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STATE OF CALIFORNIA

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June 4, 1993

BURTON W. OLIVER  
Executive Director

This is in response to your letter of May 25, 1993.

We understand that a newly formed corporation, [redacted] (the "Buyer"), is entering into an agreement to acquire substantially all of the assets of [redacted] (the "Seller"), which holds a seller's permit. The Buyer will engage in an initial public offering as part of the transaction. The Buyer will use the net proceeds from the [redacted] to pay for the assets acquired from the Seller.

The Seller is the leading commercial supplier of chemical information management software, chemical information databases and related services to the pharmaceutical and chemical industries. The Seller's software and database products are designed to enable its customers to discover and develop new products more rapidly by allowing users to access and use scientific information more effectively.

Pursuant to Section 2.1 of the Asset Purchase Agreement, the Seller will transfer substantially all of its assets to the Buyer, including, without limitation, the following:

- (a) all interests (including leasehold interests) in real property, all improvements thereto and all related rights;

- (b) all interests in machinery, equipment, leasehold improvements, furniture, computer hardware, office supplies, automobiles and other vehicles, and other tangible personal property used or held for use by the Seller in the conduct of the Business;
- (c) all lease and rent deposits, prepaid expenses, prepaid taxes, bank accounts, deposits, refunds and all other current assets;
- (d) all accounts receivable of the Seller;
- (e) all inventory of raw materials, work-in-process, spare parts, finished products, wrapping, supply and packaging items, and similar items used or held for use by the Seller;
- (f) all claims and rights under all agreements, contracts, licenses, evidences of indebtedness, purchase and sale orders and other executory commitments to which the Seller is a party;
- (g) all outstanding shares of capital stock of  
\_\_\_\_\_
- (h) all trade secrets, financial information, product plans, customer lists, marketing plans and strategies, forecasts and other business information, improvements, inventions, formulas, ideas, research and development information, circuits, mask works, works of authorship, processes, computer programs, applications, algorithms, techniques, schematics, designs, plans, proposals, know-how, data, patents, patent applications, trademarks, copyrights, trade secret rights, rights with respect to mask works and other rights used or held for use by the Seller (the "Intellectual Property");
- (i) all franchises, licenses, permits, consents and certificates of any regulatory, administrative or other governmental agency or body;
- (j) all books, records, ledgers, documents, correspondence, lists, plats, architectural plans, drawings, files, papers, studies, reports and other printed or written materials; and
- (k) all goodwill of the Business.

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The Seller may not have some of the asset categories listed in Section 2.1. For example, the Seller may not own any automobiles, circuits or mask works at the time of the sale of the assets.

Section 2.2 of the Agreement excludes certain assets from the general transfer provided for in Section 2.1. In particular, Section 2.2(f) of the Agreement provides that any tangible personal property containing software source code or other Intellectual Property will not be transferred under Section 2.1. Instead, such tangible personal property and the Intellectual Property contained therein will be transferred to the Buyer pursuant to the specific procedures set forth in Schedule 2.2 to the Agreement. Those procedures are summarized below.

Most of the Intellectual Property subject to transfer is stored on computer storage media. A small fraction of the Intellectual Property is stored in documentary form (including schematics, designs, etc.)

The Seller does not own all of the computer storage media containing Intellectual Property. The following is a list of storage media currently used by the Seller to store Intellectual Property (all storage media is located at the California facility of the Seller in California unless otherwise noted):

- (i) the storage media associated with two [redacted] mainframe computers, both of which are on loan from [redacted] free of charge pursuant to a Joint Development Agreement (the Seller creates software compatible with [redacted]);
- (ii) the storage media (disks with approximately 68 gigabytes of space) associated with 91 leased VAX computers, of which the Seller owns 43 gigabytes of disk space and leases the other 25 gigabytes of disk space from an equipment lessor (with the Seller paying use tax on the rentals);
- (iii) the storage media associated with personal computers that are owned by the Seller and located at the California facility or the residences of employees;
- (iv) seller-owned magnetic tapes located at an offsite bomb-proof shelter containing backup files and archived materials;

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- (v) Seller-owned magnetic tapes and floppy disks containing object codes and databases and held for resale to customers at the California facility or at out of state facilities (inventory); and
- (vi) Seller-owned magnetic tapes and floppy disks containing source codes, object codes and databases (non-inventory) located at the California facility, at other facilities located out of state, or at the premises of a third party manufacturer who duplicates the tape or disk for resale to the Seller's customers.

In addition to the storage media listed above, the Seller is planning to lease another 44 gigabytes of disk space to meet the anticipated needs of the business in the future. The lease will have a three year term, and the disk space will be installed prior to the closing of the transaction contemplated by the Asset Purchase Agreement (the "Closing").

Schedule 2.2 contains a chronological list of events relevant to the transfer of Intellectual Property. The transfers listed in Schedule 2.2 will take generally 2-3 days to complete, although some transfers will occur several weeks before the Closing while other transfers may occur up to a year after the Closing. The parties plan to make the transfers listed in paragraphs 2(g)-(m) of Schedule 2.2 during the weekend before the Closing to avoid disrupting the continuity of the business. Schedule 2.2 provides (in part and in chronological order):

- a. The Seller will lease equipment having a storage capacity of 44 gigabytes of disk space for a term of three years;
- b. The Seller will lease a VAX 6000 computer for a period of three months (this machine will be used to make the electronic transfers described below);
- c. The Seller will transfer all information contained on its owned VAX machine storage media to the newly leased storage media (44 gigabyte disk space) electronically;
- d. The Seller will assign its lease with respect to the newly leased 44 gigabytes

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- of storage media and the 25 gigabytes of leased VAX machine storage media to the Buyer (with ownership to the Intellectual Property contained on the storage media passing from Seller to Buyer);
- e. The Seller will assign its contracts with to Buyer (with ownership to the Intellectual Property contained on the owned storage media passing from the Seller to the Buyer);
  - f. The Seller will assign its leases with respect to the VAX computer hardware (including the newly leased VAX 6000 computer) to the Buyer;
  - g. The Seller will transmit all information contained on its owned personal computer storage media to the Buyer's storage media (the 44 gigabytes of newly leased disk space) electronically by directly linking the storage media involved to the Buyer's VAX 6000 computer (with ownership to Intellectual Property passing from Seller to Buyer);
  - h. The Buyer will make a backup of all information contained on the newly leased 44 gigabytes of storage media and transfer the backup to a bombproof vault separate from the Seller's vault as soon as practicable;
  - i. The Buyer will engage in a company-wide verification of all computer systems and will retransmit as necessary to correct any errors;
  - j. The Seller will erase all information contained on its owned VAX machine storage media;
  - k. The Seller will erase all information contained on the storage media of its personal computers;
  - l. The Seller will transfer title to its owned blank VAX machine storage media and to its personal computers (and the blank storage media contained therein) to Buyer, with the purchase price to be the fair value of the property transferred as determined by the

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parties in a schedule to be attached to the Asset Purchase Agreement;

- m. The Buyer will retransmit information from its 44 gigabytes of newly leased disk space to its personal computers by directly linking the units involved to the Buyer's VAX 6000 computer;
- n. Until Closing, the Buyer will lease or loan to the Seller at a daily rental rate to be determined all equipment transferred to the Buyer pursuant to paragraphs 2(d), 2(f) and 2(l) above;
- o. The Buyer will give the Seller an exclusive license to use the Intellectual Property on a royalty-free basis until Closing;
- p. The Seller will destroy or erase all magnetic tapes and floppy disks containing source code or databases and located at the California facility (including any tapes or disk inventory);
- q. The Buyer will produce and send new magnetic tapes or floppy disks to instate manufacturers, and the Buyer, as authorized by the Seller, will instruct the manufacturer to destroy or erase the Seller's existing tape or disk;
- r. Title to all blank or erased storage media and to all out of state storage media will pass from the Seller to the Buyer, with the purchase price to be the fair value of the property transferred as determined by the parties in a schedule to be attached to the Asset Purchase Agreement;
- s. Seller will retain ownership and possession of all storage media located in the Seller's bomb-proof shelter and any storage media not transferred above that contains source code or database information;

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- t. Title to all documents, manuals, diagrams, test reports, test materials, designs, schematics, drawings, printouts, or other written information described in Section 2.1(h) of the Asset Purchase Agreement will transfer from Seller to Buyer, with the purchase price of these items to be 130 percent of the cost of physical reproduction of these items;
- u. Following the Closing, Seller will allow Buyer to copy any information on Seller-owned storage media (which is tax-paid property); and, one year from the Closing Date, Seller will transfer to Buyer title to all Seller-owned storage media, with the purchase price to be the value of tapes and disks in blank form plus the estimated cost that the Buyer would incur in transferring the information contained on the tapes and disk onto Buyer-owned or leased storage media, which the Buyer may choose to prepay.

Since most of the transfers involved are pre-Closing, a right of rescission will be built into the Agreement to provide for a return to status quo ante if the Closing does not occur. Under the right of rescission, the Seller will be entitled to a return of all owned, leased or ~~\_\_\_\_\_~~ transferred to the Buyer (including Intellectual Property), and the Buyer will be entitled to a full refund of the purchase price. The Seller will also be entitled to a refund of any lease payments made or owed by the Seller to the Buyer.

#### Opinion

As we discussed by telephone on May 21, 1993, no sales or use tax will apply to the transactions described above except as noted below. Specifically:

1. No sales or use tax will be imposed on (i) the electronic transfer of the Intellectual Property contained on the Seller's personal computer storage media to the Buyer or (ii) the exclusive royalty free license given by the Buyer to the Seller to use the Intellectual Property until Closing.
2. Sales tax will apply to the transfer of all documentation described in paragraph 2(t) of

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Schedule 2.2, with the measure of the tax being 130% of physical reproduction cost.

3. No sales or use tax will result from the assignment of leases or contracts involving (i) the Seller's leased storage media (which will contain Intellectual Property), (ii) the Seller's leased VAX computer hardware or (iii) (which will also contain stored Intellectual Property), except that the Buyer will assume the Seller's continuing obligation (if any) to pay use tax measured by the rentals.
4. Sales tax will apply to the transfer to the Buyer of (i) the personal computers, (ii) the blank Seller-owned 43 gigabytes of VAX-related disk space, and (iii) the blank or erased storage media, with the measure of the tax being the fair value allocated to these items by the parties as reflected in a schedule attached to the Asset Purchase Agreement.
5. Sales tax does not apply to any post-Closing copies that the Buyer makes from the Seller's tax paid storage media as described in paragraph 2(u) of Schedule 2.2. Sales tax will apply to the transfer (after approximately one year) of all Seller-owned storage media described in paragraph 2(u) of Schedule 2.2 with the measure of the tax being the replacement value of the storage media in blank form plus the estimated cost to the Buyer of transmitting the information contained on the storage media electronically.
6. No sales or use tax will result from (i) the lease of equipment by the Buyer to the Seller pursuant to paragraph 2(o) of Schedule 2.2 (except for any continuing obligation to pay use tax measured by rentals) or (ii) the transfer from the Seller to the Buyer of any Intellectual Property developed by the Seller prior to the Closing Date but after the transfer described in paragraph 2(l) of Schedule 2.2 has occurred.
7. If a Closing does not occur and a rescission does occur, (i) no sales or use tax will apply on the transfer back from the Buyer and Seller of all property, and (ii) the original transfers from the Seller to the Buyer will be taxable, but the Seller

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will be entitled to a deduction for the full value of the property transferred to the Buyer and subsequently returned.

You did not request our opinion regarding the possible sales tax treatment relating to the transfer or the possible transfer of automobiles, other vehicles, leasehold improvements, supplies, packaging and wrapping materials, and circuits and mask works. Sales or use tax may apply if the Seller transfers any of these items to the Buyer.

We understand that time is of the essence because the parties intend to take certain steps to begin the transfers described above immediately. Accordingly, we are providing you with a facsimile transmission of this letter, and we are mailing the original today.

Very truly yours,

Gary J. Jugum  
Assistant Chief Counsel

GJJ:sr

bc: District Administrator