, EXECUTION OR PERFORMANCE HEREOF. EACH OF THE PARTIES HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THAT FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AN THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE MERGERS, AS APPLICABLE, BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 9.09.

Section 9.10. *Specific Performance*. The Parties agree that irreparable damage would occur in the event that any provision of this Agreement were not performed in accordance with its specific terms or was otherwise breached. It is accordingly agreed that the Parties shall be entitled to an injunction or injunctions to prevent breaches or threatened breaches of this Agreement and that the Parties may enforce specifically the terms and provisions of this Agreement, with all such matters to take place exclusively in the Chancery Court of the State of Delaware and any state appellate court therefrom within the State of Delaware (or, if the Chancery Court of the State of Delaware declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware), and any such injunction shall be in addition to any other remedy to which any Party is entitled, at law or in equity.

Section 9.11. *Entire Agreement*. This Agreement (together with the Exhibits, the Company Disclosure Schedule, the Parent Disclosure Schedule and the other instruments delivered pursuant hereto), the Loan Documents and the Confidentiality Agreement constitute the entire agreement of the Parties and supersede all prior agreements and undertakings, both written and oral, among the Parties, or any of them, with respect to the subject matter hereof and thereof.

Section 9.12. *Severability*. If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced in any jurisdiction such term or other provision shall, as to that jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability, and all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect. Upon a determination that any term or other provision of this Agreement is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner to the end that the transactions contemplated hereby are fulfilled to the greatest extent possible.

Section 9.13. *Counterparts; Effectiveness*. This Agreement may be executed by facsimile and in one or more counterparts, and by the different Parties in separate counterparts,

each of which when executed shall be deemed to be an original but all of which taken together shall constitute one and the same agreement, and which shall become effective when one or more counterparts have been signed by each of the Parties and delivered (by facsimile, electronic mail or otherwise) to the other Parties. Until and unless each Party has received a counterpart hereof signed by the other Parties hereto, this Agreement shall have no effect and no Party shall have any right or obligation hereunder (whether by virtue of any other oral or written agreement or other communication).

* * * * *

(signature page follows)

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed and delivered as of the date first above written.

HEARTWARE INTERNATIONAL, INC.

By: /s/ Douglas Godshall
Name: Douglas Godshall
Title: President and Chief Executive Officer

THORATEC CORPORATION

By: /s/ Gerhard F. Burbach
Name: Gerhard F. Burbach
Title: President and Chief Executive Officer

THOMAS MERGER SUB I, INC.

By: /s/ Gerhard F. Burbach
Name: Gerhard F. Burbach
Title: President and Chief Executive Officer

THOMAS MERGER SUB II, INC.

By: /s/ Gerhard F. Burbach
Name: Gerhard F. Burbach
Title: President and Chief Executive Officer

<DOCUMENT>
<TYPE>EX-10.1
<FILENAME>y74656exv10w1.htm
<DESCRIPTION>EX-10.1: FORM OF SUPPORT AGREEMENT
<TEXT>

Exhibit 10.1

SUPPORT AGREEMENT

This SUPPORT AGREEMENT (the "Agreement"), dated as of February 12, 2009, is entered into by and between the undersigned stockholder ("Stockholder") of HeartWare International, Inc., a Delaware corporation (the "Company"), and Thoratec Corporation, a California corporation ("Parent").

WHEREAS, concurrently with the execution of this Agreement, the Company, Parent, Thomas Merger Sub I, Inc., a Delaware corporation and a wholly-owned subsidiary of Parent ("Merger Subsidiary") and Thomas Merger Sub II, Inc., a Delaware corporation and a wholly-owned subsidiary of Parent ("Merger Subsidiary Two"), are entering into an Agreement and Plan of Merger (as the same may be amended from time to time, the "Merger Agreement"), providing for the merger of Merger Subsidiary with and into the Company (the "Merger"), with the Company continuing as the surviving corporation (the "Intermediate Surviving Corporation") and the merger of the Intermediate Surviving Corporation with and into Merger Subsidiary Two, with Merger Subsidiary Two as the surviving corporation (the "Second Merger" and together with the Merger, the "Mergers") pursuant to the terms and subject to the conditions set forth in the Merger Agreement;

WHEREAS, as a condition to its willingness to enter into the Merger Agreement, Parent has requested that Stockholder make certain representations, warranties, covenants and agreements with respect to the shares of common stock, par value $0.001 per share, of the Company (the "Common Stock") and/or CHESS Depositary Interests representing shares of Common Stock (collectively, with the Common Stock, the "Shares") beneficially owned by Stockholder and set forth opposite Stockholder's name on Schedule A attached hereto (the "Stockholder Shares"); and

WHEREAS, in order to induce Parent to enter into the Merger Agreement, Stockholder is willing to make certain representations, warranties, covenants and agreements with respect to the Stockholder Shares as set forth herein;

NOW, THEREFORE, in consideration of the promises contained herein and for other good and valuable consideration, the receipt, sufficiency and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

1. Representations of Stockholder. Stockholder represents and warrants to Parent that (a) Stockholder beneficially owns all of the Stockholder Shares free and clear of any lien, encumbrance or restriction and, except pursuant to this Agreement, there are no rights, agreements or commitments to which Stockholder is a party relating to the pledge, disposition or voting of any Shares, and there are no voting trusts or voting agreements with respect to the Stockholder Shares, (b) Stockholder does not beneficially own any Shares other than the Stockholder Shares and (c) Stockholder has full power and authority to enter into, execute and deliver this Agreement and to perform fully Stockholder's obligations hereunder, and no permit, authorization, consent or approval from any Person is necessary therefor. Stockholder further represents and warrants to Parent that this Agreement has been duly executed and delivered by

Stockholder and constitutes the legal, valid and binding obligation of Stockholder enforceable against Stockholder in accordance with its terms.

2. Representations of Parent. Parent represents and warrants to Stockholder that (a) Parent has full power and authority to enter into, execute and deliver this Agreement and to perform fully Parent's obligations hereunder and no permit, authorization, consent or approval from any Person is necessary therefore and (b) this Agreement has been duly executed and delivered by Parent and constitutes the legal, valid and binding obligation of Parent enforceable against Parent in accordance with its terms.

3. Agreement to Vote Shares. From the date of this Agreement to the earliest to occur of (a) the date upon which the Merger Agreement is validly terminated, (b) the Effective Time of the Merger, (c) the date following receipt of the Company Stockholder Approval, (d) the date that any material amendment shall be made to the Merger Agreement (a "material amendment" shall mean any valid written amendment to the Merger Agreement reducing the consideration payable to Stockholder pursuant to the Merger Agreement and any other valid written amendment to the Merger Agreement that would materially delay the consummation of the Merger) without the written consent of Stockholder and (e)(i) any amendment to the Articles of Incorporation or Bylaws (whether by merger, consolidation or otherwise) of Parent in any manner that would have a disparate effect on holders of Shares, as holders of Parent Stock at and following the Effective Time, relative to other holders of Parent Stock, and (ii) any amendment to the Articles of Incorporation of Parent to provide for any class of capital stock with rights to distributions or upon a liquidation (including upon a merger, consolidation, asset sale or similar transaction) that are superior to those of the Parent Stock, other than an amendment in connection with a shareholder rights plan, "poison pill" anti-takeover plan or other similar device (the earliest of such to occur being the "Voting Covenant Expiration Date"), Stockholder shall, and shall cause any holder of record of the Stockholder Shares or any New Shares (as defined in Section 9 hereof) to vote, or cause to be voted, the Stockholder Shares and any New Shares (i) in favor of (A) adoption of the Merger Agreement, (B) any other action in furtherance thereof; *provided*, that such action does not require a material amendment to the Merger Agreement to which Stockholder has not consented, and (C) any adjournment or postponement recommended by the Company with respect to any stockholder meeting concerning the Merger Agreement and the Mergers and (ii) against any Acquisition Proposal and any action or agreement that would result in a breach of any representation, warranty, covenant or obligation of the Company in the Merger Agreement or impair the ability of the Company to consummate the Merger. In addition, Stockholder agrees not to take, or commit or agree to take, any action inconsistent with the foregoing.

4. No Voting Trusts or Other Arrangements. Except as otherwise set forth herein, Stockholder agrees that Stockholder will not, and will not permit any entity under Stockholder's control to, deposit any of the Stockholder Shares or any New Shares in a voting trust, grant any proxies or power of attorney with respect to the Stockholder Shares or any New Shares or subject any of the Stockholder Shares or any New Shares to any arrangement with respect to the voting of the Stockholder Shares or any New Shares other than agreements entered into with Parent.

5. No Solicitations. Stockholder agrees that Stockholder will not, and will not permit any entity under Stockholder's control or any of its or their respective officers, directors, employees, agents or other representatives to, (a) solicit proxies or become a "participant" in a "solicitation", as such terms are defined in Regulation 14A under the Securities and Exchange Act of 1934, as amended (the "Exchange Act"), in opposition to or competition with the consummation of the Mergers or otherwise encourage or assist any party in taking or planning any action which would reasonably be expected to compete with, impede, interfere with or attempt to discourage the consummation of the Mergers or inhibit the timely consummation of the Mergers in accordance with the terms of the Merger Agreement, (b) directly or indirectly encourage, initiate or cooperate in a stockholders' vote or action by consent of the Company's stockholders in opposition to or in competition with the consummation of the Mergers, (c) become a member of a "group" (as such term is used in Rule 13d-5 under the Exchange Act) with respect to any voting securities of the Company for the purpose of opposing or competing with the consummation of the Mergers or (d) unless required by applicable law, make any press release, public announcement or other non-confidential communication with respect to the business or affairs of the Company or Parent, including this Agreement and the Merger Agreement and the transactions contemplated hereby and thereby, without the prior written consent of Parent.

6. Waiver of Appraisal and Dissenters' Rights and Actions. Stockholder hereby (a) waives and agrees not to exercise any rights of appraisal or rights to dissent from the Mergers that Stockholder may have and (b) agrees not to commence or participate in, and to take all actions necessary to opt out of any class in any class action with respect to, any claim, derivative or otherwise, against Parent, Merger Subsidiary, Merger Subsidiary Two, the Company or any of their respective successors relating to the negotiation, execution or delivery of this Agreement or the Merger Agreement or the consummation of the Mergers, including any claim (i) challenging the validity of or seeking to enjoin the operation of any provision of this Agreement or (ii) alleging a breach of any fiduciary duty of the Board of Directors of the Company in connection with the Merger Agreement or the transactions contemplated thereby.

7. Stockholder Capacity. Notwithstanding anything to the contrary set forth herein, Stockholder is entering into this Agreement solely in Stockholder's capacity as the beneficial owner of the Stockholder Shares and New Shares, as applicable, and nothing in this Agreement shall prevent Stockholder from taking any action or omitting to take any action in Stockholder's capacity as a member of the Board of Directors of the Company or any of its subsidiaries (or any committee thereof) or as an officer or employee of the Company or any of its subsidiaries, in either case as applicable or as may become applicable to Stockholder. If Stockholder is an officer of director of the Company, any action taken by Stockholder in Stockholder's capacity as an officer or director of the Company (but, for the avoidance of doubt, excluding any action taken by Stockholder in Stockholder's capacity as a holder or beneficial owner of any Shares) will not be deemed to constitute a breach of this Agreement, regardless of the circumstances related thereto.

8. Transfer and Encumbrance. During the period from the date hereof through the Voting Covenant Expiration Date, except as otherwise expressly contemplated by this Section 8, Stockholder agrees not to transfer, sell, offer, exchange, pledge or otherwise dispose of or encumber any of the Stockholder Shares or New Shares and not to enter into any

contract, agreement or arrangement with respect to any of the foregoing, and any such transfer shall be null and void and of no effect. This Section 8 shall not prohibit a transfer of any Stockholder Shares or New Shares by Stockholder (a) to any member of Stockholder's immediate family, or to a trust for the benefit of Stockholder or any member of Stockholder's immediate family, (b) upon the death of Stockholder, or (c) to the extent required to pay taxes resulting from the vesting of any stock awards for Shares or the exercise of any stock options within 60 days prior to their expiration or (d) to the extent required to effect a net or cashless exercise of any stock option within 60 days prior to their expiration; provided, however, that a transfer referred to in this sentence, other than a transfer in accordance with the foregoing clause (c) or (d), shall be permitted only if, as a precondition to such transfer, the proposed transferee agrees in writing, reasonably satisfactory in form and substance to Parent, to be bound by the terms of this Agreement with respect to all of the Stockholder Shares or New Shares so transferred.

9. Additional Purchases. Stockholder agrees that (a) all Shares that Stockholder purchases, acquires the right to vote or share in the voting of, or otherwise acquires beneficial ownership of, including upon the exercise of options to purchase Shares, after the execution of this Agreement and (b) all Shares which Stockholder owns beneficially or of record but has not included as Stockholder Shares as of the date hereof for any reason (all such Shares collectively, "New Shares"), shall be subject to the terms of this Agreement to the same extent as if they constituted Stockholder Shares as of the date hereof.

10. Specific Performance. Each party hereto acknowledges that it will be impossible to measure in money the damage to the other party if a party hereto fails to comply with any of the obligations imposed by this Agreement, that every such obligation is material and that, in the event of any such failure, the other party will not have an adequate remedy at law or damages. Accordingly, each party hereto agrees that injunctive relief or other equitable remedy, in addition to remedies at law or damages, is the appropriate remedy for any such failure and will not oppose the granting of such relief on the basis that the other party has an adequate remedy at law. Each party hereto agrees that it will not seek, and agrees to waive any requirement for, the securing or posting of a bond in connection with any other party's seeking or obtaining such equitable relief.

11. Remedies. All rights, powers and remedies provided under this Agreement or otherwise available in respect hereof at law or in equity shall be cumulative and not alternative, and the exercise of any such right, power or remedy by any party hereto shall not preclude the simultaneous or later exercise of any other such right, power or remedy by such party.

12. Entire Agreement. This Agreement supersedes all prior agreements, written or oral, among the parties hereto with respect to the subject matter hereof and contains the entire agreement among the parties with respect to the subject matter hereof.

13. Notices. All notices hereunder shall be in writing and shall be deemed given when delivered personally, upon receipt of a transmission confirmation if sent by telecopy, electronic mail or like transmission or on the next business day when sent by Federal Express,

Express Mail or other reputable overnight courier service to the parties at the following addresses (or at such other address for a party as shall be specified by like notice):

If to Parent:

Thoratec Corporation
6035 Stoneridge Drive
Pleasanton, CA 94588
Fax: (925) 738-0110
Attn: Gary Burbach
Attn: Legal Department
Email: gary.burbach@thortec.com
david.lehman@thortec.com

With a copy (which shall not constitute notice to Parent) to:

Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626
Fax: (714) 755-8290
Attn: Charles K. Ruck
Tad J. Freese

If to Stockholder, to the address set forth for Stockholder on Schedule A hereto.

14. Governing Law; Jurisdiction; Jury Trial Waiver.

(a) **THIS AGREEMENT, AND ALL CLAIMS AND CAUSES OF ACTION ARISING OUT OF, BASED UPON, OR RELATED TO THIS AGREEMENT OR THE NEGOTIATION, EXECUTION OR PERFORMANCE HEREOF, SHALL BE DEEMED TO BE MADE IN AND IN ALL RESPECTS SHALL BE GOVERNED BY, AND CONSTRUED, INTERPRETED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF DELAWARE, WITHOUT REGARD TO CHOICE OR CONFLICT OF LAW PRINCIPLES THAT WOULD RESULT IN THE APPLICATION OF ANY LAWS OTHER THAN THE LAWS OF THE STATE OF DELAWARE.** Any legal action, suit or proceeding arising out of, based upon or relating to this Agreement or the transactions contemplated hereby shall be brought solely in the Chancery Court of the State of Delaware and any state appellate court therefrom within the State of Delaware (or, if the Chancery Court of the State of Delaware declines to accept jurisdiction over a particular matter, any state or federal court within the State of Delaware and any direct appellate court therefrom). Each party hereby irrevocably submits to the exclusive jurisdiction of such courts in respect of any legal action, suit or proceeding arising out of, based upon or relating to this Agreement and the rights and obligations arising hereunder and agrees that it will not bring any action arising out of, based upon or related to this Agreement in any other court. Each party hereby irrevocably waives, and agrees not to assert as a defense, counterclaim or otherwise, in any legal action, suit or proceeding arising out of, based upon or relating to this Agreement, (i) any claim that it is not personally subject to the jurisdiction of the above named courts for any reason other than the

failure to serve process in accordance with Section 13, (ii) any claim that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment or otherwise), and (iii) to the fullest extent permitted by Applicable Law, any claim that (A) the suit, action or proceeding in such court is brought in an inconvenient forum, (B) the venue of such suit, action or proceeding is improper, or (C) this Agreement, or the subject mater hereof, may not be enforced in or by such courts. Each party agrees that notice or the service of process in any action, suit or proceeding arising out of, based upon or relating to this Agreement or the rights and obligations arising hereunder shall be properly served or delivered if delivered in the manner contemplated by Section 13.

(b) EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE EACH SUCH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (i) NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER, (ii) EACH PARTY UNDERSTANDS AND HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (iii) EACH PARTY MAKES THIS WAIVER VOLUNTARILY AND (iv) EACH PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN SECTION 14(a) AND THIS SECTION 14(b).

15. Severability. If any provision of this Agreement or the application of such provision to any person or circumstances shall be held invalid or unenforceable by a court of competent jurisdiction, such provision or application shall be unenforceable only to the extent of such invalidity or unenforceability, and the remainder of the provision held invalid or unenforceable and the application of such provision to persons or circumstances, other than the party as to which it is held invalid, and the remainder of this Agreement shall not be affected.

16. Counterparts. This Agreement may be executed in one or more counterparts (including by facsimile), each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

17. Termination. This Agreement shall terminate automatically on the Voting Covenant Expiration Date.

18. Further Actions. Each party hereto shall execute and deliver such additional documents, and use its commercially reasonable efforts to take or cause to be taken such additional lawful actions, as may be necessary or desirable to effect the transactions contemplated by this Agreement.

19. "Beneficial Ownership". For purposes of this Agreement, "beneficial ownership" (and related terms such as "beneficially own" or "beneficial owner") has the meaning set forth in Rule 13d-3 under the Exchange Act.

20. Waivers and Amendments. This Agreement may be amended, modified, altered or supplemented only by a written instrument executed by all of the parties to this Agreement. Any failure of the parties to this Agreement to comply with any obligation, covenant, agreement or condition in this Agreement may be waived by the party entitled to the benefits thereof only by a written instrument signed by the party granting such waiver. No delay on the part of any party to this Agreement in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any waiver on the part of any party to this Agreement of any right, power or privilege hereunder operate as a waiver of any other right, power or privilege hereunder, nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, power or privilege hereunder.

21. Merger Agreement Provisions. Capitalized terms used but not defined herein have the respective meanings ascribed to them in the Merger Agreement. The provisions of Section 1.02 of the Merger Agreement are incorporated herein and are deemed applicable to the interpretation of this Agreement. Stockholder acknowledges receipt of a copy of the Merger Agreement prior to the execution of this Agreement.

22. Effectiveness. The obligations of the parties set forth in this Agreement shall not be effective or binding upon either party hereto until such time as the Merger Agreement is executed and delivered by the Company, Parent, Merger Subsidiary and Merger Subsidiary Two.

23. Certain Disclosures. Stockholder hereby authorizes Parent and the Company to publish and disclose Stockholder's identity and ownership of Stockholder Shares and New Shares and the nature of Stockholder's commitments, arrangements and understandings pursuant to this Agreement and any other information that Parent reasonably determines to be necessary or desirable in any press release or any other disclosure document in connection with the Mergers or any other transactions contemplated by the Merger Agreement (including in any proxy statement or prospectus relating to the Merger Agreement and the Mergers and in the registration statement relating to the shares of common stock of Parent to be received by holders of Shares in the Merger and documents and schedules filed with the Securities and Exchange Commission or the Australian Securities and Investments Commission relating thereto or in connection therewith.

24. Assignment. No party to this Agreement may assign any of its rights or obligations under this Agreement without the prior written consent of the other party hereto, except that Parent may assign its rights and obligations hereunder to any of its direct or indirect wholly-owned subsidiaries (including Merger Subsidiary and Merger Subsidiary Two). Any assignment contrary to the provisions of this Section 24 shall be null and void.

25. Attachment to Shares. Without limiting any other rights Parent may have hereunder, pursuant to Section 8 or otherwise, Stockholder agrees that this Agreement and the

obligations hereunder shall attach to the Stockholder Shares and any New Shares beneficially owned by Stockholder and shall be binding upon any person to which legal or beneficial ownership of such Stockholder Shares or New Shares shall pass, whether by operation of law or otherwise, including, without limitation, Stockholder's heirs, guardians, administrators, successors or assigns.

26. Ownership of Shares. Nothing contained in this Agreement shall be deemed, upon execution, to vest in Parent any direct or indirect ownership or incidence of ownership of or with respect to any Stockholder Shares or any New Shares. All rights, ownership and economic benefits of and relating to the Stockholder Shares and any New Shares shall remain vested in and belong to Stockholder, and Parent shall have no authority to manage, direct, superintend, restrict, regulate, govern or administer any of the policies or operations of the Company or exercise any power or authority to direct Stockholder in the voting of any of the Stockholder Shares or any New Shares, except as otherwise provided herein.

27. Expenses. All costs and expenses incurred in connection with this Agreement and the transactions contemplated by this Agreement will be paid by the party incurring such expense.

28. Headings. The section headings set forth in this Agreement are for convenience of reference only and shall not affect the construction or interpretation of this Agreement in any manner.

[Remainder of Page Intentionally Left Blank]

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

PARENT:

THORATEC CORPORATION, a California corporation

By: _____

Name: Gerhard F. Burbach
Title: President and Chief Executive Officer

STOCKHOLDER:

_____

Schedule A

Name and Contact Information for Stockholder	Number of shares of Common Stock Beneficially Owned	Number of CHESS Depositary Interests Beneficially Owned	Total Number of Shares Beneficially Owned
[Name of Stockholder] [address] [address] Attention: [name] Facsimile No.: [number] [E-mail: [address]] [with a copy to:] [Name] [address] [address] Attention: [name] Facsimile No.: [number] [E-mail: [address]]			

<DOCUMENT>
<TYPE>EX-10.2
<FILENAME>y74656exv10w2.htm
<DESCRIPTION>EX-10.2: LOAN AGREEMENT
<TEXT>

Exhibit 10.2

$28,000,000
LOAN AGREEMENT

dated as of February 12, 2009

among

HEARTWARE INTERNATIONAL, INC.
as Borrower

and

ALL OF THE SUBSIDIARIES OF
HEARTWARE INTERNATIONAL, INC.
as Guarantors

and

THORATEC CORPORATION
as Lender

TABLE OF CONTENTS

This LOAN AGREEMENT is dated as of February 12, 2009 (this "Agreement"), among HEARTWARE INTERNATIONAL, INC., a Delaware corporation (the "Borrower"), the GUARANTORS (as defined herein) from time to time party hereto and THORATEC CORPORATION, a California corporation (the "Lender").

The parties hereto agree as follows:

ARTICLE I.

Definitions

SECTION 1.01. Defined Terms. As used in this Agreement, the following terms shall have the meanings specified below:

"Acquisition" shall mean, collectively, (i) the merger of Thomas Merger Sub I, Inc. with and into the Borrower, whereupon the separate existence of Thomas Merger Sub I, Inc. shall cease, and the Borrower shall continue as the surviving corporation and (ii) immediately following the consummation of the merger in clause (i) of this definition, the merger of Borrower with and into Thomas Merger Sub II, Inc., whereupon the corporate existence of Borrower shall cease and Thomas Merger Sub II, Inc. shall continue as the surviving corporation, in each case, pursuant to the terms of the Definitive Agreement.

"Affiliate" means, when used with respect to any Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with such Person.

"Agreement" shall have the meaning assigned to such term in the preamble.

"Applicable Law" means, with respect to any Person, any federal (including United States or Australian), state, local or foreign law (statutory, common or otherwise), constitution, treaty, convention, ordinance, code, rule, regulation, order, injunction, judgment, decree, ruling or other similar requirement enacted, adopted, promulgated or applied by a Governmental Authority that is binding upon or applicable to such Person.

"Applicable Rate" shall mean, for any day with respect to any Loan, a rate equal to 10% per annum.

"ASTC" means ASX Settlement and Transfer Corporation Pty Ltd ACN 008 504 532.

"ASX" means ASX Limited ACN 008 624 691 or the Australian Securities Exchange.

"AU$" shall mean lawful money of Australia.

"Bankruptcy Code" means Title 11 of the United States Code (11 U.S.C. §§ 101 et seq.), as amended from time to time, and any successor statute.

"Board" shall mean the Board of Governors of the Federal Reserve System of the United States of America.

"Borrower" shall have the meaning assigned to such term in the preamble.

"Borrowing" shall mean Loans made pursuant to Section 2.01.

"Borrowing Request" means a notice substantially in the form set forth as Exhibit A hereto.

"Business Day" means a day, other than Saturday, Sunday or other day on which commercial banks in New York, New York are authorized or required by Applicable Law to close.

"Capital Lease Obligations" of any Person shall mean the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP, and the amount of such obligations at any time shall be the capitalized amount thereof at such time determined in accordance with GAAP.

"CDIs" means CHESS Depositary Interests representing shares of Common Stock (in the ratio of one (1) share of Common Stock to thirty five (35) CDIs).

"Change of Control" shall mean, other than the transactions contemplated by the Definitive Agreement, (A) any acquisition or purchase, direct or indirect, of fifty percent (50%) or more of the assets (based on fair market value) of the Borrower and its Subsidiaries, taken as a whole, or over fifty percent (50%) of any class of equity or voting securities of the Borrower or of any of its Subsidiaries, (B) the consummation of any tender offer (including a self-tender offer) or exchange offer that results in a Third Party beneficially owning fifty percent (50%) or more of any class of equity or voting securities of the Borrower or of any of its Subsidiaries or (C) a merger, consolidation, share exchange, business combination, sale of substantially all the assets, reorganization, recapitalization, liquidation, dissolution or other similar transaction involving the Borrower or any of its Subsidiaries whose assets, individually or in the aggregate, constitute more than fifty percent (50%) of the assets (based on fair market value) of the Borrower and its Subsidiaries, taken as a whole.

"Charges" shall have the meaning assigned to such term in Section 9.08.

"CHESS" means the clearing house electronic sub-register system of share transfers operated by ASTC.

"Closing Date" shall mean February 12, 2009.

"Commitment" shall mean, with respect to the Lender, the commitment of the Lender to make Loans hereunder. The amount of the Lender's Commitment is set forth on Appendix A, subject to any adjustment or reduction pursuant to the terms and conditions hereof. The aggregate amount of the Commitments on the Closing Date is $20,000,000, subject to the terms and conditions set forth herein.

"Common Stock" shall mean the common stock, par value $0.001 per share, of the Borrower.

"Company Material Adverse Effect" shall mean any event, change or occurrence which, individually or together with any one or more other events, changes or occurrences (A) has had, or is reasonably likely to have, a material adverse effect upon the business, assets, liabilities, condition (financial or otherwise) or operating results of the Borrower and its Subsidiaries taken as a whole; *provided*, that in no event shall any of the following events, changes, or occurrences constitute a "Company Material Adverse Effect" or be considered in determining whether a "Company Material Adverse Effect" has occurred or is reasonably likely to occur: (i) changes in general economic, securities market or business conditions except to the extent that such changes have a materially disproportionate effect (relative to other industry participants) on the Borrower and its Subsidiaries, taken as a whole, (ii) changes in conditions generally affecting the industry in which the Borrower and its Subsidiaries operate, except to the extent that such changes have a materially disproportionate effect (relative to other industry participants that are development stage companies at a similar stage of development as the Borrower and its Subsidiaries) on the Borrower and its Subsidiaries, taken as a whole, (iii) any change in the trading price or trading volume of the Borrower's common stock or CDIs in and of itself or any failure to meet internal or published projections or forecasts for any period in and of itself (in each case, as distinguished from any change, event or occurrence giving rise or contributing to such change or failure), (iv) changes in GAAP or Applicable Laws or (v) changes resulting from the announcement or the existence of, or that result from the compliance by the Borrower with its obligations under, the Definitive Agreement, or (B) would prevent the Borrower from consummating, or materially delay, the Merger.

"Control" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of voting securities, by contract or otherwise, and the terms "Controls", "Controlling" and "Controlled" shall have the meanings correlative thereto.

"Conversion Notice" shall have the meaning assigned to such term in Section 2.10.

"Conversion Rate" shall mean (i) if the Acquisition is not consummated because of a Superior Proposal Termination, $21.5355 per share of Common Stock and (ii) if the Acquisition is not consummated for any reason other than a Superior Proposal Termination, AU$35.00 per share of Common Stock, in each case, as such rate may be adjusted pursuant to Section 2.13.

"Convertible Portion" shall mean, as at any date of determination, the outstanding principal amount of the Loans as of such date plus the amount of any accrued and unpaid interest thereon.

"Credit Event" shall have the meaning assigned to such term in Section 5.01.

"Default" shall mean any event or condition which constitutes an Event of Default or which upon notice, lapse of time or both would constitute an Event of Default.

"Definitive Agreement" shall mean that certain Agreement and Plan of Merger by and among Lender, Thomas Merger Sub I, Inc., Thomas Merger Sub II, Inc. and Borrower dated as of February 12, 2009.

"Definitive Agreement Termination Date" shall mean the date, if any, upon which the Definitive Agreement is terminated in accordance with its terms.

"Delayed Draw Loan" shall have the meaning assigned to such term in Section 2.01.

"Disposition" with respect to any property, shall mean any sale, lease, sale and leaseback, assignment, conveyance, transfer or other disposition thereof. The terms "Dispose" and "Disposed of" shall have correlative meanings

"Dollars" or "$" shall mean lawful money of the United States of America.

"Domestic Subsidiary" shall mean any Subsidiary organized under the laws of the United States of America, any state thereof or the District of Columbia.

"Equity Interests" shall mean shares of capital stock, partnership interests, membership interests in a limited liability company, beneficial interests in a trust or other equity interests in any Person, or any obligations convertible into or exchangeable for, or giving any Person a right, option or warrant to acquire, such equity interests or such convertible or exchangeable obligations.

"Escrow Account" shall have the meaning assigned to such term in the Escrow Agreement.

"Escrow Agent" shall mean U.S. Bank, National Association, or any Person selected or appointed as a successor thereto, as escrow agent under the Escrow Agreement.

"Escrow Agreement" shall mean the Escrow Agreement dated as of February 12, 2009, between the Lender, the Borrower and the Escrow Agent.

"Escrow Amount Conversion Date" shall have the meaning assigned to such term in Section 2.10.

"Escrow Funds" shall have the meaning assigned to such term in the Escrow Agreement.

"Event of Default" shall have the meaning assigned to such term in Article VII.

"Exchange Act" shall mean the Securities Exchange Act of 1934, as amended.

"Federal Funds Effective Rate" shall mean, for any day, the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published on the next succeeding Business Day by the Federal Reserve Bank of New York, or, if such day is not a Business Day, for the Business Day preceding such day, provided that if such rate is not so published for any day that is a Business Day, the Federal Funds Effective Rate for such day shall be the average of the quotations for the

day for such transactions received by the Lender from three Federal funds brokers of recognized standing selected by it.

"Final Outside Date Extension Option" shall mean Lender's option to extend the Outside Date (as such term is defined in the Definitive Agreement) to January 31, 2010 in accordance with Section 8.01(b)(i) of the Definitive Agreement.

"Foreign Subsidiary" means any Subsidiary that is not a Domestic Subsidiary.

"GAAP" means generally accepted accounting principles in the United States.

"Governmental Authority" means any transnational, domestic or foreign, federal, state or local governmental authority, department, court, agency or official, including any political subdivision thereof.

"Guarantee" of or by any Person (the "guarantor") shall mean any obligation, contingent or otherwise, of (a) the guarantor or (b) another Person (including any bank under a letter of credit) pursuant to which the guarantor has issued a reimbursement, counterindemnity or similar obligation, in either case guaranteeing or having the economic effect of guaranteeing any Indebtedness of any other Person (the "primary obligor") in any manner, whether directly or indirectly, and including any obligation, contingent or otherwise, of the guarantor, direct or indirect, (i) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness or to purchase (or to advance or supply funds for the purchase of) any security for the payment of such Indebtedness, (ii) to purchase or lease property, securities or services for the purpose of assuring the owner of such Indebtedness of the payment of such Indebtedness, (iii) to maintain working capital, equity capital or any other financial statement condition or liquidity of the primary obligor so as to enable the primary obligor to pay such Indebtedness, (iv) as an account party in respect of any letter of credit or letter of guaranty issued to support such Indebtedness or (v) to otherwise assure or hold harmless the owner of such Indebtedness against loss in respect thereof; provided, however, that the term "Guarantee" shall not include endorsements for collection or deposit in the ordinary course of business.

"Guaranteed Obligations" shall have the meaning assigned to such term in Section 7.01.

"Guarantor" shall mean each Subsidiary of the Borrower.

"Guaranty" shall mean the guarantees issued pursuant to Article VII by each of the Guarantors.

"HSR Act" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

"Indebtedness" of any Person shall mean, without duplication, (a) all obligations of such Person for borrowed money or with respect to deposits or advances of any kind, (b) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such Person under conditional sale or other title retention agreements relating to property or assets acquired by such Person, (d) all obligations of such Person in respect of the deferred purchase price of property or services (other than current trade accounts payable

incurred in the ordinary course of business), (e) all obligations of such Person, contingent or otherwise, to purchase, redeem, retire or otherwise acquire for value any Equity Interests in such Person, (f) all Indebtedness secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) any Lien on property owned or acquired by such Person, whether or not the Indebtedness secured thereby has been assumed, (g) all Guarantees by such Person of Indebtedness of others, (h) all Capital Lease Obligations of such Person, (i) all obligations, contingent or otherwise, of such Person as an account party in respect of letters of credit and letters of guaranty and (j) all obligations, contingent or otherwise, of such Person in respect of bankers' acceptances and bank guaranties. The Indebtedness of any Person shall include the Indebtedness of any other Person (including any partnership in which such Person is a general partner) to the extent such Person is liable therefor as a result of such Person's ownership interest in, or other relationship with, such other Person, except to the extent the terms of such Indebtedness provide that such Person is not liable therefor.

"Initial Borrowing" shall mean the initial Borrowing of Loans in accordance with this Agreement.

"Interest Payment Date" shall mean, as to any Loan, (a) each March 31, June 30, September 30 and December 31 of each year, commencing on the first such date to occur after the Closing Date, (b) the Maturity Date, (c) the date of repayment or prepayment made in respect thereof and (d) the date of conversion of such Loan pursuant to Section 2.10.

"Investor's Rights Agreement" shall mean the Investor's Rights Agreement dated as of February 12, 2009 by and among the Borrower and the Lender.

"Lender" shall have the meaning assigned to such term in the preamble.

"Lender Termination" shall mean a termination by the Lender of the Definitive Agreement in accordance with (i) Section 8.01(c)(i)(A) of the Definitive Agreement, solely to the extent that the underlying breach by the Borrower was intentional or (ii) Section 8.01(c)(i)(B) of the Definitive Agreement.

"Lien" shall mean, with respect to any asset, (a) any mortgage, deed of trust, lien (statutory or otherwise), pledge, hypothecation, encumbrance, collateral assignment, charge or security interest in, on or of such asset, (b) the interest of a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement (or any financing lease having substantially the same economic effect as any of the foregoing) relating to such asset and (c) in the case of securities, any purchase option, call or similar right of a third party with respect to such securities.

"Loan Conversion Date" shall have the meaning assigned to such term in Section 2.10.

"Loan Documents" shall mean this Agreement, any promissory note executed and delivered in connection herewith, the Investor's Rights Agreement and the Escrow Agreement.

"Loan Parties" shall mean, collectively, Borrower and the Guarantors.

"Loans" shall mean the Term Loans and Delayed Draw Loans made by the Lender to the Borrower pursuant to Article II.

"Margin Stock" shall have the meaning assigned to such term in Regulation U.

"Maturity Date" shall mean the earlier of (i) November 1, 2011, (ii) the Termination Date and (iii) the date on which all Loans shall become due and payable in full hereunder, whether by acceleration or otherwise.

"Maximum Delayed Draw Loan Amount" shall mean (a) from and after the Closing Date but prior to the Option Date, $0 and (b) after the Option Date but prior to the Maturity Date, $8,000,000, which amount may be reduced on a dollar for dollar basis by Escrow Funds that are converted into Common Stock in accordance with Section 2.11.

"Maximum Rate" shall have the meaning assigned to such term in Section 9.08.

"Maximum Term Loan Amount" shall mean (i) from and after the Closing Date but prior to May 1, 2009, $0, (ii) from and after May 1, 2009 but prior to July 31, 2009, $12,000,000 and (iii) from and after July 31, 2009 but prior to the Maturity Date, $20,000,000, in the case of clauses (ii) and (iii), as such amounts may be reduced by Escrow Funds that are converted into Common Stock in accordance with Section 2.11.

"Merger" shall mean the merger, in accordance with the General Corporation Law of the State of Delaware, of Thomas Merger Sub I, Inc. with and into the Borrower, with the Borrower continuing as the corporation surviving the Merger.

"Obligations" shall mean the Loans and all advances, debts, liabilities, obligations, covenants and duties owing by any Loan Party to the Lender or any Affiliate of the Lender, of any kind or nature, present or future, whether or not evidenced by any note, guaranty or other instrument, whether or not for the payment of money, whether arising by reason of an extension of credit, loan, guaranty, indemnification, foreign exchange contract or in any other manner, whether direct or indirect (including those acquired by assignment), absolute or contingent, due or to become due, now existing or hereafter arising and however acquired arising under or in connection with the transactions contemplated hereby. The term includes, without limitation, all interest (including any interest that, but for the provisions of the Bankruptcy Code, would have accrued), charges, expenses, fees, attorneys' fees and disbursements and any other sum chargeable to any Loan Party under this Agreement or any other Loan Document.

"Obligee Guarantor" shall have the meaning assigned to such term in Section 7.06.

"Option Date" shall mean the date, if any, on which the Lender exercises the Final Outside Date Extension Option.

"Other Taxes" shall mean any and all present or future stamp or documentary taxes or any other excise or property taxes, charges or similar levies (including interest, fines, penalties and additions to tax) arising from any payment made under any Loan Document or from the execution, delivery, registration or enforcement of, or otherwise with respect to, any Loan Document.

"Parent Material Adverse Effect" shall mean any event, change or occurrence which, individually or together with any one or more other events, changes or occurrences (A) has had, or is reasonably likely to have, a material adverse effect upon the business, assets, liabilities, condition (financial or otherwise) or operating results of the Lender and its Subsidiaries taken as a whole; *provided*, that in no event shall any of the following events, changes, or occurrences constitute a "Parent Material Adverse Effect" or be considered in determining whether a "Parent Material Adverse Effect" has occurred or is reasonably likely to occur: (i) changes in general economic, securities market or business conditions except to the extent that such changes have a materially disproportionate effect (relative to other industry participants) on the Lender and its Subsidiaries, taken as a whole, (ii) changes in conditions generally affecting the industry in which the Lender and its Subsidiaries operate, except to the extent that such changes have a materially disproportionate effect (relative to other industry participants that are at a similar stage of development as the Lender and its Subsidiaries) on the Lender and its Subsidiaries, taken as a whole, (iii) any change in the trading price or trading volume of the Lender's common stock in and of itself or any failure to meet internal or published projections or forecasts for any period in and of itself (in each case, as distinguished from any change, event or occurrence giving rise or contributing to such change or failure), (iv) changes in GAAP or Applicable Laws or (v) changes resulting from the announcement or the existence of, or that result from the compliance by the Lender with its obligations under, the Definitive Agreement or (B) would prevent the Lender, Thomas Merger Sub I, Inc. or Thomas Merger Sub II, Inc. from consummating, or materially delay, the Merger.

"Permit" shall mean any franchise, license, lease, permit, notification, certification, registration, authorization, exemption, qualification, or approval granted by or filed with a Governmental Authority.

"Person" shall have the meaning assigned to such term in the Definitive Agreement.

"Regulation T" shall mean Regulation T of the Board as from time to time in effect and all official rulings and interpretations thereunder or thereof.

"Regulation U" shall mean Regulation U of the Board as from time to time in effect and all official rulings and interpretations thereunder or thereof.

"Regulation X" shall mean Regulation X of the Board as from time to time in effect and all official rulings and interpretations thereunder or thereof.

"Related Parties" shall mean, with respect to any specified Person, such Person's Affiliates and the respective directors, officers, trustees, employees, agents and advisors of such Person and such Person's Affiliates.

"Securities Act" shall mean the Securities Act of 1933, as amended from time to time.

"Subsidiary" means, with respect to any Person, any corporation, limited liability company, partnership or other entity or organization of which such Person (either alone or through or together with any other Subsidiary of such Person), owns, directly or indirectly, a majority of the stock or other Equity Interests having ordinary voting power to elect a majority of

the board of directors or other persons performing similar functions of such entity or organization.

"Superior Proposal Termination" shall mean a termination of the Definitive Agreement (a) by the Borrower in accordance with Section 8.01 (d)(ii) of the Definitive Agreement or (b) by the Lender in accordance with Section 8.01(c)(ii) of the Definitive Agreement.

"Taxes" shall mean any and all present or future taxes, levies, imposts, duties, deductions, charges or withholdings imposed by any Governmental Authority.

"Term Loans" shall have the meaning assigned to such term in Section 2.01.

"Termination Date" shall mean the date on which all Loans and Escrow Funds shall have been converted into Common Stock in accordance with Section 2.10 or Section 2.11, as applicable, upon which date all commitments to make any Loans pursuant to this Agreement shall terminate.

"Third Party" shall mean any Person or "group" (within the meaning of Section 13(d)(3) of the Exchange Act), other than the Borrower or any of its Subsidiaries or Lender or any of its Subsidiaries.

"Total Commitment" shall mean the sum of (i) all unfunded Commitments, (ii) all outstanding and unpaid Loans and (iii) all Escrow Funds.

"Transactions" shall mean, collectively, (a) the execution, delivery and performance by each of the Loan Parties of the Loan Documents to which it is a party, (b) the Borrowings hereunder and the use of proceeds thereof and (c) the deposit by the Lender of up to $28,000,000 in the aggregate into the Escrow Account.

SECTION 1.02. Terms Generally. The definitions in Section 1.01 shall apply equally to both the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include", "includes" and "including", and words of similar import, shall not be limiting and shall be deemed to be followed by the phrase "without limitation". The word "will" shall be construed to have the same meaning and effect as the word "shall." The words "asset" and "property" shall be construed as having the same meaning and effect and to refer to any and all rights and interests in tangible and intangible assets and properties of any kind whatsoever, whether real, personal or mixed, including cash, securities, Equity Interests, accounts and contract rights. The words "herein," "hereof" and "hereunder," and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision of this Agreement unless the context shall otherwise require. All references herein to Articles, Sections, Exhibits and Schedules shall be deemed references to Articles and Sections of, and Exhibits and Schedules to, this Agreement unless the context shall otherwise require. Except as otherwise expressly provided herein, (a) any definition of, or reference to, any Loan Document or any other agreement, instrument or document in this Agreement shall mean such Loan Document or other agreement, instrument or document as amended, restated, supplemented or otherwise modified from time to time (subject to any restrictions on such amendments, restatements, supplements or modifications set forth herein) and (b) all terms of an accounting or

financial nature shall be construed in accordance with GAAP, as in effect from time to time; provided, however, that if the Borrower notifies the Lender that the Borrower wishes to amend any provision hereof to eliminate the effect of any change in GAAP occurring after the date of this Agreement on the operation of such provision (or if the Lender notifies the Borrower that it wishes to amend any provision hereof for such purpose), then the Borrower's compliance with such provision shall be determined on the basis of GAAP in effect immediately before the relevant change in GAAP became effective, until either such notice is withdrawn or such provision is amended in a manner satisfactory to the Borrower and the Lender.

ARTICLE II.

The Credits

SECTION 2.01. Commitments. Subject to the terms and conditions hereof (including, without limitation, Article IV) and relying upon the representations and warranties set forth herein, (i) the Lender agrees to make one or more term loans (collectively, the "Term Loans" and each, individually, a "Term Loan") to the Borrower from and after the Closing Date but no later than the Maturity Date in an aggregate principal amount up to the Maximum Term Loan Amount and (ii) if the Lender exercises the Final Outside Date Extension Option, the Lender agrees to make one or more delayed draw loans (collectively, the "Delayed Draw Loans" and each, individually, a "Delayed Draw Loan") to the Borrower up to an aggregate principal amount not to exceed the Maximum Delayed Draw Loan Amount on or after the Option Date but no later than the Maturity Date. Amounts paid or prepaid in respect of any Loans may not be reborrowed.

SECTION 2.02. Borrowing Request; Loans. (a) The Borrower may borrow a Loan in accordance with this Agreement by delivery to the Lender of a duly completed Borrowing Request not later than 10:00 a.m. New York time on the date three (3) Business Days prior to the proposed date of the Borrowing. Each Borrowing Request is irrevocable and will not be regarded as having been duly completed unless: (i) it identifies the Loan or Loans to be borrowed and (ii) the proposed date of Borrowing is a Business Day prior to the Maturity Date.

(b) No later than one (1) Business Day following the Closing Date, the Lender shall fund $20,000,000 into the Escrow Account and, if the Lender exercises the Final Outside Date Extension Option, then on the Option Date, the Lender shall fund an additional $8,000,000 into the Escrow Account. The Lender shall direct the Escrow Agent to fund the Loans to be made hereunder from the Escrow Account pursuant to and in accordance with the terms of Section 3 of the Escrow Agreement.

SECTION 2.03. Repayment of Loans; Evidence of Debt.

(a) The Borrower hereby unconditionally promises to pay to the Lender the principal amount of each Loan made to the Borrower by the Lender as provided in Section 2.06.

(b) The Lender may maintain an accounting evidencing the indebtedness of the Borrower to the Lender resulting from the Loans made by the Lender to the Borrower under this

Agreement from time to time, including the amounts of principal and interest payable and paid to the Lender from time to time under this Agreement.

(c) The entries made in the accounting maintained pursuant to paragraph (b) of this Section shall be prima facie evidence of the existence and amounts of the obligations therein recorded; provided, however, that the failure of the Lender to maintain such accounts or any error therein shall not in any manner affect the obligations of the Borrower to repay the Loans made to the Borrower in accordance with the terms of this Agreement.

(d) The Lender may request that the Loans made by it hereunder be evidenced by one or more promissory notes. In such event, the Borrower shall execute and deliver to the Lender one or more promissory notes payable to the Lender in a form and substance reasonably acceptable to the Lender. Notwithstanding any other provision of this Agreement, in the event the Lender shall request and receive such a promissory note, the interests represented by such note shall at all times (including after any assignment of all or part of such interests pursuant to Section 9.04) be represented by one or more promissory notes payable to the payee named therein.

SECTION 2.04. Interest on Loans. (a) Subject to the provisions of Section 2.05, the Loans shall bear interest (computed on the basis of a year of 365 days (or 366 days in a leap year)) at a rate per annum equal to the Applicable Rate.

(b) Interest on each Loan shall be payable in arrears on the Interest Payment Dates, except as otherwise provided in this Agreement, in an amount equal to the interest accrued and unpaid since the previous Interest Payment Date.

SECTION 2.05. Default Interest. Upon the occurrence and during the continuance of an Event of Default, the Borrower shall on demand from time to time pay interest in cash, to the extent permitted by law, on such defaulted amount to but excluding the date of actual payment (after as well as before judgment) at the rate otherwise applicable to Loans hereunder pursuant to Section 2.04 plus 2.00% per annum.

SECTION 2.06. Repayment of Loans. All Loans then outstanding shall be due and payable in full in cash on the Maturity Date (solely for purposes of this Section, excluding the Termination Date), together with accrued and unpaid interest on the principal amount to be paid to but excluding the date of payment. All repayments pursuant to this Section 2.06 shall be without premium or penalty.

SECTION 2.07. Voluntary Prepayments. Subject to the last sentence of this Section 2.07, the Borrower may, at any time and from time to time, prepay the Loans in whole or in part upon at least five (5) Business Days' prior written notice to the Lender; provided, however, that any partial prepayment shall be in the minimum amount of $500,000 and integral multiples of $250,000 in excess thereof. Any notice of prepayment given to the Lender under this Section 2.07 shall specify (i) the date (which shall be a Business Day) of prepayment and (ii) the aggregate principal amount of the prepayment. When notice of prepayment is delivered as provided herein, the principal amount of the Loans specified in such notice, and all accrued and unpaid interest with respect to such principal amount, shall become due and payable on the

prepayment date specified in such notice and such notice shall be irrevocable. Notwithstanding anything in this Section 2.07 to the contrary, the Borrower may not voluntarily prepay the Loans (i) prior to the Definitive Agreement Termination Date or (ii) at any time prior to the consummation of a Change of Control, if a Superior Proposal Termination shall have occurred.

SECTION 2.08. Mandatory Prepayments. (a) Upon a Change of Control, the Borrower shall repay all or any part of the Loans at 100% of the outstanding principal amount of the Loans plus accrued and unpaid interest, if any, to the date of repayment.

(b) On a repayment date under paragraph (a), the Borrower shall repay the Loans to be repaid to the Lender, and, in the case of Loans evidenced by promissory notes, the Lender shall surrender all such promissory notes.

SECTION 2.09. Payments. (a) The Borrower shall make each payment (including principal of or interest on the Loans or other amounts) hereunder and under any other Loan Document not later than 12:00 p.m. New York time, on the date when due in immediately available funds, without setoff, defense or counterclaim. For purposes of computing interest, funds received by the Lender after that time on such due date shall be deemed to have been paid by the Borrower on the next succeeding Business Day, in the Lender's sole discretion. Each such payment shall be made to the Lender at its address specified in Section 9.01. All payments hereunder and under each other Loan Document shall be made in Dollars.

(b) Except as otherwise expressly provided herein, whenever any payment (including principal of or interest on any Loan or other amounts) hereunder or under any other Loan Document shall become due, or otherwise would occur, on a day that is not a Business Day, such payment may be made on the next succeeding Business Day, and such extension of time shall in such case be included in the computation of interest, if applicable.

SECTION 2.10. Conversion of Loans. (a) From and after the Definitive Agreement Termination Date, the Lender may convert the Convertible Portion of its Loans in whole or in part into Common Stock at any time prior to 5:00 p.m. New York time on the Business Day immediately preceding the Maturity Date into a number of whole shares of Common Stock equal to the Convertible Portion of the Loans divided by the applicable Conversion Rate in effect on the date the Conversion Notice is delivered; *provided* that with respect to any conversion of the Convertible Portion of the Loans into Common Stock that would be subject to a waiting period provided by the HSR Act, no such conversion shall be considered effective until the expiration or termination of such waiting period; *provided further* that the Borrower agrees to use its commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties hereto in doing, all things necessary to consummate and make effective the conversion contemplated by this Section 2.10.

(b) The Convertible Portion of the Loans delivered for conversion will be deemed to have been converted immediately prior to 5:00 p.m. New York time on the Loan Conversion Date. The Lender shall be entitled to rights with regard to the Common Stock only to the extent such Convertible Portion of Loans has been converted (or deemed to have converted) into Common Stock pursuant hereto.

(c) The right of conversion attaching to the Convertible Portion of any Loan may be exercised (i) if such Loan is not represented by a promissory note, by book-entry transfer by the Lender, or (ii) if such Loan is represented by a promissory note, by delivery of such promissory note to the Borrower, accompanied, in either case, by: (1) a duly signed and completed Conversion Notice, in the form as set forth as Exhibit B (a "Conversion Notice"), which Conversion Notice shall specify the Convertible Portion of such Loan to be converted; (2) if any promissory note has been lost, stolen, destroyed or mutilated, a notice to the Borrower regarding the loss, theft, destruction or mutilation of the promissory note together with reasonable indemnity for the Borrower; (3) appropriate endorsements and transfer documents if reasonably required by the Borrower; and (4) payment of any transfer tax due that is payable solely as a result of the issue, delivery or registration of the Common Stock in the name of a Person other than the Lender. The date on which the Lender satisfies all of the requirements in the immediately preceding sentence is the "Loan Conversion Date." Notwithstanding any other provision of this Agreement, the Borrower may not, and shall not, redeem or prepay any Loans (or any portion thereof) with respect to which a Conversion Notice has been delivered to the Borrower. The Borrower shall deliver to the Lender the number of whole shares of Common Stock issuable upon the conversion of the Convertible Portion of the Loans in accordance with Section 2.10(a) (and cash in lieu of any fractional shares) no later than five (5) Business Days following the relevant Loan Conversion Date. All such shares shall be fully paid, duly authorized and issued and nonassesable.

(d) Upon conversion of a Loan and receipt of Common Stock issued upon conversion of the Convertible Portion of the Loans, the recipient of such Common Stock shall no longer be the Lender to the extent of such converted Loan. No adjustment will be made to the Conversion Rate for accrued and unpaid interest on a converted Loan except as provided herein.

(e) Upon surrender of a Loan evidenced by a promissory note that is converted in part, the Borrower shall execute and deliver to the Lender a new note evidencing the Loan equal in principal amount to the unconverted portion of the Loan promissory note surrendered.

SECTION 2.11. Conversion of Escrow Funds . (a) From and after the Definitive Agreement Termination Date, the Lender may convert any Escrow Funds in whole or in part into Common Stock at any time prior to 5:00 p.m. New York time on the Business Day immediately preceding the Maturity Date into a number of whole shares of Common Stock equal to the Escrow Funds delivered for conversion divided by the applicable Conversion Rate; *provided* that with respect to any conversion of any Escrow Funds into Common Stock that would be subject to a waiting period provided by the HSR Act, no such conversion shall be considered effective until the expiration or termination of such waiting period; *provided further* that the Borrower agrees to use its commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties hereto in doing, all things necessary to consummate and make effective the conversion contemplated by this Section 2.11.

(b) Any Escrow Funds delivered for conversion will be deemed to have been converted immediately prior to 5:00 p.m. New York time on Escrow Amount Conversion Date. The Lender shall be entitled to rights with regard to the Common Stock only to the extent such

Escrow Funds have been converted (or deemed to have converted) into Common Stock pursuant hereto.

(c) The right of conversion attaching to any Escrow Funds may be exercised if the Lender shall have delivered (i) a Conversion Notice, which Conversion Notice shall specify the Escrow Funds to be converted and (ii) payment of any transfer tax due that is payable solely as a result of the issue, delivery or registration of the Common Stock in the name of a Person other than the Lender. The date on which the Lender satisfies all of the requirements in the immediately preceding sentence is the "Escrow Amount Conversion Date." Upon receipt by the Borrower of the Escrow Funds delivered for conversion in accordance with Section 2.11(a), the Borrower shall deliver to the Lender the number of whole shares of Common Stock issuable upon the conversion thereof (and cash in lieu of any fractional shares) no later than five (5) Business Days following the relevant Escrow Amount Conversion Date. All such shares shall be fully paid, duly authorized and issued and nonassesable.

(d) Upon delivery of the Escrow Funds to Borrower and receipt of Common Stock by the Lender, (i) the Commitment of the Lender shall be reduced by the amounts so converted and (ii) such amounts shall no longer be available to the Borrower for Borrowings hereunder.

SECTION 2.12. Maximum Amount of Converted Common Stock . Notwithstanding anything in Section 2.10, Section 2.11 or in any other Loan Document, for so long as the Borrower's CHESS Depositary Receipts are listed on the ASX, no more than 14.99% in the aggregate of the then authorized and outstanding shares of Common Stock as of the date of any conversion in accordance with Section 2.10 or Section 2.11 (without giving effect to such conversion) shall be issued to the Lender hereunder.

SECTION 2.13. Adjustment of Conversion Rate . If at any time between (i) the execution of this Agreement and (ii) the date on which all amounts outstanding under this Agreement are paid by Borrower and/or all of the Loans and any Escrow Funds have been converted into Common Stock as provided herein, the number of outstanding shares of Common Stock shall (A) increase by virtue of or in connection with any dividend or distribution on the Common Stock or any stock split or other subdivision of the outstanding shares of Common Stock or a reclassification, then the Conversion Rate in effect immediately prior to such dividend, distribution, stock split or other subdivision shall, concurrently with the effectiveness of such increase, be adjusted to a Conversion Rate that would entitle the holder of any Loans and any Escrow Funds delivered for conversion to receive, from time to time upon conversion thereof, the same percentage of the outstanding shares of Common Stock that such holder would have received on conversion thereof had such Loan or Escrow Funds been outstanding and converted immediately prior to such increase and (B) decrease by virtue of or in connection with any combination or consolidation, by reclassification or otherwise, into a lesser number of shares of Common Stock (including, without limitation, pursuant to a reverse stock split), then the Conversion Rate in effect immediately prior to such combination, consolidation, reclassification, stock split or other process shall, concurrently with the effectiveness of such decrease, be adjusted to a Conversion Rate that would entitle the holder of any Loans and any Escrow Funds delivered for conversion to receive, from time to time upon conversion, the same percentage of the outstanding shares of Common Stock that such holder would have received on conversion

thereof had such Loan or Escrow Funds been outstanding and converted immediately prior to such decrease.

ARTICLE III.

Representations and Warranties of the Loan Parties

Each Loan Party represents and warrants to the Lender that:

SECTION 3.01. Organization; Powers. Such Loan Party (a) is duly organized or formed, validly existing and in good standing under the laws of the jurisdiction of its organization or formation, (b) has all corporate power and authority, and the legal right, to own and operate its property and assets, to lease the property it operates as lessee and to carry on its business as now conducted and as proposed to be conducted, except where any failure of a Loan Party to have such power, authority and legal right would not have a Company Material Adverse Effect, (c) is qualified to do business in, and is in good standing in, every jurisdiction where such qualification is required, except where any failure to have such qualification would not have a Company Material Adverse Effect and (d) has the corporate power and authority, and the legal right, to execute, deliver and perform its obligations under this Agreement and each of the other Loan Documents.

SECTION 3.02. Authorization; No Conflicts. The Transactions: (a) have been duly authorized by all requisite corporate action of such Loan Party and (b) will not (i) violate (A) any provision of law, statute, rule or regulation, or of the certificate or articles of incorporation or other constitutive documents or by-laws of such Loan Party, (B) any order of any Governmental Authority or (C) any provision of any indenture, agreement or other instrument to which such Loan Party is a party or by which it or any of its property is or may be bound, (ii) be in conflict with, result in a breach of or constitute (alone or with notice or lapse of time or both) a default under, or give rise to any right to accelerate or to require the prepayment, repurchase or redemption of any obligation under any such indenture, agreement or other instrument or (iii) result in the creation or imposition of any Lien upon or with respect to any property or assets of such Loan Party, except in the case of any of clauses (b)(i)(C), (b)(ii) and (b)(iii) for matters that would not have a Company Material Adverse Effect.

SECTION 3.03. Enforceability. This Agreement has been duly executed and delivered by such Loan Party, and assuming this Agreement is a valid and binding obligation of the Lender, constitutes, and each other Loan Document when executed and delivered by such Loan Party, and assuming each other Loan Document is a valid and binding obligation of the Lender, will constitute, a legal, valid and binding obligation of such Loan Party enforceable against such Loan Party in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other laws affecting creditors' rights generally and subject to general principles of equity, regardless of whether considered in a proceeding in equity or at law.

SECTION 3.04. Governmental Approvals. No action, consent or approval of, registration or filing with, Permit from, notice to, or any other action by, any Governmental Authority is or will be required in connection with the Transactions as they relate to such Loan Party, except for (a) filings required by applicable federal and state securities laws, (b) such as have been made or

obtained and are in full force and effect and (c) for such other actions, consents, approvals, registrations, filings, and notifications, which if not obtained or made would not cause a Company Material Adverse Effect.

SECTION 3.05. Senior Ranking. The obligations of such Loan Party under the Loan Documents are its direct, general and unconditional obligations and, as of the date of this Agreement, rank senior and prior to all its other secured and unsecured obligations and liabilities, whether actual or contingent.

SECTION 3.06. Federal Reserve Regulations. (a) Such Loan Party is not engaged principally, or as one of its important activities, in the business of purchasing or carrying Margin Stock or extending credit for the purpose of buying or carrying Margin Stock.

(b) No part of the proceeds of any Loan will be used, whether directly or indirectly, and whether immediately, incidentally or ultimately, by such Loan Party for the purpose of purchasing, carrying or trading in any securities under such circumstances as to involve any of the Loan Parties in a violation of Regulation X or to involve any broker or dealer in a violation of Regulation T. None of the transactions contemplated by this Agreement will violate or result in the violation of any of the provisions of the Regulations of the Board, including Regulation T, U or X.

SECTION 3.07. Investment Company Act. Such Loan Party is not an "investment company" as defined in, or subject to regulation under, the Investment Company Act of 1940, as amended.

SECTION 3.08. Solvency. Immediately after the consummation of the Transactions to occur on the Closing Date and immediately following the making of the Loans and after giving effect to the application of the proceeds of the Loans: (a) the value of the assets of each of the Loan Parties at a fair valuation, will exceed its debts and liabilities, subordinated, contingent or otherwise; (b) the present fair saleable value of the property of each of the Loan Parties will be greater than the amount that will be required to pay the probable liability of its debts and other liabilities, subordinated, contingent or otherwise, as such debts and other liabilities become absolute and matured; (c) each of the Loan Parties expects to be able to pay its debts and liabilities, subordinated, contingent or otherwise, as such debts and liabilities become absolute and matured; and (d) no Loan Party will have unreasonably small capital resources with which to conduct the business in which it is engaged as such business is now conducted and is proposed to be conducted following the Closing Date.

ARTICLE IV.

Representations and Warranties of the Lender

The Lender represents and warrants to each Loan Party that:

SECTION 4.01. Organization; Powers. The Lender (a) is duly organized or formed, validly existing and in good standing under the laws of the jurisdiction of its organization or formation and (b) has the corporate power and authority to execute, deliver and perform its obligations under this Agreement.

SECTION 4.02. Authorization; No Conflicts. The Transactions: (a) have been duly authorized by all necessary corporate action of the Lender and (b) will not (i) violate (A) any provision of law, statute, rule or regulation, or of the certificate or articles of incorporation or other constitutive documents or by-laws of the Lender, (B) any order of any Governmental Authority, or (C) any provision of any indenture, agreement or other instrument to which the Lender is a party or by which it or any of its property is or may be bound, (ii) be in conflict with, result in a breach of or constitute (alone or with notice or lapse of time or both) a default under, or give rise to any right to accelerate or to require the prepayment, repurchase or redemption of any obligation under any such indenture, agreement or other instrument or (iii) result in the creation or imposition of any Lien upon or with respect to any property or assets of the Lender, except with respect to clauses (b)(i)(C), (b)(ii) and (b)(iii) of this Section 4.02 for matters that would not have a Parent Material Adverse Effect.

SECTION 4.03. Enforceability. This Agreement has been duly executed and delivered by the Lender, and assuming this Agreement is a valid and binding obligation of each of the Loan Parties, constitutes, and each other Loan Document when executed and delivered by the Lender, and assuming each other Loan Document is a valid and binding obligation of each of the Loan Parties, will constitute, a legal, valid and binding obligation of the Lender enforceable against such the Lender in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other laws affecting creditors' rights generally and subject to general principles of equity, regardless of whether considered in a proceeding in equity or at law.

SECTION 4.04. Governmental Approvals. No action, consent or approval of, registration or filing with, Permit from, notice to, or any other action by, any Governmental Authority is or will be required in connection with the Transactions as they relate to the Lender, except for (a) filings required by applicable federal and state securities laws, (b) such as have been made or obtained and are in full force and effect and (c) for such other actions, consents, approvals, registrations, filings, and notifications, which if not obtained or made would not cause a Parent Material Adverse Effect.

SECTION 4.05. Capital Resources. The Lender has, or will have prior to the Closing Date, sufficient cash or other sources of immediately available funds to enable it to fund $20,000,000 into the Escrow Account and, if the Lender exercises the Final Outside Date Extension Option, on or prior to the Option Date, the Lender will have sufficient cash or other sources of immediately available funds to enable it to fund and additional $8,000,000 into the Escrow Account.

ARTICLE V.

Conditions of Lending

The obligations of the Lender to make the Loans hereunder are subject to the satisfaction (or waiver in accordance with Section 9.07) of the following conditions:

SECTION 5.01. All Credit Events. In respect of any Borrowing, the Lender will only be obliged to comply with Article II if, on or as of the date of such Borrowing (each such event being a "Credit Event"):

(a) The representations and warranties set forth in each Loan Document (disregarding any exception in such representations and warranties relating to materiality or a Company Material Adverse Effect) shall be true and correct in all material respects on and as of the date of such Credit Event with the same effect as though made on and as of such date (except for any such representations and warranties which address matters only as of an earlier date, which shall be true and correct in all material respects as of such earlier date), except for such failures to be true and correct which do not have a Company Material Adverse Effect.

(b) At the time of and immediately after such Borrowing, no Event of Default or Default shall have occurred and be continuing.

(c) A Superior Proposal Termination shall not have occurred.

(d) A Lender Termination shall not have occurred.

(e) Prior to the Initial Borrowing, the Lender shall have received (i) a copy of the certificate or articles of incorporation or other formation documents, including all amendments thereto, of each Loan Party, certified as of a recent date by the Secretary of State of the state of its organization, and a certificate as to the good standing of such Loan Party as of a recent date, from such Secretary of State; (ii) a certificate of the Secretary or Assistant Secretary of each Loan Party dated the Closing Date and certifying (A) that attached thereto is a true and complete copy of the by-laws, limited partnership agreement, operating agreement or other governing document of such Loan Party as in effect on the Closing Date and at all times since a date prior to the date of the resolutions described in clause (B) below (such by-laws, limited partnership agreement, operating agreement or other governing document to be in form and substance reasonably satisfactory to the Lender), (B) that attached thereto is a true and complete copy of resolutions duly adopted by the board of directors of the Borrower authorizing the execution, delivery and performance of the Loan Documents to which such Person is a party and, in the case of the Borrower, the Borrowings hereunder, and that such resolutions have not been modified, rescinded or amended and are in full force and effect, (C) that the certificate or articles of incorporation or other formation documents of such Loan Party have not been amended since the date of the last amendment thereto shown on the certificate of good standing furnished pursuant to clause (i) above and (D) as to the incumbency and specimen signature of each officer executing any Loan Document or any other document delivered in connection herewith on behalf of the such Loan Party; and (iii) a certificate of another officer as to the incumbency and specimen signature of the Secretary or Assistant Secretary executing the certificate pursuant to (ii) above.

(f) Prior to the Initial Borrowing, the Lender shall have received (i) this Agreement and each of the other Loan Documents, each executed and delivered by a duly authorized officer of each Loan Party thereto, and (ii) if requested by the Lender pursuant to Section 2.03, a promissory note or notes conforming to the requirements of such Section and executed and delivered by a duly authorized officer of the Borrower.

SECTION 5.02. Delayed Draw Loans. In addition to the satisfaction (or waiver in accordance with Section 9.07) of the conditions set forth in Section 5.01 hereof, the Lender shall

not be obligated to fund any Delayed Draw Loans unless the Lender shall have first exercised the Final Outside Date Extension Option.

ARTICLE VI.

Covenants

Each Loan Party covenants and agrees with the Lender that so long as this Agreement shall remain in effect and until the principal of and interest on each Loan and all other expenses or amounts payable under any Loan Document shall have been satisfied in full, that:

SECTION 6.01. Notices. (a) Such Loan Party will furnish to the Lender promptly, and in any event no later than five (5) Business Days after such Loan Party has knowledge of an Event of Default or Default, written notice of any Event of Default or Default, specifying the nature and extent thereof and the corrective action (if any) taken or proposed to be taken with respect thereto.

(b) Such Loan Party shall give the Lender written notice, at least ten (10) Business Days prior to the consummation of any Change of Control, of the anticipated date of consummation of such Change of Control and the material terms and conditions thereof.

(c) Whenever the Conversion Rate is adjusted pursuant to Section 2.13, the Borrower shall promptly notify, and in no event later than five (5) Business Days after such an adjustment, the Lender in writing of the adjustment, which notice shall briefly state the facts requiring the adjustment, the manner of computing such adjustment and the adjusted Conversion Rate.

SECTION 6.02. Use of Proceeds. At all times prior to the termination of the Definitive Agreement in accordance with its terms, the Borrower shall use the proceeds of the Loans only (i) in the ordinary course of its business consistent with past practice, and to pay NASDAQ related expenses and any expenses incurred in connection with the transactions contemplated by the Definitive Agreement and (ii) to lend money directly to any Subsidiary for use by such Subsidiary only in the ordinary course of business in accordance with the Capital Expenditure and Loan Proceeds Budget (as such term is defined in the Definitive Agreement) and shall not authorize any expenditures of the proceeds of the Loans that, in the aggregate, exceed any specific line item set forth in the Capital Expenditure and Loan Proceeds Budget (as such term is defined in the Definitive Agreement).

SECTION 6.03. Further Assurances. Each Loan Party shall, from time to time, duly authorize, execute and deliver, or cause to be duly authorized, executed and delivered, such additional instruments, certificates, agreements or documents, and take all such actions, as the Lender may reasonably request or as may be necessary, for the purposes of implementing or effectuating the provisions of this Agreement and the other Loan Documents. Upon the exercise by the Lender of any power, right, privilege or remedy pursuant to this Agreement or the other Loan Documents which requires any consent, approval, recording, qualification or authorization of any Governmental Authority, each Loan Party will execute and deliver, or will cause the execution and delivery of, all applications, certifications, instruments and other documents and

papers that the Lender may be required to obtain from it for such governmental consent, approval, recording, qualification or authorization.

SECTION 6.04. Taxes. (a) All sums payable by or on behalf of any Loan Party hereunder and under the other Loan Documents shall (except to the extent required by law) be paid free and clear of, and without any deduction or withholding on account of, any Tax (excluding any income or franchise Tax imposed on the net income of the Lender by the United States of America or any political subdivision thereof). So long as Thoratec Corporation is the Lender and the Lender has complied with Section 6.04(b), if the Borrower shall be required to deduct any such non-excluded Taxes from such payments, then (i) the sum payable shall be increased as necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section) the Lender receives an amount equal to the sum it would have received had no such deductions been made, (ii) the Borrower shall make such deductions and (iii) the Borrower shall pay the full amount deducted to the relevant Governmental Authority in accordance with applicable law.

(b) On or prior to the Closing Date, the Lender shall deliver to the Borrower a properly completed and duly executed Internal Revenue Service Form W-9 (or any subsequent versions thereof or successors thereto). Any permitted assignee pursuant to Section 9.04(b) shall, on or prior to such assignment, deliver to the Borrower a properly completed and duly executed Internal Revenue Service Form W-9 (or any subsequent versions thereof or successors thereto) or applicable Internal Revenue Service Form W-8 (or any subsequent versions thereof or successors thereto).

(c) The Borrower shall pay any Other Taxes.

SECTION 6.05. Compliance with Laws. Each Loan Party will comply in all material respects with the requirements of all applicable laws, rules, regulations and orders of any Governmental Authority in performing its obligations under this Agreement and the other Loan Documents.

SECTION 6.06. Common Stock. (a) The Borrower shall, at all times prior to the Maturity Date, and from time to time thereafter as may be necessary, reserve at all times and keep available, free from preemptive rights, out of its authorized but unissued Common Stock, a sufficient number of shares of Common Stock such that the Borrower shall be able to deliver at any time and from time to time following the date hereof all of the shares of Common Stock that would be deliverable upon conversion of all of the Convertible Portion of the Loans and Escrow Funds pursuant to Section 2.10 and Section 2.11.

(b) The Borrower shall take all actions necessary to ensure that all shares of Common Stock that may be issued upon conversion of any Loans and/or Escrow Funds shall be (i) newly issued shares or shares held in the treasury of the Borrower, (ii) duly authorized, validly issued, fully paid and nonassessable and (iii) free of any preemptive rights, lien or adverse claim.

ARTICLE VII.

Guaranty

SECTION 7.01. Guaranty of the Obligations. (a) Guarantors jointly and severally hereby irrevocably and unconditionally guaranty to the Lender the due and punctual payment in full of all Obligations when the same shall become due, whether at stated maturity, by required prepayment, declaration, acceleration, demand or otherwise (including amounts that would become due but for the operation of the automatic stay under Section 362(a) of the Bankruptcy Code) (collectively, the "Guaranteed Obligations").

(b) Each Guarantor and the Lender hereby confirms that it is the intention of all such Persons that this Guaranty and the Obligations of each Guarantor hereunder not constitute a fraudulent transfer or conveyance for purposes of any law related to fraudulent transfer or conveyance to the extent applicable to this Guaranty and the Obligations of the Guarantor hereunder. To effectuate the foregoing intention, the Lender and the Guarantors hereby irrevocably agree that the Obligations of each Guarantor under this Guaranty at any time shall be limited to the maximum amount as will result in the Obligations of such Guarantor under this Guaranty not constituting a fraudulent transfer or conveyance.

SECTION 7.02. Payment by Guarantors. Guarantors hereby jointly and severally agree, in furtherance of the foregoing and not in limitation of any other right which the Lender may have at law or in equity against any Guarantor by virtue hereof, that upon the failure of Borrower to pay any of the Guaranteed Obligations when and as the same shall become due, whether at stated maturity, by required prepayment, declaration, acceleration, demand or otherwise (including amounts that would become due but for the operation of the automatic stay under Section 362(a) of the Bankruptcy Code), Guarantors will upon demand pay, or cause to be paid, in cash, to the Lender, an amount equal to the sum of the unpaid principal amount of all Guaranteed Obligations then due as aforesaid, accrued and unpaid interest on such Guaranteed Obligations (including interest which, but for Borrower's becoming the subject of a case under the Bankruptcy Code, would have accrued on such Guaranteed Obligations, whether or not a claim is allowed against Borrower for such interest in the related bankruptcy case) and all other Guaranteed Obligations then owed to the Lenders as aforesaid.

SECTION 7.03. Liability of Guarantors Absolute. Each Guarantor agrees that its obligations hereunder are irrevocable, absolute, independent and unconditional and shall not be affected by any circumstance which constitutes a legal or equitable discharge of a guarantor or surety other than payment in full of the Guaranteed Obligations. In furtherance of the foregoing and without limiting the generality thereof, each Guarantor agrees as follows:

(a) this Guaranty is a guaranty of payment when due and not of collectability. This Guaranty is a primary obligation of each Guarantor and not merely a contract of surety;

(b) the Lender may enforce this Guaranty upon the occurrence of an Event of Default notwithstanding the existence of any dispute between Borrower and the Lender with respect to the existence of such Event of Default;

(c) the obligations of each Guarantor hereunder are independent of the obligations of Borrower and the obligations of any other guarantor (including any other Guarantor) of the obligations of Borrower, and a separate action or actions may be brought and prosecuted against such Guarantor whether or not any action is brought against Borrower or any of such other guarantors and whether or not Borrower is joined in any such action or actions;

(d) payment by any Guarantor of a portion, but not all, of the Guaranteed Obligations shall in no way limit, affect, modify or abridge any Guarantor's liability for any portion of the Guaranteed Obligations which has not been paid. Without limiting the generality of the foregoing, if the Lender is awarded a judgment in any suit brought to enforce any Guarantor's covenant to pay a portion of the Guaranteed Obligations, such judgment shall not be deemed to release such Guarantor from its covenant to pay the portion of the Guaranteed Obligations that is not the subject of such suit, and such judgment shall not, except to the extent satisfied by such Guarantor, limit, affect, modify or abridge any other Guarantor's liability hereunder in respect of the Guaranteed Obligations;

(e) the Lender, upon such terms as it deems appropriate, without notice or demand and without affecting the validity or enforceability hereof or giving rise to any reduction, limitation, impairment, discharge or termination of any Guarantor's liability hereunder, from time to time may (i) renew, extend, accelerate, increase the rate of interest on, or otherwise change the time, place, manner or terms of payment of the Guaranteed Obligations; (ii) settle, compromise, release or discharge, or accept or refuse any offer of performance with respect to, or substitutions for, the Guaranteed Obligations or any agreement relating thereto and/or subordinate the payment of the same to the payment of any other obligations; (iii) request and accept other guaranties of the Guaranteed Obligations and take and hold security for the payment hereof or the Guaranteed Obligations; and (iv) exercise any other rights available to it under the Loan Documents; and

(f) this Guaranty and the obligations of Guarantors hereunder shall be valid and enforceable and shall not be subject to any reduction, limitation, impairment, discharge or termination for any reason (other than payment in full of the Guaranteed Obligations), including the occurrence of any of the following, whether or not any Guarantor shall have had notice or knowledge of any of them: (i) any failure or omission to assert or enforce or agreement or election not to assert or enforce, or the stay or enjoining, by order of court, by operation of law or otherwise, of the exercise or enforcement of, any claim or demand or any right, power or remedy (whether arising under the Loan Documents, at law, in equity or otherwise) with respect to the Guaranteed Obligations or any agreement relating thereto, or with respect to any other guaranty of the payment of the Guaranteed Obligations; (ii) any rescission, waiver, amendment or modification of, or any consent to departure from, any of the terms or provisions (including provisions relating to Events of Default) hereof, any of the other Loan Documents or any agreement or instrument executed pursuant thereto, or of any other guaranty for the Guaranteed Obligations, in each case whether or not in accordance with the terms hereof or such Loan Document or any agreement relating to such other guaranty; (iii) the Guaranteed Obligations, or any agreement relating thereto, at any time being found to be illegal, invalid or unenforceable in any respect; (iv) the application of payments received from any source (other than payments received pursuant to the other Loan Documents) to the payment of indebtedness other than the Guaranteed Obligations, even though the Lender might have elected to apply such payment to

any part or all of the Guaranteed Obligations; (v) the Lender's consent to the change, reorganization or termination of the corporate structure or existence of Borrower or any of its Subsidiaries and to any corresponding restructuring of the Guaranteed Obligations; (vi) any defenses, set offs or counterclaims which Borrower may allege or assert against the Lender in respect of the Guaranteed Obligations, including failure of consideration, breach of warranty, payment, statute of frauds, statute of limitations, accord and satisfaction and usury; and (vii) any other act or thing or omission, or delay to do any other act or thing, which may or might in any manner or to any extent vary the risk of any Guarantor as an obligor in respect of the Guaranteed Obligations.

SECTION 7.04. Waivers by Guarantors. Each Guarantor hereby waives, for the benefit of the Lender: (a) any right to require the Lender, as a condition of payment or performance by such Guarantor, to (i) proceed against Borrower, any other guarantor (including any other Guarantor) of the Guaranteed Obligations or any other Person, (ii) proceed against or exhaust any security held from Borrower, any such other guarantor or any other Person, (iii) proceed against or have resort to any balance of any deposit account or credit on the books of the Lender in favor of Borrower or any other Person, or (iv) pursue any other remedy in the power of the Lender whatsoever; (b) any defense arising by reason of the incapacity, lack of authority or any disability or other defense of Borrower or any other Guarantor including any defense based on or arising out of the lack of validity or the unenforceability of the Guaranteed Obligations or any agreement or instrument relating thereto or by reason of the cessation of the liability of Borrower or any other Guarantor from any cause other than payment in full of the Guaranteed Obligations; (c) any defense based upon any statute or rule of law which provides that the obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; (d) any defense based upon the Lender's errors or omissions in the administration of the Guaranteed Obligations, except behavior which amounts to bad faith; (e) (i) any principles or provisions of law, statutory or otherwise, which are or might be in conflict with the terms hereof and any legal or equitable discharge of such Guarantor's obligations hereunder, (ii) the benefit of any statute of limitations affecting such Guarantor's liability hereunder or the enforcement hereof, and (iii) any rights to set offs, recoupments and counterclaims; (f) notices, demands, presentments, protests, notices of protest, notices of dishonor and notices of any action or inaction, including acceptance hereof, notices of default hereunder, notices of any renewal, extension or modification of the Guaranteed Obligations or any agreement related thereto, notices of any extension of credit to Borrower and notices of any of the matters referred to in Section 7.03 and any right to consent to any thereof; and (g) any defenses or benefits that may be derived from or afforded by law which limit the liability of or exonerate guarantors or sureties, or which may conflict with the terms hereof.

SECTION 7.05. Guarantors' Rights of Subrogation, Contribution, Etc. Until the Guaranteed Obligations shall have been indefeasibly paid in full and the Commitments shall have terminated, each Guarantor hereby waives any claim, right or remedy, direct or indirect, that such Guarantor now has or may hereafter have against Borrower or any other Guarantor or any of its assets in connection with this Guaranty or the performance by such Guarantor of its obligations hereunder, in each case whether such claim, right or remedy arises in equity, under contract, by statute, under common law or otherwise and including (a) any right of subrogation, reimbursement or indemnification that such Guarantor now has or may hereafter have against Borrower with respect to the Guaranteed Obligations, and (b) any right to enforce, or to

participate in, any claim, right or remedy that the Lender now has or may hereafter have against Borrower. In addition, until the Guaranteed Obligations shall have been indefeasibly paid in full and the Commitments shall have terminated, each Guarantor shall withhold exercise of any right of contribution such Guarantor may have against any other guarantor (including any other Guarantor) of the Guaranteed Obligations. Each Guarantor further agrees that, to the extent the waiver or agreement to withhold the exercise of its rights of subrogation, reimbursement, indemnification and contribution as set forth herein is found by a court of competent jurisdiction to be void or voidable for any reason, any rights of subrogation, reimbursement or indemnification such Guarantor may have against Borrower, and any rights of contribution such Guarantor may have against any such other guarantor, shall be junior and subordinate to any rights the Lender may have against Borrower to any right the Lender may have against such other guarantor. If any amount shall be paid to any Guarantor on account of any such subrogation, reimbursement, indemnification or contribution rights at any time when all Guaranteed Obligations shall not have been finally and indefeasibly paid in full, such amount shall be held in trust for the Lender and shall forthwith be paid over to the Lender to be credited and applied against the Guaranteed Obligations, whether matured or unmatured, in accordance with the terms hereof.

SECTION 7.06. Subordination of Other Obligations. Any Indebtedness of Borrower or any Guarantor now or hereafter held by any Guarantor (the "Obligee Guarantor") is hereby subordinated in right of payment to the Guaranteed Obligations, and any such Indebtedness collected or received by the Obligee Guarantor after an Event of Default has occurred and is continuing shall be held in trust for the Lender and shall forthwith be paid over to the Lender to be credited and applied against the Guaranteed Obligations but without affecting, impairing or limiting in any manner the liability of the Obligee Guarantor under any other provision hereof.

SECTION 7.07. Continuing Guaranty. This Guaranty is a continuing guaranty and shall remain in effect until all of the Guaranteed Obligations shall have been paid in full and the Commitments shall have terminated. Each Guarantor hereby irrevocably waives any right to revoke this Guaranty as to future transactions giving rise to any Guaranteed Obligations.

SECTION 7.08. Authority of Guarantors or Borrower. It is not necessary for the Lender to inquire into the capacity or powers of any Guarantor or Borrower or the officers, directors or any agents acting or purporting to act on behalf of any of them.

SECTION 7.09. Financial Condition of Borrower. Any Loan may be made to Borrower or continued from time to time without notice to or authorization from any Guarantor regardless of the financial or other condition of Borrower at the time of any such grant or continuation. The Lender shall have no obligation to disclose or discuss with any Guarantor its assessment, or any Guarantor's assessment, of the financial condition of Borrower. Each Guarantor has adequate means to obtain information from Borrower on a continuing basis concerning the financial condition of Borrower and its ability to perform its obligations under the Loan Documents and each Guarantor assumes the responsibility for being and keeping informed of the financial condition of Borrower and of all circumstances bearing upon the risk of nonpayment of the Guaranteed Obligations. Each Guarantor hereby waives and relinquishes any duty on the part of the Lender to disclose any matter, fact or thing relating to the business, operations or conditions of Borrower now known or hereafter known by the Lender.

SECTION 7.10. Bankruptcy, Etc. (a) So long as any Guaranteed Obligations remain outstanding, no Guarantor shall, without the prior written consent of the Lender, commence or join with any other Person in commencing any bankruptcy, reorganization or insolvency case or proceeding of or against Borrower or any other Guarantor. The obligations of Guarantors hereunder shall not be reduced, limited, impaired, discharged, deferred, suspended or terminated by any case or proceeding, voluntary or involuntary, involving the bankruptcy, insolvency, receivership, reorganization, liquidation or arrangement of Borrower or any other Guarantor or by any defense which Borrower or any other Guarantor may have by reason of the order, decree or decision of any court or administrative body resulting from any such proceeding.

(b) Each Guarantor acknowledges and agrees that any interest on any portion of the Guaranteed Obligations which accrues after the commencement of any case or proceeding referred to in clause (a) above (or, if interest on any portion of the Guaranteed Obligations ceases to accrue by operation of law by reason of the commencement of such case or proceeding, such interest as would have accrued on such portion of the Guaranteed Obligations if such case or proceeding had not been commenced) shall be included in the Guaranteed Obligations because it is the intention of Guarantors and the Lender that the Guaranteed Obligations which are guaranteed by Guarantors pursuant hereto should be determined without regard to any rule of law or order which may relieve Borrower of any portion of such Guaranteed Obligations. Guarantors will permit any trustee in bankruptcy, receiver, debtor in possession, assignee for the benefit of creditors or similar Person to pay the Lender, or allow the claim of the Lender in respect of, any such interest accruing after the date on which such case or proceeding is commenced.

(c) In the event that all or any portion of the Guaranteed Obligations are paid by Borrower, the obligations of Guarantors hereunder shall continue and remain in full force and effect or be reinstated, as the case may be, in the event that all or any part of such payment(s) are rescinded or recovered directly or indirectly from the Lender as a preference, fraudulent transfer or otherwise, and any such payments which are so rescinded or recovered shall constitute Guaranteed Obligations for all purposes hereunder.

ARTICLE VIII.

Events of Default

In case of the happening of any of the following events ("Events of Default"):

(a) any representation or warranty made in any Loan Document, shall prove to have been false or misleading in any material respect when so made, deemed made or furnished;

(b) default shall be made in the payment of any principal of any Loan when and as the same shall become due and payable, whether at the due date thereof or at a date fixed for prepayment thereof or by acceleration thereof or otherwise;

(c) default shall be made in the payment of any interest on any Loan or any other amount (other than an amount referred to in (b) above) due under any Loan Document, when and

as the same shall become due and payable, and such default shall continue unremedied for a period of three (3) Business Days;

(d) default shall be made in the due observance or performance by the Borrower of any covenant, condition or agreement contained in Section 2.10 or Section 2.11, and such default shall continue unremedied for a period of three (3) Business Days;

(e) the Borrower shall fail to comply in all material respects with any covenant, condition or agreement contained in any Loan Document (other than those specified in clauses (b), (c) or (d) above) and such default shall continue unremedied for a period of 30 days;

(f) the Borrower shall default in the observance or performance of any agreement or condition relating to any Indebtedness (including any Guarantee of Indebtedness) exceeding $5,000,000 in aggregate principal and accrued interest, or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event shall occur or condition exist (other than (x) any disposition of assets giving rise to a repayment or prepayment obligation on Indebtedness secured by such assets and (y) the issuance of Equity Interests or Indebtedness giving rise to a repayment obligation with respect to the proceeds of such issuance, provided in each case such payment is timely made), the effect of which default or other event or condition is to cause such Indebtedness to become due prior to its stated maturity or (in the case of any Guarantee of Indebtedness) to become due or payable in respect of any such accelerated Indebtedness;

(g) an involuntary proceeding shall be commenced or an involuntary petition shall be filed in a court of competent jurisdiction seeking (i) relief in respect of the Borrower , or of a substantial part of the property or assets of the Borrower under the Bankruptcy Code, as now constituted or hereafter amended, or any other Federal, state or foreign bankruptcy, insolvency, receivership or similar law, (ii) the appointment of a receiver, trustee, custodian, sequestrator, conservator or similar official for the Borrower or for a substantial part of the property or assets of the Borrower or (iii) the winding-up or liquidation of the Borrower; and such proceeding or petition shall continue undismissed for 60 days or an order or decree approving or ordering any of the foregoing shall be entered;

(h) the Borrower shall (i) voluntarily commence any proceeding or file any petition seeking relief under the Bankruptcy Code, as now constituted or hereafter amended, or any other Federal, state or foreign bankruptcy, insolvency, receivership or similar law, (ii) consent to the institution of, or fail to contest in a timely and appropriate manner, any proceeding or the filing of any petition described in (g) above, (iii) apply for or consent to the appointment of a receiver, trustee, custodian, sequestrator, conservator or similar official for the Borrower or for a substantial part of the property or assets of the Borrower, (iv) file an answer admitting the material allegations of a petition filed against it in any such proceeding, (v) make a general assignment for the benefit of creditors, (vi) admit in writing its inability or fail generally to pay its debts as they become due or (vii) take any action for the purpose of effecting any of the foregoing;

(i) one or more judgments for the payment of money that, individually or in the aggregate, would reasonably be expected to result in a Company Material Adverse Effect shall

be rendered against the Borrower or any combination thereof and the same shall remain undischarged for a period of thirty (30) consecutive days during which execution shall not be effectively stayed, or any action shall be legally taken by a judgment creditor to levy upon assets or properties of the Borrower to enforce any such judgment; or

(j) the Borrower shall fail to repay on the date required pursuant to Section 2.06 the entire principal amount of and accrued interest on the Loans,

then, and in every such event (other than an event with respect to the Borrower described in paragraph (g) or (h) above), and at any time thereafter during the continuance of such event either or both of the following actions may be taken: the Lender by notice to the Borrower may declare the Loans then outstanding to be forthwith due and payable in whole or in part, whereupon the principal of the Loans so declared to be due and payable, together with accrued interest thereon and all other liabilities of the Borrower accrued hereunder and under any other Loan Document, shall become forthwith due and payable, without presentment, demand, protest or further notice of any kind, all of which are hereby expressly waived by the Borrower, anything contained herein or in any other Loan Document to the contrary notwithstanding, and the Lender shall have the right to take all or any actions and exercise any remedies available to them under this Agreement, applicable law or in equity; and in any event with respect to the Borrower described in paragraph (g) or (h) above, the principal of the Loans then outstanding, together with accrued interest thereon and all other liabilities of the Borrower accrued hereunder and under any other Loan Document, shall automatically become due and payable, without presentment, demand, protest or any other notice of any kind, all of which are hereby expressly waived by the Borrower, anything contained herein or in any other Loan Document to the contrary notwithstanding, and the Lender shall have the right to take all or any actions and exercise any remedies available to them under this Agreement, applicable law or in equity.

ARTICLE IX.

Miscellaneous

SECTION 9.01. Notices. (a) Except in the case of notices and other communications expressly permitted to be given by telephone (and subject to paragraph (b) of this Section 9.01), notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by fax, as follows:

(i) if to the Borrower to:

HeartWare International, Inc.
14000-14050 NW 57th Court
Miami Lakes, FL 33014
Attention: David McIntyre
Fax: (305) 818-4123
Email: dmcintyre@heartwareinc.com

with a copy (which shall not constitute notice) to:

Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022
Attention: Clare O'Brien
Robert M. Katz
Fax: (212) 848-7179

(ii) if to the Lender to:

Thoratec Corporation
6035 Stoneridge Drive
Pleasanton, CA 94588
Attention: Gary Burbach
Fax: (925) 264-4341
Email: gary.burbach@thortec.com

with a copy (which shall not constitute notice) to:

Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626
Attn: Charles K. Ruck
Tad J. Freese
Fax: (714) 755-8290

provided that, upon receipt of prior consent from the Lender, any notice delivered by the Borrower pursuant to Article II may be delivered via email (to be promptly confirmed by written or fax notice).

All such notices and other communications (i) sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received or (ii) sent by fax shall be deemed to have been given when sent and when receipt has been confirmed by telephone; provided that if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next Business Day for the recipient. Notices delivered through electronic communications to the extent provided in paragraph (b) below, shall be effective as provided in such paragraph (b).

(b) Notices and other communications to the Lender hereunder may be delivered or furnished by electronic communications (including e-mail) pursuant to procedures approved by the Lender; provided that the foregoing shall not apply to notices to the Lender pursuant to Article II. The Lender or the Borrower may, in its discretion, agree to accept notices and other communications to it hereunder by electronic communications pursuant to procedures approved by it; provided that approval of such procedures may be limited to particular notices or

communications. All such notices and other communications (i) sent to an e-mail address shall be deemed received upon the sender's receipt of an acknowledgement from the intended recipient (such as by the "return receipt requested" function, return e-mail or other written acknowledgment); provided that if not given during the normal business hours of the recipient, such notice or communication shall be deemed to have been given at the opening of business on the next Business Day for the recipient, and (ii) posted to an internet or intranet website shall be deemed received upon the deemed receipt by the intended recipient at its e-mail address as described in the foregoing clause (b)(i) of notification that such notice or communication is available and identifying the website address therefor.

(c) Any party hereto may change its address or fax number for notices and other communications hereunder by notice to the other parties hereto in accordance with the provisions hereof.

SECTION 9.02. Survival of Agreement. All rights, covenants, agreements, representations and warranties made by the Borrower in this Agreement shall be considered to have been relied upon by the other parties hereto and shall survive the execution and delivery of this Agreement and the making of any Loans, regardless of any investigation made by any such other party or on its behalf and notwithstanding that any such other party may have had notice or knowledge of any Default or incorrect representation or warranty at the time any credit is extended hereunder, and shall continue in full force and effect as long as (i) the principal of or any accrued interest on any Loan or any other amount payable under this Agreement is outstanding and unpaid, (ii) any Convertible Portion of the Loans has not been converted into Common Stock and (iii) any amount remains in the Escrow Account that has not been converted into Common Stock.

SECTION 9.03. Binding Effect. This Agreement shall become effective when it shall have been executed by each of the parties hereto and thereto and when the Lender shall have received counterparts hereof and thereof which, when taken together, bear the signatures of each of the other parties hereto and thereto.

SECTION 9.04. Successors and Assigns. (a) Whenever in this Agreement any of the parties hereto is referred to, such reference shall be deemed to include the permitted successors and assigns of such party; and all covenants, promises and agreements by or on behalf of the Borrower or the Lender that are contained in this Agreement shall bind and inure to the benefit of their respective successors and assigns.

(b) Neither the Lender nor the Borrower shall assign or delegate any of its rights or duties hereunder to any Person (other than with respect to the Borrower by operation of law to Thomas Merger Sub I, Inc. and Thomas Merger Sub II, Inc., or their respective successors and assigns, in the Acquisition) without the prior written consent of the Lender or the Borrower, as applicable, and any attempted assignment without such prior written consent shall be null and void.

(c) The Borrower and the Lender intend that the Loans (including any promissory notes evidencing such Loans) shall be obligations in "registered form" within the meaning of section 163(f) of the Internal Revenue Code of 1986, as amended, and section 5f.103-1(c) of the

Treasury Regulations (and any successor provisions) at all times during which the Loans remain in effect. Neither the Borrower nor the Lender shall take any action or otherwise permit such obligation to become an obligation that is not in "registered form." The Borrower shall maintain a register for the recordation of the name and address of the Lender (and any permitted assignees pursuant to Section 9.04(b)) and principal and interest shall only be paid to such persons recorded in the register. The register is intended to function as a "book entry" system within the meaning of sections 5f.103-1(c)(1)(ii) and 5f.103–1(c)(2) of the Treasury Regulations (and any successor provisions).

SECTION 9.05. Right of Setoff. If an Event of Default shall have occurred and be continuing, the Lender is hereby authorized at any time and from time to time, except to the extent prohibited by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by the Lender to or for the credit or the account of the Borrower against any of and all the obligations of the Borrower now or hereafter existing under this Agreement and other Loan Documents held by the Lender, irrespective of whether or not the Lender shall have made any demand under this Agreement or such other Loan Document and although such obligations may be unmatured. The rights of the Lender under this Section 9.05 are in addition to other rights and remedies (including other rights of setoff) which the Lender may have.

SECTION 9.06. Applicable Law. THIS AGREEMENT AND THE NOTES SHALL BE CONSTRUED IN ACCORDANCE WITH, AND GOVERNED BY, THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO CONFLICT OF LAWS PRINCIPLES THEREOF.

SECTION 9.07. Waivers; Amendment. (a) No failure or delay of the Lender in exercising any power or right hereunder or under any other Loan Document shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The rights and remedies of the Lender hereunder and under the other Loan Documents are cumulative and are not exclusive of any rights or remedies that it would otherwise have. No waiver of any provision of this Agreement or any other Loan Document or consent to any departure by the Borrower therefrom shall in any event be effective unless the same shall be permitted by paragraph (b) below, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No notice or demand on the Borrower in any case shall entitle the Borrower to any other or further notice or demand in similar or other circumstances.

(b) Neither this Agreement nor any provision hereof may be waived, amended or modified except pursuant to an agreement or agreements in writing entered into by the Borrower and the Lender.

SECTION 9.08. Interest Rate Limitation. Notwithstanding anything herein to the contrary, if at any time the interest rate applicable to any Loan, together with all fees, charges and other amounts which are treated as interest on such Loan under applicable law (collectively the "Charges"), shall exceed the maximum lawful rate (the "Maximum Rate") which may be contracted for, charged, taken, received or reserved by the Lender holding such Loan or

participation in accordance with applicable law, the rate of interest payable in respect of such Loan or participation hereunder, together with all Charges payable in respect thereof, shall be limited to the Maximum Rate and, to the extent lawful, the interest and Charges that would have been payable in respect of such Loan or participation but were not payable as a result of the operation of this Section 9.08 shall be cumulated and the interest and Charges payable to the Lender in respect of other Loans or participations or periods shall be increased (but not above the Maximum Rate therefor) until such cumulated amount, together with interest thereon at the Federal Funds Effective Rate to the date of repayment, shall have been received by the Lender.

SECTION 9.09. Entire Agreement. This Agreement, the other Loan Documents, the Definitive Agreement and the other documents contemplated hereby and thereby constitute the entire contract between the parties relative to the subject matter hereof. Any other previous agreement among the parties with respect to the subject matter hereof is superseded by this Agreement, the other Loan Documents, the Definitive Agreement and the other documents contemplated hereby and thereby. Nothing in this Agreement or in the other Loan Documents, expressed or implied, is intended to confer upon any person (other than the parties hereto and thereto, their respective successors and assigns permitted hereunder and, to the extent expressly contemplated hereby, the Related Parties of the Lender) any rights, remedies, obligations or liabilities under or by reason of this Agreement or the other Loan Documents.

SECTION 9.10. WAIVER OF JURY TRIAL. EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OF THE OTHER LOAN DOCUMENTS. EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS, AS APPLICABLE, BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 9.10.

SECTION 9.11. Severability. In the event any one or more of the provisions contained in this Agreement should be held invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein and therein shall not in any way be affected or impaired thereby (it being understood that the invalidity of a particular provision in a particular jurisdiction shall not in and of itself affect the validity of such provision in any other jurisdiction). The parties shall endeavor in good-faith negotiations to replace the invalid, illegal or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provisions.

SECTION 9.12. Counterparts. This Agreement may be executed in counterparts (and by different parties hereto on different counterparts), each of which shall constitute an original but all of which when taken together shall constitute a single contract, and shall become effective as provided in Section 9.03. Delivery of an executed signature page to this Agreement by facsimile

or other electronic transmission shall be as effective as delivery of a manually signed counterpart of this Agreement.

SECTION 9.13. Headings. Article and Section headings and the Table of Contents used herein are for convenience of reference only, are not part of this Agreement and are not to affect the construction of, or to be taken into consideration in interpreting, this Agreement.

SECTION 9.14. Jurisdiction; Consent to Service of Process. (a) The Borrower and the Lender each irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of any New York State court or Federal court of the United States of America sitting in the Borough of Manhattan, New York, New York and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in such New York State or, to the extent permitted by law, in such Federal court sitting in the Borough of Manhattan, New York, New York. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

(a) Each party hereto hereby irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement in any New York State or Federal court sitting in the Borough of Manhattan, New York, New York. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

(b) Each party to this Agreement irrevocably consents to service of process in the manner provided for notices in Section 9.01. Nothing in this Agreement will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

SECTION 9.15. No Fiduciary Duty. The Lender and its Affiliates (collectively, solely for purposes of this paragraph, the "Lender"), may have economic interests that conflict with those of the Borrower. The Borrower agrees that nothing in the Loan Documents or otherwise will be deemed to create an advisory, fiduciary or agency relationship or fiduciary or other implied duty between the Lender and the Borrower, its stockholders or its affiliates. The Borrower acknowledge and agree that (i) the transactions contemplated by the Loan Documents are arm's-length commercial transactions between the Lender, on the one hand, and the Borrower, on the other, (ii) in connection therewith and with the process leading to such transaction the Lender is acting solely as a principal and not the agent or fiduciary of the Borrower, its management, stockholders, creditors or any other Person, (iii) the Lender has not assumed an advisory or fiduciary responsibility in favor of the Borrower with respect to the transactions contemplated hereby or the process leading thereto (irrespective of whether the Lender or any of its affiliates has advised or is currently advising the Borrower on other matters) or any other obligation to the Borrower except the obligations expressly set forth in the Loan Documents and (iv) the Borrower has consulted its own legal and financial advisors to the extent they deemed appropriate. The Borrower further acknowledges and agrees that it is responsible for making its own independent

judgment with respect to such transactions and the process leading thereto. The Borrower agrees that it will not claim that the Lender has rendered advisory services of any nature or respect, or owes a fiduciary or similar duty to the Borrower, in connection with such transaction or the process leading thereto.

SECTION 9.16. Payments Set Aside. To the extent that any payment by or on behalf of the Borrower is made to the Lender, or the Lender exercises its right of setoff, and such payment or the proceeds of such setoff or any part thereof is subsequently invalidated, declared to be fraudulent or preferential, set aside or required (including pursuant to any settlement entered into by the Lender in its discretion) to be repaid to a trustee, receiver or any other party, in connection with any proceeding under any bankruptcy or insolvency law or otherwise, then to the extent of such recovery, the obligation or part thereof originally intended to be satisfied shall be revived and continued in full force and effect as if such payment had not been made or such setoff had not occurred.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

HEARTWARE INTERNATIONAL, INC., as Borrower

By: /s/ Douglas Godshall
Name: Douglas Godshall
Title: President and Chief Executive Officer

HEARTWARE LIMITED, as a Guarantor

By: /s/ Douglas Godshall
Name: Douglas Godshall
Title: President and Chief Executive Officer

HEARTWARE, INC., as a Guarantor

By: /s/ Douglas Godshall
Name: Douglas Godshall
Title: President and Chief Executive Officer

THORATEC CORPORATION, as Lender

By: /s/ Gerhard F. Burbach
Name: Gerhard F. Burbach
Title: President and Chief Executive Officer

APPENDIX A

Commitments

Lender	Commitment	Pro Rata Share
Thoratec Corporation	$28,000,000.00	100%
Total	**$28,000,000.00**	**100%**

<DOCUMENT>
<TYPE>EX-10.3
<FILENAME>y74656exv10w3.htm
<DESCRIPTION>EX-10.3: INVESTOR’S RIGHTS AGREEMENT
<TEXT>

Exhibit 10.3

INVESTOR'S RIGHTS AGREEMENT

between

THORATEC CORPORATION

and

HEARTWARE INTERNATIONAL, INC.

Dated as of February 12, 2009

TABLE OF CONTENTS

INVESTOR'S RIGHTS AGREEMENT

INVESTOR'S RIGHTS AGREEMENT, dated as of February 12, 2009 (this "**Agreement**"), by and among HEARTWARE INTERNATIONAL, INC., a Delaware corporation (the "**Company**"), and THORATEC CORPORATION, a California corporation (the "**Investor**").

WITNESSETH:

WHEREAS, reference is made to that certain Loan Agreement, dated as of February 12, 2009 among the Company, as borrower, all of the subsidiaries of Company, as guarantors, and the Investor, as lender (as amended, amended and restated, extended or otherwise modified from time to time, the "**Loan Agreement**");

WHEREAS, the Convertible Loans are convertible into shares of Common Stock as provided in the Loan Agreement; and

WHEREAS, the parties believe that it is in the best interests of the Company and its stockholders to set forth their agreements on certain matters regarding the Investor's ownership and rights with respect to Common Stock of the Company beneficially owned by the Investor from and after the time of any conversion of any Convertible Loans.

NOW, THEREFORE, in consideration of the mutual covenants and obligations set forth in this Agreement, and intending to be legally bound, the parties agree as follows:

1 Definitions

1.1 Definitions of Certain Terms

Capitalized terms used but not otherwise defined herein shall have the meanings ascribed thereto in the Loan Agreement.

For purposes of this Agreement, the following terms have the indicated meanings:

"**Agreement**" is defined in the preamble to this Agreement.

"**ASIC**" means the Australian Securities and Investments Commission.

"**Board**" means the board of directors of the Company.

"**Bylaws**" means the Bylaws of the Company, as amended from time-to-time (or any similar governing document of any successor).

"**Certificate of Incorporation**" means the Certificate of Incorporation of the Company, as amended from time-to-time (or any similar governing document of any successor).

"**Common Stock**" means the common stock, par value $0.001 per share, of the Company.

"**Company**" is defined in the preamble to this Agreement.

"**Company Indemnified Parties**" is defined in Section 5.1.1.

"**Convertible Loans**" means, collectively, the Convertible Portion of the Loans and any Escrow Funds delivered for conversion in accordance with Section 2.10 or Section 2.11, as applicable, of the Loan Agreement.

"**Corporations Act**" means the Australian Corporations Act 2001 (Cth), as amended and the Corporations Regulations made under it.

"**Definitive Agreement**" means the Agreement and Plan of Merger, dated as of February 12, 2009 by and among the Investor, Thomas Merger Sub I, Inc., Thomas Merger Sub II, Inc. and the Company.

"**Exchange Act**" means the Securities Exchange Act of 1934, as amended from time to time, and the rules and regulations promulgated thereunder.

"**Indemnified Party**" is defined in Section 5.1.3.

"**Indemnifying Party**" is defined in Section 5.1.3.

"**Investor**" is defined in the preamble to this Agreement.

"**Investor's Counsel**" is defined in Section 4.3.5.

"**Investor Indemnified Parties**" is defined in Section 5.1.2.

"**Loan Agreement**" is defined in the preamble to this Agreement.

"**Piggyback Registration Statement**" is defined in Section 4.2.1.

"**register**", "**registered**" and "**registration**" refer to a registration effected by preparing and filing a registration statement in compliance with the Securities Act, and the declaration or ordering of the effectiveness of such registration statement.

"**Registrable Securities**" means (i) any and all Common Stock issued or issuable from time to time upon conversion of the Convertible Loans and (ii) any Common Stock issued or issuable in respect of the securities described in clause (i) above, or this clause (ii), upon any stock split, stock dividend, recapitalization, reclassification, merger, consolidation or similar event; *provided* that, such Common Stock shall cease to be Registrable Securities when a registration statement covering such Common Stock has been declared effective under the Securities Act by the SEC and such Common Stock has been disposed of pursuant to such effective registration statement.

"**Registration Expenses**" is defined in Section 4.4.1.

"**Registration Statement**" means a registration statement including the prospectus and other documents filed with the SEC to effect a registration under the Securities Act.

"**Resale Effectiveness Period**" is defined in Section 4.1.1.

"**Resale Shelf Registration Statement**" is defined in Section 4.1.1.

"**SEC**" means the United States Securities and Exchange Commission or any other federal agency at the time administering the Securities Act.

"**Securities Act**" means the Securities Act of 1933, as amended from time to time, and the rules and regulations promulgated thereunder.

"**Subsequent Shelf Registration**" is defined in Section 4.1.2.

"**Termination Date**" means the date, if any, upon which the Definitive Agreement is terminated in accordance with its terms.

1.2 Headings; Table of Contents

Headings and table of contents should be ignored in construing this Agreement.

1.3 Interpretation

The definitions in Section 1.1 shall apply equally to both the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include", "includes" and "including", and words of similar import, shall not be limiting and shall be deemed to be followed by the phrase "without limitation". The word "will" shall be construed to have the same meaning and effect as the word "shall." The word "property" shall be construed to refer to any and all rights and interests in tangible and intangible assets and properties of any kind whatsoever, whether real, personal or mixed, including cash, securities, Equity Interests, accounts and contract rights. The words "herein," "hereof" and "hereunder," and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision of this Agreement unless the context shall otherwise require. All references herein to Sections shall be deemed references to Sections of this Agreement unless the context shall otherwise require. Except as otherwise expressly provided herein, any definition of, or reference to, any agreement, instrument or document in this Agreement shall mean such agreement, instrument or document as amended, restated, supplemented or otherwise modified from time to time (subject to any restrictions on such amendments, restatements, supplements or modifications set forth herein).

2 Corporate Governance

2.1 Neither the Certificate of Incorporation nor the Bylaws shall be amended in a manner inconsistent with the terms of this Agreement without the prior written consent of the Investor.

2.2 The Company shall not enter into any contract, agreement or arrangement or take any action which would limit or materially delay the Company's performance of its obligations hereunder.

3 Legends; Securities Law Compliance

3.1 Each certificate representing Registrable Securities that is restricted stock as defined in Rule 144 under the Securities Act shall bear the following legend:

"THE SECURITIES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND MAY NOT BE TRANSFERRED, SOLD OR OTHERWISE DISPOSED OF UNLESS SUCH DISPOSITION IS PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR AN EXEMPTION THEREFROM."

3.2 When (i) any Registrable Securities have been registered under the Securities Act and such Registrable Securities have been sold pursuant to such registration or (ii) any Registrable Securities have been sold pursuant to Rule 144 under the Securities Act or are eligible to be sold pursuant to such rule without volume limitations or other restrictions, the holder of such Registrable Securities shall be entitled to exchange the certificate representing such Registrable Securities for a certificate not bearing the legend required by Section 3.1.

4 Registration Rights

4.1 Shelf Registration

4.1.1 If the Company shall receive at any time after the Termination Date a written request from the Investor to file a registration statement on Form S-3 or an equivalent form or forms covering the registration of the Registrable Securities, the Company will use its commercially reasonable efforts to file, within thirty (30) days after the receipt of such request, a registration statement on Form S-3 or any equivalent form or forms (the "**Resale Shelf Registration Statement**") and shall use its commercially reasonable efforts to cause such Resale Shelf Registration Statement to be declared effective by the SEC as soon as reasonably practicable after the filing thereof, and such Resale Shelf Registration Statement (i) will be a "shelf" registration statement providing for the registration, and the sale on a continuous or delayed basis, of all of the Registrable Securities pursuant to Rule 415 under the Securities Act and (ii) will not provide for the registration, and the sale on a continuous or delayed basis, of any Common Stock other than the Registrable Securities. Upon filing a Resale Shelf Registration Statement, the Company will, if applicable, use its commercially reasonable efforts to keep such Resale Shelf Registration Statement effective with the SEC for nine months following the date of the initial effectiveness of the Resale Shelf Registration Statement; *provided* that such nine month period shall be extended by any period or periods of time during which the Resale Registration Statement (taken together with any Subsequent Shelf Registration) is unavailable for sales of Registrable

Securities, whether as provided in Section 4.1.2, Section 4.5 or otherwise (such nine month period, as extended, the "**Resale Effectiveness Period**").

4.1.2 If any Resale Shelf Registration Statement or subsequent Registration Statement (a "**Subsequent Shelf Registration**") ceases to be effective under the Securities Act for any reason at any time within the Resale Effectiveness Period, including the expiration thereof, the Company shall use its commercially reasonable efforts to cause such Resale Shelf Registration Statement or Subsequent Shelf Registration, respectively, to again become effective under the Securities Act (including obtaining the prompt withdrawal of any order suspending the effectiveness of such Resale Shelf Registration Statement), and in any event shall within thirty (30) days of such cessation of effectiveness, amend such Resale Shelf Registration Statement or Subsequent Shelf Registration, respectively, in a manner reasonably expected to obtain the withdrawal of any order suspending the effectiveness of such Resale Shelf Registration Statement or Subsequent Shelf Registration, respectively, or file an additional registration statement providing for the registration, and the sale on a continuous or delayed basis, of all of the Registrable Securities pursuant to Rule 415 under the Securities Act; *provided* that such Subsequent Shelf Registration will not provide for the registration, and the sale on a continuous or delayed basis, of any Common Stock other than the Registrable Securities. If a Subsequent Shelf Registration is filed, the Company shall use its commercially reasonable efforts to (x) cause such Subsequent Shelf Registration to become effective under the Securities Act as soon as reasonably practicable after such filing and (y) keep such Subsequent Shelf Registration (or another Subsequent Shelf Registration) continuously effective with the SEC at all times during the Resale Effectiveness Period. Any such Subsequent Shelf Registration shall be a registration statement on Form S-3 to the extent that the Company is eligible to use such form. For the avoidance of doubt, the Company shall not be required to maintain a Resale Shelf Registration Statement or Subsequent Shelf Registration after the end of the Resale Effectiveness Period.

4.1.3 If for any reason the Company is unable to qualify as a registrant to register the Registrable Securities on Form S-3 or any equivalent form or forms or any similar registration in accordance with Section 4.1.1 or Section 4.1.2, as applicable, the Company shall use commercially reasonable efforts to file a registration statement on Form S-1 or any equivalent form or forms within thirty (30) days of such failure to qualify in order to provide for the registration of such Registrable Securities for resale by the Investor in accordance with any reasonable method of distribution elected by the Investor.

4.1.4 If the Investor intends that any Registrable Securities covered by any registration pursuant to Section 4.1 shall be distributed by means of an underwritten offering, the Investor will so advise the Company. In such event, the managing underwriter to administer the offering will be chosen by the Investor, subject to the prior written consent of the Company, such consent not to be unreasonably withheld, conditioned or delayed. Unless otherwise mutually agreed by the Company and the Investor, the Company and the Investor shall enter into an underwriting agreement in such reasonable and customary form as shall have been negotiated and agreed to by the Company with the underwriter or underwriters selected for such underwriting. If the Investor disapproves of the terms of the underwriting, the Investor may promptly elect to withdraw therefrom by written notice to the Company and the managing underwriter.

4.1.5 If the managing underwriter in any underwritten offering pursuant to this Section 4.1, advises the Company that in its reasonable opinion the number of securities requested by the Investor to be included in such distribution exceeds the number which can be sold without adversely affecting the marketability of such offering (including an adverse effect on the per share offering price), the Investor will include in such distribution only such number of securities that in the reasonable opinion of such underwriter can be sold without adversely affecting the marketability of the offering (including an adverse effect on the per share offering price).

4.1.6 Notwithstanding the foregoing, if the Company shall furnish to the Investor a certificate signed by the Chief Executive Officer of the Company stating that in the good faith judgment of the Board it would be detrimental to the Company and its stockholders for such Resale Shelf Registration Statement to be filed, the Company shall have the right to defer such filing for a period of not more than sixty (60) days after receipt of the request by the Investor; *provided*, *however*, that the Company shall not register any securities for the account of itself or any other stockholder during such sixty (60) day period.

4.1.7 In addition, the Company shall not be obligated to effect or to take any action to effect, any registration pursuant to this Section 4.1 after the Company has effected one (1) registration pursuant to this Section 4.1; *provided*, *however*, that such registration has been declared or ordered effective and has been available for sales of Registrable Securities for the entire Resale Effectiveness Period.

4.2 Piggyback Registrations

4.2.1 Whenever the Company proposes to register any of its Common Stock in connection with an underwritten public offering of such securities solely for cash, other than a registration on Form S-4 or Form S-8 (or any successor form), and the registration form to be filed may be used for the

registration or qualification for distribution of Registrable Securities by the Company, the Company will give prompt written notice to the Investor of its intention to effect such a registration (but in no event less than ten (10) Business Days prior to the anticipated filing date) and, subject to Section 4.2.3, will include in such registration all Registrable Securities with respect to which the Company has received written requests for inclusion therein from the Investor within ten (10) Business Days after the date of the Company's notice (a "**Piggyback Registration Statement**"). The Investor may withdraw its Registrable Securities from such Piggyback Registration Statement by giving prompt written notice to the Company and the managing underwriter, if any, on or before the fifth (5th) Business Day prior to the planned effective date of such Piggyback Registration Statement. The Company may terminate or withdraw any registration under this Section 4.2.1 prior to the effectiveness of such registration, whether or not the Investor has elected to include Registrable Securities in such registration.

4.2.2 The right of the Investor to registration pursuant to this Section 4.2 will be conditioned upon the Investor's participation in the underwriting and the inclusion of the Investor's Registrable Securities in the underwriting, and the Company and the Investor will (together with any other Persons distributing their securities through such underwriting) enter into an underwriting agreement (including all reasonable and customary questionnaires, powers of attorney, indemnities, lock-up letters and other documents required under the terms of such underwriting agreement) in such reasonable and customary form as shall have been negotiated and agreed to by the Company with the underwriter or underwriters selected for such underwriting by the Company. If the Investor disapproves of the terms of the underwriting, the Investor may elect to withdraw therefrom by written notice to the Company and the managing underwriter.

4.2.3 If the managing underwriter in any underwritten offering pursuant to a Piggyback Registration Statement advises the Company that in its sole and reasonable opinion the number of securities requested to be included in such registration exceeds the number which can be sold without adversely affecting the marketability of such offering (including an adverse effect on the per share offering price), the Company will include in such registration only such number of securities that in the reasonable opinion of such underwriter can be sold without adversely affecting the marketability of the offering (including an adverse effect on the per share offering price), which securities will be so included in the following order of priority: (i) first, the securities the Company proposes to sell and (ii) second, the Registrable Securities of the Investor and any other securities of the Company that have been requested by other holders of Common Stock having registration rights to be so included, on a *pro rata* basis, up to the maximum number of securities the managing underwriter advises the

Company may be sold without adversely affecting the marketability of such offering.

4.3 Registration Procedures

Whenever any Registrable Securities are to be registered pursuant to Section 4.1, the Company will use its commercially reasonable efforts to effect the registration and sale of such Registrable Securities as soon as reasonably practicable in accordance with the intended method of disposition thereof and pursuant thereto. The Company shall, without limitation of its other obligations set forth in this Agreement:

4.3.1 Prepare and file, within thirty (30) days after receipt by the Company of a request by the Investor to file with the SEC a Registration Statement with respect to such Registrable Securities required to be filed pursuant to Section 4.1, together with any notices or regulatory filings required to be made in connection therewith (including filing a copy of the Registration Statement and any amendments or supplements thereto, with ASX), and thereafter use its commercially reasonable efforts to cause such Registration Statement to become effective as soon as reasonably practicable after the filing thereof (with a copy of the Registration Statement once effective to be lodged with ASIC if required); *provided* that, before filing a Registration Statement or any amendments or supplements thereto, the Company will, at the Company's expense, furnish or otherwise make available to the Investor and the Investor's Counsel copies of all such documents proposed to be filed and such other documents reasonably requested by the Investor and the Investor's Counsel, which documents will be subject to the review and/or reasonable comment, as applicable, of the Investor and the Investor's Counsel, including any comment letter from the SEC with respect to such filing or the documents incorporated by reference therein and any response to such comment letter, and provide the Investor and the Investor's Counsel reasonable opportunity to participate in the preparation of such Registration Statement and the opportunity to conduct a reasonable investigation within the meaning of the Securities Act, including reasonable access to the Company's financial books and records, officers, accountants and other advisors, as the Investor or the Investor's Counsel may reasonably request; *provided,* that, it shall be a condition to such review of such information that the inspecting person enter into a customary confidentiality agreement in form and substance reasonably satisfactory to the Company;

4.3.2 Prepare and file with the SEC (with a copy to be lodged with ASIC if required) such amendments and supplements to such Registration Statement as may be necessary to keep such Registration Statement effective for a period of either (i) not less than, if such Registration Statement is a Piggyback Registration Statement relating to an underwritten offering, such period as, based upon the opinion of counsel

for the underwriters, a prospectus is required by law to be delivered in connection with sales of Registrable Securities by an underwriter or dealer or such shorter period as will terminate when all of the securities covered by such Registration Statement have been disposed of in accordance with the intended methods of disposition by the seller or sellers thereof set forth in such Registration Statement (but in any event not before the expiration of any longer period required under the Securities Act) or (ii) continuously in the case of shelf registration statements, including the Resale Shelf Registration Statement and any Subsequent Shelf Registration, and any shelf registration statement, including the Resale Shelf Registration Statement and any Subsequent Shelf Registration, shall be re-filed upon its expiration (or in each case, such shorter period ending on the date that the securities covered by such shelf registration statement cease to constitute Registrable Securities), and cause the related prospectus to be supplemented by any prospectus supplement as may be necessary to comply with the provisions of the Securities Act with respect to the disposition of the securities covered by such Registration Statement, and as so supplemented to be filed pursuant to Rule 424 (or any similar provisions then in force) under the Securities Act; *provided* that the Company shall not be required to maintain a Resale Shelf Registration Statement or Subsequent Shelf Registration after the end of the Resale Effectiveness Period;

4.3.3 Furnish to the Investor, and each managing underwriter, if any, such number of copies, without charge, of such Registration Statement, each amendment and supplement thereto, including each preliminary prospectus, final prospectus, any other prospectus (including any prospectus filed under Rule 424, Rule 430A or Rule 430B under the Securities Act and any "issuer free writing prospectus" as such term is defined under Rule 433 under the Securities Act), all exhibits and other documents filed therewith and such other documents as the Investor or such managing underwriter may reasonably request including in order to facilitate the disposition of the Registrable Securities owned by the Investor, and upon request a copy of any and all transmittal letters or other correspondence to or received from, the SEC or any other Governmental Authority relating to such offer;

4.3.4 Use commercially reasonable efforts to register or qualify (or exempt from registration or qualification) such Registrable Securities, and keep such registration or qualification (or exemption therefrom) effective, under such other securities or blue sky laws of such United States jurisdictions as the Investor reasonably requests and do any and all other acts and things that may be reasonably necessary or reasonably advisable to enable the Investor to consummate the disposition in such jurisdictions of the Registrable Securities owned by the Investor (*provided* that the Company will not be required to (i) qualify generally to do business in any jurisdiction where it would not otherwise be required to qualify but for this

subsection or (ii) consent to general service of process in suits or to taxation in any such jurisdiction);

4.3.5 Notify the Investor, the outside counsel to the Investor (the "**Investor's Counsel**") and the managing underwriter(s), if any, at any time when a prospectus relating thereto is required to be delivered under the Securities Act, upon discovery that, or upon the discovery of the happening of any event that makes, any statement made in the Registration Statement or related prospectus or any document incorporated or deemed to be incorporated therein by reference includes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading or incomplete in the light of the circumstances then existing or that otherwise requires the making of any changes in such Registration Statement, prospectus or documents;

4.3.6 Notify the Investor, the Investor's Counsel and the managing underwriter(s), if any, (i) when such Registration Statement or the prospectus or any prospectus supplement or post-effective amendment has been filed and, with respect to such Registration Statement or any post-effective amendment, when the same has become effective, (ii) of any request by the SEC for amendments or supplements to such Registration Statement or to amend or to supplement such prospectus or for additional information, (iii) of the issuance by the SEC of any stop order suspending the effectiveness of such Registration Statement or the initiation of any proceedings for such purpose, to the extent that it is aware of such proceedings and (iv) of the receipt by the Company of any notification with respect to the suspension of the qualification or exemption from qualification of any of the Registrable Securities for sale in any jurisdiction, or the initiation or threatening of any proceeding for such purpose;

4.3.7 Upon the occurrence of an event contemplated in Section 4.3.5 or in Section 4.3.6(ii), 4.3.6(iii) or 4.3.6(iv), as soon as reasonably practicable, (i) prepare and furnish to the Investor a reasonable number of copies of a supplement or amendment to the Registration Statement or supplement to the related prospectus or any document incorporated or deemed to be incorporated therein by reference, or file any other required document so that, in the case of a Registration Statement, it will not contain any untrue statement of a material fact or omit to state any fact necessary to make the statements therein not misleading and that, in the case of any prospectus, it will not contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statement therein, in light of the circumstances in which they were made, not misleading or (ii) advise the Investor in writing that the Registration Statement may be used for the sale of Registrable Securities;

4.3.8 Use commercially reasonable efforts to cause all such Registrable Securities to be listed on each securities exchange on which Common Stock issued by the Company is then listed or, if no similar securities issued by the Company are then listed on any securities exchange, use its commercially reasonable efforts to cause all such Registrable Securities to be listed on the NASDAQ Global Market;

4.3.9 Provide a transfer agent and registrar for all such Registrable Securities not later than the effective date of such Registration Statement;

4.3.10 Enter into such customary agreements (including underwriting agreements and lock-up agreements in customary form (excluding any lock-up of Registrable Securities), including provisions with respect to indemnification and contribution in customary form) and take all such other customary actions as the Investor or the underwriters, if any, reasonably request in order to expedite or facilitate the disposition of such Registrable Securities;

4.3.11 In connection with any underwritten offering, make such representations and warranties to the Investor and the managing underwriter(s), if any, with respect to the business of the Company and the Company's Subsidiaries, and the Registration Statement, prospectus, and documents incorporated or deemed to be incorporated by reference therein, in each case, in form, substance and scope as are customarily made by the issuer in underwritten offerings, and, if true, make customary confirmations of the same if and when reasonably requested;

4.3.12 If requested by the Investor, or the managing underwriter(s), if any, promptly include in a prospectus supplement or amendment such information as the Investor or managing underwriter(s), if any, may reasonably request in order to permit the intended method of distribution of such securities and make all required filings of such prospectus supplement or such amendment as soon as reasonably practicable after the Company has received such request;

4.3.13 In the case of certificated Registrable Securities, cooperate with the Investor and the managing underwriter(s), if any, to facilitate the timely preparation and delivery of certificates (not bearing any legends) representing Registrable Securities to be sold after receiving written representations from the Investor that the Registrable Securities represented by the certificates so delivered by the Investor will be transferred in accordance with the Registration Statement and applicable law, and enable such Registrable Securities to be in such denominations and registered in such names as the Investor or managing underwriters, if any, may request at least two (2) Business Days prior to any sale of such Registrable Securities;

4.3.14 Make available for inspection by the Investor and the Investor's Counsel, any underwriter participating in any disposition pursuant to such Registration Statement and any attorney, accountant or other agent retained by the Investor or underwriter, to the extent reasonably necessary and solely for conducting customary due diligence, all financial and other records, pertinent corporate documents and documents relating to the business of the Company, *provided* that, it shall be a condition to such inspection and receipt of such information that the inspecting person enter into a customary confidentiality agreement in form and substance reasonably satisfactory to the Company;

4.3.15 Otherwise use its commercially reasonable efforts to comply with (i) all applicable rules and regulations of the SEC, (ii) all applicable Australian securities laws (including any ASIC class orders, policies and requirements), including the lodgment of any effective Registration Statement with ASIC, with an Australian offer document if required, and (iii) all applicable rules and regulations of any applicable securities exchange, including while the Company is admitted to the official list of ASX, the listing rules of the ASX, including (A) notifying ASX of the issue of the Registrable Securities in the form of an Appendix 3B and (B) if any of the Registrable Securites were issued in reliance on an exception in section 708 of the Corporations Act, providing the ASX with a notice that complies with section 708A(6) of the Corporations Act in respect of the Registrable Securities;

4.3.16 Timely provide to its security holders earning statements satisfying the provisions of Section 11(a) of the Securities Act and Rule 158 thereunder (which need not be audited);

4.3.17 In the event of the issuance of any stop order suspending the effectiveness of a Registration Statement, or of any order suspending or preventing the use of any related prospectus or ceasing trading of any securities included in such Registration Statement for sale in any jurisdiction, use every commercially reasonable effort to promptly obtain the withdrawal of such order;

4.3.18 In connection with any underwritten offering, obtain one or more comfort letters, addressed to the underwriters, if any, dated the effective date of such Registration Statement and the date of the closing under the underwriting agreement for such offering, signed by the Company's independent registered public accountants (and if necessary, any other independent registered public accountants of any business acquired by the Company for which financial statements and financial data are, or are required to be, included in the Registration Statement) in customary form and covering such matters of the type customarily covered by comfort letters as such underwriters shall reasonably request;

4.3.19 In connection with any underwritten offering, provide legal opinions of the Company's counsel, addressed to the underwriters, if any, dated the date of the closing under the underwriting agreement, with respect to the Registration Statement, each amendment and supplement thereto (including the preliminary prospectus) and such other documents relating thereto as the underwriter shall reasonably request in customary form and covering such matters of the type customarily covered by legal opinions of such nature; and

4.3.20 Obtain any required regulatory approval necessary for the Investor to sell its Registrable Securities in an offering, other than regulatory approvals required solely as a result of the nature of the Investor.

As a condition to registering Registrable Securities, the Company may require the Investor to furnish the Company with such information (including information regarding the Investor, the Registrable Securities held by the Investor and the intended method of distribution) reasonably necessary to comply with the disclosure requirements relating to the registration and the distribution of such securities as the Company may from time to time reasonably request in writing.

4.4 Registration Expenses

4.4.1 Except as otherwise provided in this Agreement, all fees, costs and expenses incidental to the Company's performance of or compliance with this Agreement, including all registration and filing fees, fees and expenses of compliance with securities or blue sky laws, word processing, duplicating and printing expenses, messenger, telephone and delivery expenses, expenses incurred in connection with any road show, and fees, costs and expenses of counsel for the Company and all independent certified public accountants and other persons retained by the Company (all such expenses, "**Registration Expenses**"), will be borne by the Company. The Company will, in any event, pay its internal expenses (including all salaries and expenses of its officers and employees performing legal or accounting duties), the expenses of any annual audit or quarterly review, the expenses of any liability insurance and the expenses and fees for listing the securities to be registered on each securities exchange on which they are required to be listed hereunder. The Investor shall pay all underwriting discounts, selling commissions and transfer taxes applicable to the sale of Registrable Securities by the Investor hereunder and any other Registration Expenses required by law to be paid by the Investor, provided that, in the event of a registration of Registrable Securities pursuant to a Piggyback Registration Statement, such underwriting discounts, selling commissions and transfer taxes shall be payable by the Company and the holders of securities listed in such Piggyback Registration Statement *pro rata* on the basis of the amount of proceeds received from the sale of such securities so registered and sold in such sale.

4.4.2 In connection with any registration, the Company will reimburse the Investor for its reasonable costs, fees and expenses (other than underwriters' discounts and commissions), including the reasonable fees and disbursements of the Investor's Counsel.

4.5 Discontinuance of Use of Prospectus

4.5.1 The Investor agrees that, upon receipt of any notice from the Company of the happening of any event of the kind described in Section 4.3.5, Section 4.3.6(ii), Section 4.3.6(iii) and Section 4.3.6(iv), the Investor will forthwith discontinue the disposition of its Registrable Securities pursuant to the Registration Statement until the Investor receives copies of a supplemented or amended prospectus as contemplated by Section 4.3.7 or until the Company advises the Investor in writing that the disposition of the Registrable Securities may resume.

4.5.2 Notwithstanding any other provision of this Agreement, if the Board of Directors of the Company has determined in good faith that (i) the disclosure necessary for continued use of the prospectus or Registration Statement by the Investor could be materially detrimental to the Company or (ii) the Company is undergoing, or the Board of Directors of the Company has determined in good faith to evaluate whether there is a need for, a restatement of its audited financial statements and, as a result thereof, the Company's historical financial statements included or incorporated by reference (or to be included or incorporated by reference) in the Registration Statement or prospectus may not be relied upon (or the Company believes that it may so determine), then the Company shall have the right not to file or not to cause the effectiveness of any registration covering any Registrable Securities and to suspend the use of the prospectus and the Registration Statement covering any Registrable Security for such period of time as (x) its use could be materially detrimental to the Company or (y) is reasonably necessary to complete such restatement, in either case by delivering written notice of such suspension to the Investor; provided, however, that during the Resale Effectiveness Period, the Company may exercise the right to such suspension not more than twice and for not more than an aggregate of 90 days. From and after the date of a notice of suspension under this Section 4.4.1, the Investor agrees not to use the prospectus or Registration Statement until the earlier of (1) notice from the Company that such suspension has been lifted or (2) the day following the 60th day of suspension.

4.6 Rule 144

The Company will use its commercially reasonable efforts to timely file all reports and other documents required to be filed by it under the Securities Act and the Exchange Act (or, if the Company is not required to file such reports, it will, upon the request of the

Investor, make publicly available such information as necessary to permit sales pursuant to Rule 144 or Regulation S under the Securities Act), and it will take such further action as the Investor may reasonably request, to the extent required from time to time to enable the Investor to sell shares of Registrable Securities without registration under the Securities Act within the limitation of the exemptions provided by (i) Rule 144 or Regulation S under the Securities Act, as such rules may be amended from time to time, or (ii) any similar rule or regulation hereafter adopted by the SEC. Upon the reasonable request of the Investor, the Company will deliver to the Investor a written statement as to whether it has complied with such information requirements, and, if not, the specifics thereof.

4.7 Additional Interest

In the event the Company fails to file the Resale Shelf Registration Statement within sixty (60) days of receipt by the Company of a request from the Investor pursuant to Section 4.1.1 (or ninety (90) days to the extent the Company exercises its righs under Section 4.1.6), the Company will pay to the Investor (i) if prior to the Maturity Date, on the next applicable Interest Payment Date, an amount equivalent to 0.5% per annum on the principal amount of the Convertible Loans that have been converted into Registrable Securities and (ii) if from and after the Maturity Date, on the last day of each fiscal month of the Company, 1.0% per annum on the principal amount of the Convertible Loans that have been converted into Registrable Securities, in each case, for each day that such filing is late.

5 Indemnification

5.1.1 The Company will, with respect to any Registrable Securities as to which registration or qualification or compliance under applicable "blue sky" laws has been effected pursuant to this Agreement, indemnify and hold harmless the Investor, the Investor's officers, directors, partners and members, and each person controlling the Investor within the meaning of Section 15 of the Securities Act, and each underwriter thereof, if any, and each person who controls any such underwriter within the meaning of Section 15 of the Securities Act (collectively, the "**Company Indemnified Parties**"), against all expenses, claims, losses, damages and liabilities, joint or several (or actions in respect thereof) arising out of or based on (i) any untrue statement (or alleged untrue statement) of a material fact contained in any registration statement, prospectus, preliminary prospectus, offering circular or other document, or any amendment or supplement thereto incident to any such registration, qualification or compliance or based on any omission (or alleged omission) to state therein a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances in which they were made, not misleading, or (ii) any violation by the Company of any rule or regulation promulgated under the Securities Act, Exchange Act or other federal or state securities laws applicable to the Company in connection with any such registration, qualification or compliance, and, in each such

case, the Company will reimburse each of the Company Indemnified Parties for any reasonable legal and any other expenses reasonably incurred in connection with investigating, preparing or defending any such claim, loss, damage, liability or action, as such expenses are incurred, in each case. The indemnity agreement contained in this Section 5.1.1 shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the consent of the Company (which consent shall not be unreasonably withheld, conditioned or delayed), nor shall the Company be liable to the Company Indemnified Parties in any such case for any such loss, claim, damage, liability or action (i) to the extent that it arises out of or is based upon a violation or alleged violation of any state or federal law (including any claim arising out of or based on any untrue statement or alleged untrue statement or omission or alleged omission in the registration statement or prospectus) which occurs in reliance upon and in conformity with written information furnished expressly for use in connection with such registration by or on behalf of a Company Indemnified Party or (ii) in the case of a sale directly by the Investor of Registrable Securities (including a sale of such Registrable Securities through any underwriter retained by the Investor engaging in a distribution solely on behalf of the Investor), such untrue statement or alleged untrue statement or omission or alleged omission was corrected in a final or amended prospectus delivered to the Investor prior to the confirmation of the sale of the Registrable Securities to the person asserting any such loss, claim, damage or liability, and the Investor failed to deliver a copy of the final or amended prospectus at or prior to the confirmation of the sale of the Registrable Securities to the person asserting any such loss, claim, damage or liability in any case in which such delivery is required by the Securities Act.

5.1.2 The Investor will, if Registrable Securities held by the Investor are included in the securities as to which such registration or qualification or compliance under applicable "blue sky" laws is being effected, indemnify and hold harmless the Company, each of its directors, officers, partners and members, each underwriter, if any, of the Company's securities covered by such a registration, and each person who controls the Company or such underwriter within the meaning of Section 15 of the Securities Act (collectively, the "**Investor Indemnified Parties**"), against all expenses, claims, losses, damages and liabilities, joint or several (or actions in respect thereof) arising out of or based on (i) any untrue statement (or alleged untrue statement) of a material fact contained in any registration statement, prospectus, preliminary prospectus, offering circular or other document, or any amendment or supplement thereto incident to any such registration, qualification or compliance or based on any omission (or alleged omission) to state therein a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances in which they were made, not misleading, to the extent, but only to the extent, that such untrue statement (or alleged untrue statement)

or omission (or alleged omission) is made in such registration statement, prospectus, offering circular or other document in reliance upon and in conformity with written information furnished to the Company by or on behalf of the Investor and stated to be specifically for use therein, or (ii) any violation by the Investor of any rule or regulation promulgated under the Securities Act, Exchange Act or state securities law applicable to the Investor in connection with such registration, qualification or compliance, and in each such case the Investor will reimburse each of the Investor Indemnified Parties for any reasonable legal or any other expenses reasonably incurred in connection with investigating, preparing or defending any such claim, loss, damage, liability or action, as such expenses are incurred, in each case, *provided, however*, that in no event shall any indemnity under this Section 5.1.2 payable by the Investor exceed the amount by which (x) the net proceeds actually received by the Investor from the sale of Registrable Securities included in such registration exceeds (y) the amount of any other losses, expenses, settlements, damages, claims and liabilities that the Investor has been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission or violation. The indemnity agreement contained in this Section 5.1.2 shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the consent of the Investor (which consent shall not be unreasonably withheld, conditioned or delayed), nor shall the Investor be liable to any Investor Indemnified Party for any such loss, claim, damage, liability or action where such untrue statement or alleged untrue statement or omission or alleged omission was corrected in a final or amended prospectus prior to the confirmation of the sale of the Registrable Securities to the person asserting any such loss, claim, damage or liability, and the Company or the underwriters failed to deliver a copy of the final or amended prospectus at or prior to the confirmation of the sale of the Registrable Securities to the person asserting any such loss, claim, damage or liability in any case in which such delivery is required by the Securities Act.

5.1.3 Each party entitled to indemnification under this Section 5 (the "**Indemnified Party**") shall give written notice to the party required to provide indemnification (the "**Indemnifying Party**") promptly after such Indemnified Party has actual knowledge of any claim as to which indemnity may be sought, and shall permit the Indemnifying Party to participate or to assume the defense of any such claim or any litigation resulting therefrom, *provided, however,* that counsel for the Indemnifying Party, who shall conduct the defense of such claim or litigation, shall be approved by the Indemnified Party (whose approval shall not unreasonably be withheld, conditioned or delayed), and the Indemnified Party may participate in such defense at such party's expense; *provided, further, however*, that an Indemnified Party (together with all other Indemnified Parties which may be represented without conflict by one

counsel) shall have the right to retain one separate counsel, with the reasonable fees and expenses to be paid by the Indemnifying Party, if representation of such Indemnified Party by the counsel retained by the Indemnifying Party would be inappropriate due to conflicting interests between such Indemnified Party and any other party represented by such counsel in such proceeding. The failure of any Indemnified Party to give notice as provided herein shall relieve the Indemnifying Party of its obligations under this Section 5 only to the extent that the failure to give such notice is materially prejudicial or harmful to an Indemnifying Party's ability to defend such action. No Indemnifying Party, in the defense of any such claim or litigation, shall, except with the consent of each Indemnified Party (which consent shall not be unreasonably withheld, conditioned or delayed), consent to entry of any judgment or enter into any settlement which does not include as an unconditional term thereof the giving by the claimant or plaintiff to such Indemnified Party of a release from all liability in respect to such claim or litigation. The indemnity agreements contained in this Section 5 shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the consent of the Indemnifying Party, which consent shall not be unreasonably withheld, conditioned or delayed. The indemnification set forth in this Section 5 shall be in addition to any other indemnification rights or agreements that an Indemnified Party may have.

5.1.4 If the indemnification provided for in this Section 5 is held by a court of competent jurisdiction to be unavailable to an Indemnified Party, other than pursuant to its terms, with respect to any claim, loss, damage, liability or action referred to therein, then, subject to the limitations contained in the last sentence of this Section 5.1.4, the Indemnifying Party, in lieu of indemnifying such Indemnified Party hereunder, shall contribute to the amount paid or payable by such Indemnified Party as a result of such claim, loss, damage, liability or action in such proportion as is appropriate to reflect the relative fault of the Indemnifying Party on the one hand and the Indemnified Party on the other in connection with the actions that resulted in such claims, loss, damage, liability or action, as well as any other relevant equitable considerations. The relative fault of the Indemnifying Party and of the Indemnified Party shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or the omission to state a material fact related to information supplied by the Indemnifying Party or by the Indemnified Party and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission. The Company and the Investor agree that it would not be just and equitable if contribution pursuant to this Section 5.1.4 were based solely upon the number of entities from whom contribution was requested or by any other method of allocation which does not take account of the equitable considerations referred to above in this Section 5.1.4. In no event shall the Investor's contribution obligation under this Section 5.1.4 exceed (i) the

amount by which the net proceeds actually received by the Investor from the sale of Registrable Securities included in such registration exceeds (ii) the amount of any other losses, expenses, settlements, damages, claims and liabilities that the Investor has been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission or violation. No person guilty of fraudulent misrepresentation (within the meaning of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation.

5.1.5 Notwithstanding the foregoing, to the extent that the provisions on indemnification and contribution contained in an underwriting agreement entered into in connection with an underwritten public offering are in conflict with the foregoing provisions, the provisions in such underwriting agreement shall control.

6 Miscellaneous

6.1 Notices

6.1.1 Notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by fax, as follows:

6.1.1.1 if to the Company to:

HeartWare International, Inc.
14000-14050 NW 57th Court
Miami Lakes, FL 33014
Attention: David McIntyre
Fax: (305) 818-4123
Email: dmcintyre@heartwareinc.com

with a copy (which shall not constitute notice) to:

Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022
Attention: Clare O'Brien
Robert M. Katz
Fax: (212) 848-7179

6.1.1.2 if to the Investor to:

Thoratec Corporation
6035 Stoneridge Drive
Pleasanton, CA 94588
Attention: Gary Burbach

Fax: (925) 264-4341
Email: gary.burbach@thortec.com

with a copy (which shall not constitute notice) to:

Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626

Attn: Charles K. Ruck
Tad J. Freese
Fax: (714) 755-8290

All such notices and other communications (i) sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received or (ii) sent by fax shall be deemed to have been given when sent with confirmation of receipt; provided that if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next Business Day for the recipient.

6.1.2 Any party hereto may change its address or fax number for notices and other communications hereunder by notice to the other parties hereto in accordance with the provisions hereof.

6.2 Termination

This Agreement shall be effective as of the date hereof and shall terminate with respect to the Investor with respect to all provisions (other than Section 4, Section 5 or Section 6), unless otherwise provided herein, on the date on which (i) no Loans remain outstanding and/or available for Borrowing and no amounts remain in the Escrow Account and (ii) there cease to be any Registrable Securities outstanding.

6.3 Governing Law

THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH, AND GOVERNED BY, THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO CONFLICT OF LAWS PRINCIPLES THEREOF.

6.4 Submission to Jurisdiction

6.4.1 The Company and the Investor each irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of any New York State court or Federal court of the United States of America sitting in the Borough of Manhattan, New York, New York, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or

proceeding may be heard and determined in such New York State or, to the extent permitted by law, in such Federal court. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

6.4.2 The Company and the Investor each irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement in any New York State court or Federal court of the United States of America sitting in the Borough of Manhattan, New York, New York. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

6.4.3 Each party to this Agreement irrevocably consents to service of process in the manner provided for notices in Section 6.1. Nothing in this Agreement will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

6.5 Waiver of Jury Trial

EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT. EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 6.5.

6.6 Severability

In the event any one or more of the provisions contained in this Agreement should be held invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein and therein shall not in any way be affected or impaired thereby (it being understood that the invalidity of a particular provision in a particular jurisdiction shall not in and of itself affect the validity of such provision in any other jurisdiction). The parties shall endeavor in good-faith negotiations to replace the invalid, illegal or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provisions.

6.7 Entire Agreement

This Agreement, the other Loan Documents, the Definitive Agreement and the other documents contemplated hereby and thereby constitute the entire contract between the parties relative to the subject matter hereof. Any other previous agreement among the parties with respect to the subject matter hereof is superseded by this Agreement, the other Loan Documents, the Definitive Agreement and the other documents contemplated hereby and thereby. Nothing in this Agreement or in the other Loan Documents, expressed or implied, is intended to confer upon any person (other than the parties hereto and thereto, their respective successors and assigns permitted hereunder and, to the extent expressly contemplated hereby, the Related Parties of the Investor) any rights, remedies, obligations or liabilities under or by reason of this Agreement or the other Loan Documents.

6.8 Amendment and Waiver

6.8.1 No failure or delay of the Investor in exercising any power or right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The rights and remedies of the Investor hereunder are cumulative and are not exclusive of any rights or remedies that it would otherwise have. No waiver of any provision of this Agreement or consent to any departure by the Company therefrom shall in any event be effective unless the same shall be permitted by Section 6.8.2, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No notice or demand on the Company in any case shall entitle the Company to any other or further notice or demand in similar or other circumstances.

6.8.2 Neither this Agreement nor any provision hereof may be waived, amended or modified except pursuant to an agreement or agreements in writing entered into by the Company and the Investor.

6.9 Successors and Assigns

6.9.1 This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement. Any purported assignment or delegation in violation of this Agreement shall be null and void *ab initio*.

6.9.2 The Company shall not assign any or all of its rights or obligations under this Agreement without the prior written consent of the Investor.

6.9.3 All or a portion of the rights and obligations of the Investor under this Agreement in proportion, and to the extent applicable, to the Loans, Commitments, Escrow Funds or Registrable Securities so transferred or assigned may be assigned to a transferee or assignee in connection with any transfer or assignment of Loans, Commitments, Escrow Funds or Registrable Securities under the Loan Agreement; *provided, however,* that (a) such transfer must otherwise be effected in accordance with applicable securities laws, (b) prior written notice of such assignment is given to the Company, (c) the Company is, within a reasonable time after such transfer, furnished with written notice of the name and address of such transferee or assignee and the Registrable Securities with respect to which such registration rights are being assigned and (d) such transferee or assignee agrees to be bound by, and subject to, this Agreement with respect to the rights and obligations so assigned to the same extent as the Investor, pursuant to a written instrument in form and substance reasonably acceptable to the Company. In the event any transfer of rights and obligations pursuant to this Agreement occurs, the transferee or assignee shall be treated as the Investor for all purposes hereunder with respect to such rights and obligations so assigned and each reference to the "Investor" herein shall be deemed to be a reference to the Investor taken together with such assignee or transferee, *mutatis mutandis*, and any rights exercisable, or determination or appointments to be made, by the Investor hereunder shall be exercisable by the holders of a majority of the Registrable Securities hereunder at the time such determination is made. Each party to this Agreement shall have the absolute right to exercise or refrain from exercising any right or rights that such party may have by reason of this Agreement, and such party shall not incur any liability to any other party or other holder of any securities of the Company as a result of exercising or refraining from exercising any such right or rights.

6.10 No Third-Party Beneficiaries

Nothing in this Agreement is intended to or shall confer any rights or benefits upon any Person other than the parties hereto.

6.11 Expenses

Except as provided in Section 4.4, all fees, costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby, including accounting and legal fees shall be paid by the party incurring such expenses.

6.12 Binding Effect

This Agreement shall become effective when it shall have been executed by each of the parties hereto and thereto and when the Investor shall have received counterparts hereof and thereof which, when taken together, bear the signatures of each of the other parties hereto and thereto.

6.13 Counterparts

This Agreement may be executed in counterparts (and by different parties hereto on different counterparts), each of which shall constitute an original but all of which when taken together shall constitute a single contract, and shall become effective as provided in Section 6.12. Delivery of an executed signature page to this Agreement by facsimile or other electronic transmission shall be as effective as delivery of a manually signed counterpart of this Agreement.

[Remainder of Page Intentionally Left Blank]

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

HEARTWARE INTERNATIONAL, INC., as the Company

By: /s/ Douglas Godshall
Name: Douglas Godshall
Title: President and Chief Executive Officer

THORATEC CORPORATION, as the Investor

By: /s/ Gerhard F. Burbach
Name: Gerhard F. Burbach
Title: President and Chief Executive Officer