

CIENA CORP  
Form S-4/A  
March 26, 2004

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**SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549**

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**PRE-EFFECTIVE AMENDMENT NO. 1  
TO  
FORM S-4**

**REGISTRATION STATEMENT**

**UNDER  
THE SECURITIES ACT OF 1933**

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**CIENA Corporation**

(Exact name of registrant as specified in its charter)

**Delaware**  
(State or other jurisdiction of incorporation or organization)

**3661**  
(Primary Standard Industrial Classification Code Number)

**23-2725311**  
(I.R.S. Employer Identification Number)

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**1201 Winterson Road  
Linthicum, MD 21090  
(410) 865-8500**  
(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

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**Russell B. Stevenson, Jr.  
Senior Vice President, General Counsel and Secretary  
CIENA Corporation  
1201 Winterson Road  
Linthicum, MD 21090  
(410) 865-8500**  
(Name, address, including zip code, and telephone number, including area code, of agent for service)

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*Copies to:*

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**Approximate date of commencement of proposed sale to the public:** As soon as practicable after this Registration Statement becomes effective (but no sooner than 20 business days after such effectiveness) and all other conditions to the merger contemplated by the Agreement and Plan of Merger dated as of February 18, 2004, as such agreement may be amended, described in the enclosed Prospectus have been satisfied or waived.

If the securities being registered on this Form are being offered in connection with the formation of a holding company and there is compliance with General Instruction G, check the following box.

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act of 1933, please check the following box and list the Securities Act of 1933 registration statement number of the earlier effective registration statement for the same offering.  \_\_\_\_\_

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act of 1933, check the following box and list the Securities Act of 1933 registration statement number of the earlier effective registration statement for the same offering.  \_\_\_\_\_

**The registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933, or until the Registration Statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.**

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On Behalf of the Board of Directors,

Gregory W. Koss

President and Chief Executive Officer

**Prospectus dated March 26, 2004**

**First mailed to stockholders on or about March 29, 2004**

**Neither the Securities and Exchange Commission nor any state securities regulator has approved or disapproved of these securities or passed upon the adequacy or accuracy of this information statement/prospectus. Any representation to the contrary is a criminal offense.**

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This information statement/ prospectus incorporates important business and financial information about CIENA from documents that it has filed with the Securities and Exchange Commission but that have not been included in or delivered with this information statement/ prospectus. For a listing of documents incorporated by reference into this information statement/ prospectus, please see the section entitled Where You Can Find More Information beginning on page 61 of this information statement/prospectus.

CIENA will provide you with copies of this information, without charge, upon written or oral request to:

CIENA Corporation

1201 Winterson Road  
Linthicum, Maryland 21090  
Attention: Investor Relations  
Telephone Number: (410) 865-8500

In addition, you may obtain copies of this information by sending an e-mail to [ir@ciena.com](mailto:ir@ciena.com).

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**SUMMARY**

*This summary highlights selected information from this information statement/prospectus. It does not contain all of the information that is important to you. You should carefully read this information statement/prospectus and the other documents incorporated by reference into this information statement/prospectus. See **Where You Can Find More Information** on page 61. In this information statement/prospectus, *we*, *us* and *our* may refer to either CIENA or Internet Photonics, depending on the context in which they are used, and *you* and *your* refer to stockholders of Internet Photonics.*

***The Companies (page 46)***

***CIENA Corporation***

1201 Winterson Road  
Linthicum, Maryland 21090  
(410) 865-8500

CIENA is a leader in innovative networking solutions to service providers and enterprises worldwide. CIENA's customers include long-distance carriers, local exchange carriers, Internet service providers, wireless and wholesale carriers, systems integrators, large businesses and governmental and non-profit institutions. CIENA offers network solutions that enable service providers to provision, manage and deliver economic, high-bandwidth services to their customers. On February 19, 2004, CIENA announced an agreement to acquire Catena Networks, Inc., a private provider of integrated broadband access solutions. CIENA expects to issue approximately 75.9 million shares of common stock in that acquisition.

***Internet Photonics, Inc.***

1030 Broad Street, Suite 200  
Shrewsbury, New Jersey 07702-4330  
(732) 389-1160

Internet Photonics designs, manufactures, and markets equipment and software used to send voice, video, and data traffic across optical networks. This equipment was developed specifically for operators whose existing networks are running out of capacity and who need a non-disruptive and reliable expansion of capacity, as well as the ability to offer new revenue-generating optical services to customers. Internet Photonics believes that its products simplify network deployment and the provisioning of communication services, and offer size, power consumption, cost and capacity advantages over many alternative products. All seven of Internet Photonics' products currently produce revenue and are in use with telecommunications and cable networks around the world.

***The Merger (page 15)***

The merger agreement provides that Internet Photonics will merge with and into CIENA and CIENA will be the surviving corporation. The merger agreement, and the merger with CIENA contemplated thereby, have been approved by both the board of directors of Internet Photonics and the stockholders of Internet Photonics.

*The merger agreement, as amended, is included as Annex A to this information statement/prospectus. It is the legal document that governs the merger.*

***Reasons for the Merger (page 21)***

The Internet Photonics board of directors has unanimously determined that the merger is advisable and in the best interests of Internet Photonics and its stockholders.

See **The Merger** **Internet Photonics** **Reasons for the Merger** for the reasons supporting the Internet Photonics board of directors' approval of the merger.

***What You Will Receive in the Merger (page 31)***

At the effective time of the merger, each issued and outstanding share of Internet Photonics capital stock will be converted into a fraction of a share of CIENA common stock in accordance with the terms of the merger agreement and the certificate of incorporation of Internet Photonics. Because the consummation of the merger will constitute a sale event under the terms of the certificate of incorporation of Internet Photonics, at

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the effective time of the merger, holders of each series of Internet Photonics preferred stock will receive payment of their respective liquidation preference in shares of CIENA common stock. Each share of CIENA common stock to be issued in respect of the liquidation preference payable to each series of preferred stock has been designated a fixed value of \$6.127 per share pursuant to the terms of the merger agreement. Payment of the liquidation preference shall be made to holders of

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Internet Photonics preferred stock prior to any payment or allocation of merger consideration to holders of Internet Photonics common stock.

Following payment of approximately 14,225,995 shares of CIENA common stock in satisfaction of the aggregate liquidation preference in respect of outstanding shares of Internet Photonics preferred stock, each share of Internet Photonics common stock and preferred stock (other than series A preferred stock), treating each series of Internet Photonics preferred stock on an as-converted into Internet Photonics common stock basis, shall be exchanged for a fraction of a share of CIENA common stock based upon the common stock exchange ratio. The common stock exchange ratio is a fraction, the numerator of which is 24,080,843 shares of CIENA common stock minus the aggregate number of shares of CIENA common stock issued in payment of the foregoing liquidation preferences, and the denominator of which is the number of shares of Internet Photonics common stock outstanding on a modified, fully-diluted basis (modified by excluding certain out-of-the-money and unvested Internet Photonics stock options as described more fully in Terms of the Merger Agreement and Related Transactions Treatment of Stock, Options and Warrants ). Consequently, the actual fraction of a share of CIENA common stock to be received for each share of Internet Photonics capital stock (other than the series A preferred stock) is subject to adjustment in the event that Internet Photonics modified fully-diluted outstanding capital stock changes due to option issuances, exercise of preferred stock warrants, stock repurchases and similar events or because of the exercise of outstanding options with an exercise price equal to or greater than \$1.00 per share. Any issuance of Internet Photonics capital stock due to the exercise of outstanding stock options with exercise prices less than \$1.00 per share will not affect the exchange ratios. Any exercise of outstanding preferred stock warrants for 68,721 shares of series C preferred stock, 432,496 shares of series D preferred stock and 20,000 shares of series E preferred stock would increase the number of shares to be issued in satisfaction of the aggregate liquidation preference in respect of outstanding Internet Photonics preferred stock and decrease the applicable common stock exchange ratio.

Internet Photonics stockholders will not know the dollar value of the CIENA common stock they will receive in the merger until the merger is completed. The dollar value of the CIENA common stock will depend upon its market price when the merger is completed.

If the total number of shares of Internet Photonics capital stock outstanding on a modified fully-diluted basis on the day the merger is completed is 60,292,575, which was the number of shares of capital stock outstanding on a fully-diluted basis as of February 18, 2004, the date of execution of the merger agreement, the following exchange ratios, rounded to the nearest ten thousandth, would apply:

<b>Class of Internet Photonics Stock</b>	<b>Exchange Ratio*</b>
Common Stock	0.1635
Series A preferred stock**	1.6321
Series B preferred stock	1.8641
Series C preferred stock	2.1742
Series D preferred stock	0.3267
Series E preferred stock	0.4083

\* Exchange ratios above include and reflect payment of the applicable liquidation preference payable to holders of Internet Photonics preferred stock in shares of CIENA common stock at a fixed value of \$6.127 per share.

\*\* The exchange ratio for the series A preferred stock is fixed, and therefore not subject to adjustment based on changes in Internet Photonics fully-diluted outstanding capital stock.

Assuming the application of the above common stock exchange ratio, a holder of 100 shares of Internet Photonics common stock would receive 16.35 shares of CIENA common stock in the merger. The following chart sets forth the dollar value of those shares of CIENA common stock at a range of prices of CIENA common stock. The

chart does not include cash received for fractional shares or cash paid in respect of dissenting shares.

<b>Illustrative Market Price of CIENA Common Stock at Closing</b>	<b>Value of Shares of CIENA Common Stock Issued at Closing to the Holder of 100 Shares of Internet Photonics Common Stock</b>
\$4.50	\$ 73.58
\$5.00	\$ 81.75
\$5.50	\$ 89.93
\$6.00	\$ 98.10
\$6.28*	\$ 102.68
\$6.50	\$ 106.28
\$7.00	\$ 114.45
\$7.50	\$ 122.63

\* The closing price of CIENA common stock on February 18, 2004.

**Treatment of Options and Warrants (page 31)**

CIENA will assume each option or warrant to acquire Internet Photonics common stock and preferred stock granted under Internet Photonics stock plans or otherwise issued by Internet Photonics and that is outstanding and unexercised immediately prior to the effective time of the merger. At the effective time of the merger, CIENA will replace these Internet Photonics options and warrants with options or warrants, respectively, to purchase CIENA common stock, in each case adjusting the number of shares issuable upon exercise and the exercise price per share of such option or warrant to reflect the exchange ratio in the merger applicable to the Internet Photonics common or preferred stock underlying such Internet Photonics option or warrant. The duration and other terms of each such CIENA option or warrant, including the vesting schedule, will be the same as the Internet Photonics option or warrant so assumed.

**Total Consideration CIENA Will Pay (page 31)**

Subject to the indemnification and escrow arrangements described herein, at the effective time of the merger, CIENA will issue (or reserve for issuance) approximately 24.1 million shares of its common stock in exchange for all outstanding Internet Photonics common and preferred stock and in respect of assumed options and warrants (other than out-of-the-money options and certain unvested options excluded from the definition of common stock equivalents in the merger agreement). Based on the closing price per share of CIENA common stock on March 24, 2004, these shares had an aggregate value of approximately \$114.4 million.

**Appraisal Rights of Dissenting Stockholders (page 28)**

**If you object to the merger, the Delaware General Corporation Law, or DGCL, permits you to seek relief as a dissenting stockholder and have the fair value of your shares of Internet Photonics common stock and Internet Photonics preferred stock determined by a court and paid to you in cash.**

If you are an Internet Photonics stockholder who did not execute the written consent approving the merger and wish to dissent to the merger, you must deliver to CIENA, before April 19, 2004, a written demand for appraisal of your shares.

Beneficial owners of Internet Photonics common stock or Internet Photonics preferred stock whose shares are held of record by another person, such as a bank, broker or nominee, and who wish to seek appraisal, should instruct the record holder to follow the appraisal procedures of the DGCL. The relevant provisions of the DGCL are technical in nature and complex. If you wish to exercise appraisal rights and obtain appraisal of the fair value of your shares, you may wish to consult with legal counsel, because the failure to comply strictly with these provisions may result in waiver or forfeiture of your appraisal rights.

*A copy of Section 262 of the DGCL which governs this process is attached as Annex B to this information statement/prospectus.*

**Indemnification and Escrow Arrangement (page 39)**

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If the merger occurs, all holders of Internet Photonics capital stock who have not elected the appraisal rights described above will be obligated to indemnify CIENA and its affiliates against losses due to, among other things, the breach or inaccuracy of any of Internet Photonics representations and warranties made in the merger agreement. This obligation is limited to escrowed shares equaling 10% of the total number of shares of CIENA common stock issued in the merger to



































services to cable subscribers. Specifically, Internet Photonics products will enable CIENA to target additional types of customers, including the MSOs, by providing flexible Gigabit Ethernet solutions that permit the cost-efficient delivery of new, growing broadband services such as Voice Over Internet Protocol (VOIP), high-speed Internet access and video on demand (VoD) (the so-called triple play of voice, data and video services), as well as existing services such as cable modem Internet access and broadcast television. The cable companies may also use these products in the future for real-time gaming and other high-bandwidth applications. In addition, the same carrier-grade Ethernet infrastructure will enable the traditional telecom carriers, particularly the international carriers and U.S. CLECs without a broad SONET or SDH installed base, to provide new Ethernet-based enterprise services in their metropolitan and access networks faster and at a lower cost. The potential also exists in the future to apply Internet Photonics flexible, low-cost solutions to enhance CIENA's existing metropolitan and enterprise products.

In particular, CIENA believes that the following strategic benefits will result from the merger:

***Network Convergence.*** CIENA believes that the addition of Internet Photonics products to the CIENA portfolio is consistent with CIENA's vision of network convergence. The Internet Photonics platforms allow multiple services to be offered in a single infrastructure in cable networks, allowing traditional cable and new video services such as VoD and HDTV to travel on a common infrastructure, and in traditional telecom networks, allowing SONET/SDH services and Ethernet services to be combined on a common infrastructure. The Internet Photonics platforms also allow multiple network functions to be converged onto single devices, such as performing both optical transport and Ethernet switching functions in cable networks.

***Cost Efficiency.*** CIENA believes that Internet Photonics product suite presents a cost-efficient solution to customers to enable rapid deployment of revenue-generating services that combine the simplicity of Ethernet with carrier-grade reliability and availability.

***New Customer Relationships.*** CIENA believes that Internet Photonics has developed valuable relationships with the MSOs, an incumbent customer base to which CIENA does not currently offer products. Six of the top ten cable operators in the United States are existing customers of Internet Photonics, including significant deployments by Cablevision and Adelphia. CIENA believes that these relationships will enhance CIENA's ability to compete for future business from the MSOs and complement CIENA's existing sales and distribution channels. CIENA also believes it will be able to leverage its existing sales channels and customer relationships to offer the Internet Photonics products to a wider range of customers than Internet Photonics currently reaches.

***New International Sales Channel.*** CIENA believes that Internet Photonics has established a valuable international resale relationship, which will provide an important sales channel for Internet Photonics products in Europe and Asia. This relationship has already resulted in the sale of Internet Photonics products into three PTT accounts, and has the potential to grow into a channel for some of CIENA's other products.

***Expand Addressable Market.*** CIENA believes that the proposed merger will expand its addressable market. CIENA currently does not have a product offering directly targeted at the worldwide Ethernet serviced market. Internet Photonics product suite is a leading platform in this space and will give CIENA immediate entry into this fast-growing portion of the market.

***Broader Scope.*** CIENA believes that the current telecommunications environment makes vendors with a broad product portfolio more attractive to large incumbent carriers than companies with narrow or single point solutions. In an effort to simplify their networks and reduce operating expenses, large operators are reducing the number of equipment vendors, forming strong relationships with a few large, strategic vendors. CIENA believes that the acquisition of Internet Photonics will strengthen its position with major operators by allowing it to offer a more complete, complementary portfolio of products covering a larger portion of network operators' equipment needs.

**Additional Reasons for the Merger**

The strategic fit with Internet Photonics represents the principal rationale to CIENA for the merger. CIENA believes that the following factors also support the desirability of the merger to CIENA:

**Operating Expense Savings.** It is expected that the proposed merger will result in certain operating expense cost savings, which will primarily be derived from the lower cost of research and development and the ability to leverage economies of scale. Additional savings may be possible through increased manufacturing efficiencies.

**Cultural Fit.** CIENA and Internet Photonics share a common heritage as entrepreneurial companies. Both companies have established reputations for being flexible, innovative, and customer-focused.

**Strong Engineering Teams.** CIENA believes that Internet Photonics has a strong engineering team that will add significantly to CIENA's engineering resources and enhance its ability to continue to innovate and rapidly bring new products to market.

In addition, the CIENA board of directors received advice from Morgan Stanley, its financial advisor, in connection with the financial terms of the proposed merger to CIENA.

In view of the variety of factors considered in connection with its evaluation of the merger, the CIENA board of directors did not quantify or otherwise assign relative weights to the factors considered in reaching its conclusions. In addition, individual members of the CIENA board of directors may have given different weights to different factors. However, on an overall basis, the CIENA board of directors concluded that the factors favoring the merger outweigh the countervailing factors.

For the strategic reasons set forth above, after consultation with CIENA's senior management and its advisors and consideration of the terms and conditions of the merger agreement and the transactions contemplated by the merger agreement, the CIENA board of directors determined that the merger agreement and the merger are in the best interests of CIENA and its stockholders.

**Internet Photonics Reasons for the Merger**

At a special meeting held on February 14, 2004, the board of directors of Internet Photonics discussed, and on February 18, 2004, by unanimous written consent, the board of directors of Internet Photonics approved, the terms and conditions of the merger agreement and the transactions contemplated thereby, including the merger. On March 17, 2004, the board of directors of Internet Photonics signed and delivered a unanimous written consent approving an amendment to the merger agreement permitting Internet Photonics to adopt a retention plan and make cash payments totalling approximately \$2.3 million to its employees immediately prior to the closing of the merger and reducing the number of shares of CIENA common stock to be issued in the merger in exchange for all of the equity of Internet Photonics by approximately 400,000 shares. In evaluating the merger agreement and the transactions contemplated thereby, and deciding to approve them, the board of directors of Internet Photonics considered a number of factors, including the following:

the consideration being offered by CIENA for shares of Internet Photonics' capital stock;

Internet Photonics' prospects if it were to remain independent, including:

the resources necessary to insure Internet Photonics' future growth;

Internet Photonics' ability to raise the additional capital necessary for continuing operations and to expand its business, especially in light of the fact that Internet Photonics' operating plan indicated a need for additional investment capital in the near term and the investment terms for private companies like Internet Photonics have not been favorable;

Internet Photonics' ability to market efficiently, sell to and support its existing customers while remaining an independent, private company;

Internet Photonics' ability to independently develop the necessary infrastructure to attract and support larger customers critical to Internet Photonics' long-term viability;

the challenge faced by Internet Photonics of dedicating significant resources to growth while at the same time focusing on achieving profitability; and

Internet Photonics' ability to continue to compete in the cable and telecommunications markets;

the possible alternatives to the CIENA transaction, including:

the possibility of continuing to operate Internet Photonics as an independent entity and the resulting strain on Internet Photonics' resources such as an option would present;

the possibility of continuing to seek another financial or strategic partner;

the range of possible benefits to Internet Photonics' stockholders of these alternatives;

the timing and likelihood of accomplishing any of these alternatives; and

the contacts that had been made with potential acquirers and the fact that, although companies with a potential interest in acquiring Internet Photonics had been contacted, only discussions with CIENA had advanced beyond preliminary stages;

the strategic value of Internet Photonics in the hands of a company with significantly greater financial resources and a more diverse product line, such as CIENA;

the ability of the two companies to combine their technological resources to develop new products with increased functionality and bring them to market faster;

the availability to the combined company of greater resources for product marketing and distribution;

the likelihood that CIENA's offer would be completed, in light of the experience, reputation and financial capabilities of CIENA and the terms of the merger agreement;

the belief of the board of directors of Internet Photonics, based on its assessment of the negotiations, that a more favorable purchase price could not be achieved through continued negotiations with CIENA;

the fact that certain significant stockholders of Internet Photonics were willing to support the transaction, thereby increasing the likelihood that the conditions to CIENA's offer would be satisfied;

the fact that the other conditions to CIENA's obligations to consummate the merger were customary and, in the assessment of the board of directors of Internet Photonics, not unduly onerous;

the terms of the merger agreement including the limited conditions to the parties' respective obligations under the merger agreement; and that the exchange ratios in the merger agreement did not limit the appreciation of the value of CIENA's common stock;

the expectation that the merger will qualify as a tax-free reorganization under federal tax law;

the opportunity created by the merger for Internet Photonics' stockholders to share in the combined company's long term growth;

information concerning Internet Photonics' and CIENA's respective businesses, historical financial performance and condition, operations, technology, products, customers, competitive positions, prospects and management; and

due diligence discussions with CIENA by the board of directors of Internet Photonics and reports from management of Internet Photonics as to the results of its due diligence investigation of CIENA.

The board of directors of Internet Photonics also identified and considered a variety of potentially negative factors in its deliberations concerning the merger, including, but not limited to:

the risk that the potential benefits sought in the merger might not be fully realized;

the possibility that the merger might not be completed and the effect such a result would have on Internet Photonics operations;

that the exchange ratios in the merger agreement provided no protection against the depreciation of the value of CIENA's common stock;

the challenges relating to the integration of the two companies;

the possibility of management and employee disruption associated with the proposed merger and integrating the operations of the companies; and

the risks relating to CIENA's business and how they would affect the operations of the combined company.

The board of directors of Internet Photonics believed that these negative factors were outweighed by the potential benefits of the merger. In view of the wide variety of factors, both positive and negative, considered by the board of directors of Internet Photonics, the board of directors of Internet Photonics did not find it practical to, and did not, quantify or otherwise assign relative weights to the specific factors considered and did not find that any factor was of special importance. Rather, the board of directors of Internet Photonics viewed its position and recommendations as being based on the totality of the information presented to and considered by it. In addition, different members of the board of directors of Internet Photonics may have assigned different weights to the various factors described above.

For the reasons discussed above, the board of directors of Internet Photonics unanimously approved the merger agreement and the merger, unanimously determined that the merger is fair to, and in the best interests of, Internet Photonics and its stockholders and unanimously recommended that the stockholders of Internet Photonics adopt the merger agreement and approve the merger.

In addition, the board of directors of Internet Photonics considered the interests that its officers and directors may have with respect to the merger in addition to their interests as stockholders of Internet Photonics. See [Interests of Executive Officers and Directors in the Merger](#) for a more complete discussion of these interests.

#### **Interests of Executive Officers and Directors in the Merger**

Internet Photonics stockholders should be aware that some Internet Photonics directors and executive officers have interests in the merger and related arrangements that are different from, or in addition to, their interests as Internet Photonics stockholders. These interests may create potential conflicts of interest for these directors and officers because they may be more likely to approve the merger than Internet Photonics stockholders generally. The Internet Photonics board of directors was aware of these interests and took these interests into account in its deliberations of the merits of the merger and in approving the merger and the transactions contemplated by the merger agreement.

#### ***Stock Ownership; Liquidation Preference Payment.***

The executive officers and directors of Internet Photonics, and the stockholders of Internet Photonics affiliated with them, will own a majority of the shares to be issued by CIENA in the merger. As of March 1, 2004, the directors and executive officers of Internet Photonics, and their respective affiliates, beneficially owned 3,074,738 shares of common stock, no shares of series A preferred stock, 1,608,329 shares of series B preferred stock, 7,776,073 shares of series C preferred stock, 26,276,296 shares of

series D preferred stock and 8,245,230 shares of series E preferred stock, all on as-converted to common stock basis, representing approximately 87.2% of the voting power of the fully-diluted outstanding Internet Photonics capital stock. See Approval of the Merger and the Amended Certificate of Incorporation by Internet Photonics Stockholders for a discussion of the written consents executed by certain stockholders of Internet Photonics, including certain directors and executive officers, and their respective affiliates.

Because the merger constitutes a sale event under the certificate of incorporation of Internet Photonics, holders of Internet Photonics preferred stock will receive payment of the liquidation preference applicable to the series of Internet Photonics preferred stock they held at the effective time of the merger. Pursuant to the terms of the merger agreement and the certificate of incorporation of Internet Photonics, the liquidation preference applicable to each series of Internet Photonics preferred stock will be payable in shares of CIENA common stock at a fixed value of \$6.127 per share. In respect of their aggregate liquidation preference of approximately \$72,533,275, directors and executive officers of Internet Photonics, and their respective affiliates, that own shares of Internet Photonics preferred stock, will receive an aggregate of approximately 11,838,302 shares of CIENA common stock upon the closing of the merger. In addition, affiliates of members of the Internet Photonics board of directors hold preferred stock warrants exercisable for 68,721 shares of series C preferred stock and 199,996 shares of series D preferred stock. Exercise of such warrants in full would result in payment of an additional liquidation preference of \$887,206 to such persons. For additional information regarding this liquidation preference and the consideration payable to holders of Internet Photonics preferred stock in the merger, see Terms of the Merger Agreement and Related Transactions Treatment of Stock, Options and Warrants.

#### ***Payments under the Internet Photonics Retention Plan***

Pursuant to the terms of the Internet Photonics, Inc. Retention Plan (the retention plan ), Internet Photonics will make cash payments totaling approximately \$2.3 million in the aggregate to certain Internet Photonics employees immediately prior to the closing of the merger, provided they are employees of Internet Photonics at such time. Under the retention plan, sixteen Internet Photonics officers, at or above the vice president level, will collectively receive an aggregate cash payment of \$591,615 immediately prior to the effective time of the merger. Payments to such officers range from approximately \$5,000 to \$67,000 per person.

#### ***Acceleration of Vesting of Internet Photonics Restricted Stock and Options.***

Upon completion of the merger, Internet Photonics right to repurchase an aggregate of 13,333 shares of Internet Photonics restricted common stock held by Martin Nuss at a price of \$0.009374 per share will terminate and such shares shall become fully vested. In addition, if the merger is completed, options to acquire an aggregate 667,989 shares of Internet Photonics common stock held by directors and executive officers as of March 1, 2004 will vest and become immediately exercisable. The weighted average exercise price of all such options is \$0.62 per share.

#### ***Indemnification***

The merger agreement provides that, upon the completion of the merger, for a period of six years CIENA will fulfill the obligations of Internet Photonics to indemnify and hold harmless each person who is or was a director or officer of Internet Photonics against any losses incurred based upon matters existing or occurring prior to the completion of the merger to the same extent that these persons were indemnified pursuant to Internet Photonics certificate of incorporation, bylaws or any indemnification agreement immediately prior to the merger.

#### **Accounting Treatment**

The merger is expected to be accounted for using the purchase method of accounting. CIENA will be deemed the acquiror for financial reporting purposes. Under the purchase method of accounting, the purchase price in the merger is allocated among the Internet Photonics assets acquired and the Internet Photonics liabilities assumed to the extent of their fair market value, with any excess purchase price being allocated to goodwill.

### **Listing on The Nasdaq Stock Market**

CIENA has agreed to cause the shares of CIENA common stock issued in the merger to be approved for listing on the Nasdaq Stock Market.

### **Governmental and Regulatory Approvals**

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 as amended (the HSR Act ) and its related rules and regulations prohibit Internet Photonics and CIENA from completing the merger until CIENA and Internet Photonics each file notifications with the Antitrust Division of the Department of Justice and the Federal Trade Commission, and the Hart-Scott-Rodino waiting period requirements have been satisfied. Even after the Hart-Scott-Rodino waiting period expires or is terminated, and even after the merger is completed, the Antitrust Division or the Federal Trade Commission could challenge the merger on antitrust grounds. In addition, before or after the merger is completed, states and private litigants could also challenge the merger on antitrust grounds. CIENA and Internet Photonics each filed Hart-Scott-Rodino notifications with the Federal Trade Commission and the Antitrust Division on February 26, 2004, and the waiting period was terminated on March 10, 2004.

### **U.S. Federal Income Tax Consequences**

#### *Generally*

The following discussion describes the material U.S. federal income tax consequences of the exchange of shares of Internet Photonics capital stock for CIENA common stock pursuant to the merger that are generally applicable to holders of Internet Photonics capital stock. This discussion is based on currently existing provisions of the Internal Revenue Code of 1986, as amended (the Tax Code ), existing and proposed Treasury regulations thereunder and current administrative rulings and court decisions, all of which are subject to change. Any such change, which may or may not be retroactive, could alter the tax consequences to Internet Photonics stockholders as described herein. Neither Internet Photonics nor CIENA has requested nor will request a ruling from the Internal Revenue Service with regard to any of the tax consequences of the merger.

Internet Photonics stockholders should be aware that this discussion does not deal with all U.S. federal income tax considerations that may be relevant to particular Internet Photonics stockholders in light of their particular circumstances, such as stockholders who are dealers in securities, stockholders who received their shares in connection with the performance of services where such shares were subject to vesting restrictions, stockholders who are subject to the alternative minimum tax provisions of the Tax Code, stockholders who are foreign persons, insurance companies, tax-exempt organizations, financial institutions, or broker-dealers, stockholders who hold their shares as part of a hedge, straddle, conversion or other risk-reduction transaction, stockholders who do not hold their Internet Photonics stock as capital assets, stockholders who hold their Internet Photonics stock through a partnership or other pass-through entity or stockholders who acquired their shares in connection with stock option or stock purchase plans or in other compensatory transactions. In particular, this discussion does not discuss the tax consequences of payments that may be subject to the golden parachute provisions of the Tax Code. In addition, unless specifically addressed below, the following discussion does not address the tax consequences of the merger under foreign, state or local tax laws, the tax consequences of transactions effectuated prior or subsequent to, or concurrently with, the merger (whether or not any such transactions are undertaken in connection with the merger), including without limitation any transaction in which shares of Internet Photonics capital stock are acquired or shares of CIENA common stock are disposed of, or the tax consequences of the assumption by CIENA of the Internet Photonics employee options or the tax consequences of any receipt of rights to acquire CIENA common stock.

**Accordingly, Internet Photonics stockholders are urged to consult their own tax advisors as to the specific tax consequences to them of the merger, including the applicable federal, state, local and foreign tax consequences.**

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In the opinion of Hogan & Hartson L.L.P., counsel to CIENA, and Sonnenschein Nath & Rosenthal LLP, counsel to Internet Photonics, the merger will be treated for U.S. federal income tax purposes as a reorganization within the meaning of Section 368(a) of the Tax Code. The opinions:

will not be binding on the IRS or the courts nor preclude the IRS from adopting a contrary position;

will be based on the assumption that the merger will be completed in accordance with the terms of the merger agreement; and

will be subject to the limitations discussed below.

Additionally, the opinions will be based on certain assumptions and limitations, as well as factual representations made by, among others, CIENA and Internet Photonics. Such representations, if incorrect, could jeopardize the conclusions reached in the opinions. Neither CIENA nor Internet Photonics is currently aware of any facts or circumstances which would cause any such representations made to counsel to be untrue or incorrect in any material respect. Hogan & Hartson L.L.P. and Sonnenschein Nath & Rosenthal LLP are under no obligation to update the opinions as a result of a change in law or discovery of any inaccuracy in such representations.

### ***U.S. Federal Income Tax Consequences if the Merger Qualifies as a Reorganization***

Assuming the merger qualifies as a reorganization within the meaning of Section 368(a) of the Tax Code and the merger is completed under the current terms of the merger agreement, subject to the discussion below under the heading **Taxation of Escrowed Shares**, the following U.S. federal income tax consequences generally will result:

No gain or loss will be recognized by holders of Internet Photonics capital stock solely upon their receipt of CIENA common stock, including CIENA common stock subject to the escrow, in exchange for such Internet Photonics capital stock in the merger (except with respect to cash received in lieu of fractional shares and escrowed CIENA common stock sold to either reimburse expenses of the stockholders representative or to make indemnification payments to CIENA as discussed below).

The aggregate tax basis of the CIENA common stock received by each Internet Photonics stockholder in the merger (including any fractional share interest in CIENA common stock and CIENA common stock subject to the escrow) will be the same as the aggregate tax basis of the Internet Photonics capital stock surrendered by such Internet Photonics stockholder in exchange therefor.

The holding period of the CIENA common stock received by each Internet Photonics stockholder in the merger (including the CIENA common stock subject to the escrow) will include the period for which the Internet Photonics capital stock surrendered in exchange therefor was considered to be held, provided that the Internet Photonics capital stock so surrendered is held as a capital asset at the time of the merger.

Any cash payment received by a holder of Internet Photonics capital stock in lieu of a fractional share of CIENA common stock will be treated as if such fractional share had been issued in the merger and then redeemed by CIENA. An Internet Photonics stockholder receiving such cash will recognize gain or loss upon such payment, measured by the difference, if any, between the amount of cash received and the stockholders' basis in such fractional share. The gain or loss will be capital gain or loss provided that the shares of Internet Photonics capital stock were held as capital assets and will be long-term capital gain or loss if the Internet Photonics capital stock exchanged for that fractional share of CIENA common stock had been held for more than one year at the time of the merger. However, if the receipt of cash instead of fractional shares is essentially equivalent to a dividend (determined by application of Section 302 of the Tax Code on a stockholder by stockholder basis), the cash payment may be treated as dividend income to the stockholder not reduced by the stockholder's tax basis in the fractional share. Under existing Treasury regulations, such tax basis would be allocated to the stockholder's aggregate tax basis in CIENA common stock

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retained, but if proposed Treasury regulations are finalized in their current form prior to the effective time, the loss with respect to such tax basis would be allowed upon a certain reduction of the stockholder's direct or indirect interest in CIENA common stock, or upon certain other events, all determined in accordance with Section 302 of the Tax Code and the Treasury regulations thereunder. A dividend realized by an individual stockholder should be subject to a maximum tax rate of 15 percent. A dividend realized by a corporate stockholder may be entitled to a dividends received deduction unless the dividend is treated as an extraordinary dividend under Section 1059 of the Tax Code.

If an Internet Photonics stockholder dissents to the merger and receives solely cash in exchange for such stockholder's Internet Photonics capital stock, although the law is subject to uncertainty, such cash generally should be treated as a distribution in redemption of such stockholder's Internet Photonics capital stock. The stockholder should recognize gain or loss measured by the difference between the amount of cash received and the adjusted tax basis of the Internet Photonics capital stock surrendered. However, in certain situations when the stockholder owns CIENA common stock directly or indirectly by reason of certain attribution rules set forth in the Tax Code, the cash received could be treated as dividend income to the stockholder not reduced by the stockholder's tax basis in the stockholder's Internet Photonics capital stock. Under existing Treasury regulations, such tax basis would be allocated to the stockholder whose stock was attributed to the dissenting stockholder, but if proposed Treasury regulations are finalized in their current form prior to the effective time, the loss with respect to such tax basis would be allowed upon a certain reduction of the stockholder's indirect interest in CIENA common stock, or upon certain other events, all determined in accordance with Section 302 of the Tax Code and the Treasury regulations thereunder. Different tax consequences will apply to any interest awarded by a court to a dissenting Internet Photonics stockholder.

### ***Taxation of Escrowed Shares***

Internet Photonics stockholders will be treated as owning an allocable portion of the CIENA common stock issued in the merger and deposited in escrow. An allocable portion of any dividends received on escrowed stock will be taxed to each former Internet Photonics stockholder as ordinary income when such amounts are received by the escrow agent. CIENA does not anticipate declaring dividends. The escrow agreement provides that a portion of the shares of CIENA common stock placed in escrow may be sold to reimburse the expenses of the stockholders' representative. In addition, the escrow agreement provides CIENA the option to elect to be indemnified from the escrow fund by either return of escrowed shares of CIENA common stock or by payment of the cash proceeds from the sale of escrowed shares of CIENA common stock, in each case valued at \$6.127 per share. In the case of reimbursement of expenses or indemnification in cash through the sale of escrowed shares, the sale of such shares of CIENA common stock will be treated as a taxable sale to the Internet Photonics stockholders. Each Internet Photonics stockholder will recognize capital gain or loss as a result of such sale, measured as the difference between such Internet Photonics stockholder's basis in such sold shares of CIENA common stock and the sales price of such shares of CIENA common stock. Likewise, Internet Photonics stockholders will be allocated their portion of any interest or other income earned from the investment of the proceeds of such sale. No gain or loss will be recognized by an Internet Photonics stockholder upon the distribution of escrowed stock to the stockholder upon termination of the escrow arrangement or upon the release of escrowed stock to CIENA pursuant to the terms of the escrow agreement. The tax basis of CIENA common stock released to CIENA would be spread among the Internet Photonics stockholder's tax basis in remaining CIENA common stock (including remaining CIENA common stock held in escrow).

### ***Tax Reporting***

Each of CIENA and Internet Photonics has agreed to report the merger as a reorganization within the meaning of Section 368(a) of the Tax Code in all applicable U.S. federal, and to the extent permitted, state tax returns filed by each party. Each Internet Photonics stockholder will be required to file with such stockholder's U.S. federal income tax return a statement setting forth certain facts relating to the merger.

*U.S. Federal Backup Withholding*

A holder of Internet Photonics capital stock may be subject, under some circumstances, to backup withholding at a rate of 28% with respect to certain payments made in the merger unless the holder provides proof of an applicable exemption or a correct taxpayer identification number, and otherwise complies with applicable requirements of the backup withholding rules. Any amounts withheld under the backup withholding rules are not an additional tax and may be refunded or credited against the holder's U.S. federal income tax liability, provided the required information is furnished to the Internal Revenue Service.

**Appraisal Rights of Dissenting Stockholders of Internet Photonics**

If the merger is completed, a holder of record of Internet Photonics stock on the date of making a demand for appraisal, as described below, will be entitled to have those shares appraised by the Delaware Court of Chancery under Section 262 of the Delaware General Corporation Law or DGCL, and to receive payment for the fair value of those shares instead of the consideration provided for in the merger agreement. In order to be eligible to receive this payment, however, an Internet Photonics stockholder must (1) continue to hold his or her shares through the time of the merger; and (2) strictly comply with the procedures discussed under Section 262. This information statement/prospectus is being sent to all holders of record of Internet Photonics stock and constitutes notice of the appraisal rights available to those holders under Section 262.

The following summary is not a complete statement of Section 262 of the DGCL, and is qualified in its entirety by reference to Section 262, which is incorporated herein by reference, together with any amendments to the laws that may be adopted after the date of this information statement/prospectus. A copy of Section 262 is attached as Annex B to this information statement/prospectus. **The statutory right of appraisal granted by Section 262 requires strict compliance with the procedures in Section 262. Failure to follow any of these procedures may result in a termination or waiver of dissenters' rights under Section 262.**

A holder of Internet Photonics stock who elects to exercise appraisal rights under Section 262 must deliver a written demand for appraisal of its shares of Internet Photonics before April 19, 2004. The written demand must identify the stockholder of record and state the stockholder's intention to demand appraisal of his or her shares. All demands should be delivered to CIENA Corporation, 1201 Winterson Road, Linthicum, Maryland 21090, Attention: Corporate Secretary.

Only a holder of shares of Internet Photonics stock on the date of making a written demand for appraisal who did not execute the written consent approving the merger and who continuously holds those shares through the time of the merger is entitled to seek appraisal. Demand for appraisal must be executed by or for the holder of record, fully and correctly, as that holder's name appears on the holder's stock certificates representing shares of Internet Photonics stock. If Internet Photonics stock is owned of record in a fiduciary capacity by a trustee, guardian or custodian, the demand should be made in that capacity. If Internet Photonics stock is owned of record by more than one person, as in a joint tenancy or tenancy in common, the demand should be made by or for all owners of record. An authorized agent, including one or more joint owners, may execute the demand for appraisal for a holder of record; that agent, however, must identify the record owner or owners and expressly disclose in the demand that the agent is acting as agent for the record owner or owners of the shares.

A record holder such as a broker who holds shares of Internet Photonics stock as a nominee for beneficial owners, some of whom desire to demand appraisal, must exercise appraisal rights on behalf of those beneficial owners with respect to the shares of Internet Photonics stock held for those beneficial owners. In that case, the written demand for appraisal should state the number of shares of Internet Photonics stock covered by it. Unless a demand for appraisal specifies a number of shares, the demand will be presumed to cover all shares of Internet Photonics stock held in the name of the record owner.

**Beneficial owners who are not record owners and who intend to exercise appraisal rights should instruct the record owner to comply with the statutory requirements with respect to the exercise of appraisal rights before April 19, 2004.**

Within 10 days after the merger, the surviving or resulting corporation is required to send a notice of the effectiveness of the merger to each Internet Photonics stockholder who, in response to this information statement/prospectus, has timely delivered a notice of intent to demand appraisal as set forth in the third paragraph of this section.

Within 120 days after the merger, the surviving corporation or any stockholder who has complied with the requirement of Section 262 may file a petition in the Delaware Court of Chancery demanding a determination of the fair value of the shares of Internet Photonics stock held by all stockholders seeking appraisal. A dissenting stockholder must serve a copy of the petition on the surviving corporation. If no petition is filed by either the surviving corporation or any dissenting stockholder within the 120-day period, the rights of all dissenting stockholders to appraisal will cease. Stockholders seeking to exercise appraisal rights should not assume that the surviving corporation will file a petition with respect to the appraisal of the fair value of their shares or that the surviving corporation will initiate any negotiations with respect to the fair value of those shares. The surviving corporation shall be under no obligation to and CIENA, as the surviving corporation in the merger, has no present intention to take any action in this regard. Accordingly, stockholders who wish to seek appraisal of their shares should initiate all necessary action with respect to the perfection of their appraisal rights within the time periods and in the manner prescribed in Section 262. **Failure to file the petition on a timely basis will cause the stockholder's right to an appraisal to cease.**

Within 120 days after the time of the merger, any stockholder who has complied with subsections (a) and (d) of Section 262 is entitled, upon written request, to receive from the surviving corporation a statement setting forth the total number of shares of Internet Photonics stock not voted in favor of the merger with respect to which demands for appraisal have been received by Internet Photonics and the number of holders of those shares. The statement must be mailed within 10 days after Internet Photonics has received the written request or within 10 days after the time for delivery of demands for appraisal under subsection (d) of Section 262 has expired, whichever is later.

If a petition for an appraisal is filed in a timely manner, at the hearing on the petition, the Delaware Court of Chancery will determine which stockholders are entitled to appraisal rights and will appraise the shares of Internet Photonics stock owned by those stockholders. The court will determine the fair value of those shares, exclusive of any element of value arising from the accomplishment or expectation of the merger, together with a fair rate of interest, to be paid, if any, upon the fair value.

Stockholders who consider seeking appraisal should consider that the fair value of their shares under Section 262 could be more than, the same as, or less than, the value of the consideration provided for in the merger agreement without the exercise of appraisal rights. The Court of Chancery may determine the cost of the appraisal proceeding and assess it against the parties as the Court deems equitable. Upon application of a dissenting stockholder, the Court may order that all or a portion of the expenses incurred by any dissenting stockholder in connection with the appraisal proceeding (including, without limitation, reasonable attorney's fees and the fees and expenses of experts) be charged pro rata against the value of all shares of Internet Photonics stock entitled to appraisal. In the absence of a court determination or assessment, each party bears its own expenses.

Any stockholder who has demanded appraisal in compliance with Section 262 will not, after the merger, be entitled to vote such stock for any purpose or receive payment of dividends or other distributions, if any, on the Internet Photonics stock, except for dividends or distributions, if any, payable to stockholders of record at a date prior to the merger.

A stockholder may withdraw a demand for appraisal and accept the CIENA common stock at any time within 60 days after the merger. If an appraisal proceeding is properly instituted, it may not be dismissed as to any stockholder without the approval of the Delaware Court of Chancery, and any such approval may be conditioned on the Court of Chancery's deeming the terms to be just. If, after the merger, a holder of Internet Photonics stock who had demanded appraisal for his or her shares fails to perfect or loses his or her right to appraisal, those shares will be treated under the merger agreement as if they were converted into CIENA common stock at the time of the merger.

**In view of the complexity of these provisions of the Delaware corporate law, any Internet Photonics stockholder who is considering exercising appraisal rights should consult a legal advisor.**

## **TERMS OF THE MERGER AGREEMENT AND RELATED TRANSACTIONS**

*The following summary of the material terms and provisions of the merger agreement is qualified in its entirety by reference to the merger agreement. The merger agreement, as amended, is attached as Annex A to this information statement/prospectus and is incorporated herein by reference. All stockholders are urged to read the merger agreement carefully.*

### **General**

The merger agreement provides that Internet Photonics will be merged with and into CIENA, at the effective time of the merger. Pursuant to the merger agreement, Internet Photonics will cease to exist as a separate entity and CIENA will be the surviving corporation. At the effective time of the merger, each outstanding share of Internet Photonics capital stock (other than treasury shares and shares held by dissenting stockholders) will be converted into CIENA common stock, all as more fully described below. The certificate of incorporation of CIENA will be the certificate of incorporation of the surviving corporation. The bylaws of CIENA will be the bylaws of the surviving corporation.

### **Management and Operations After the Merger**

Following the merger, CIENA will integrate all of Internet Photonics operations into its Metro and Enterprise Solutions Group. All of the officers and directors of CIENA before the merger will remain officers and directors of the surviving corporation after the merger.

### **Treatment of Stock, Options and Warrants**

At the effective time of the merger, each issued and outstanding share of Internet Photonics capital stock will be converted into shares of CIENA common stock in accordance with the terms of the merger agreement and the certificate of incorporation of Internet Photonics as described below. Each share of CIENA common stock issued in the merger will include the corresponding fraction of a right to purchase shares of junior preferred stock, par value \$0.01 per share, pursuant to the Rights Agreement dated as of December 29, 1997 between CIENA and Equiserve Trust Co., N.A. (formerly BankBoston, N.A.), as rights agent, as amended. Shares of Internet Photonics capital stock held in the treasury of Internet Photonics will be canceled and extinguished at the effective time of the merger without the payment of any consideration.

Subject to the indemnification and escrow arrangements described below, CIENA has agreed to issue an aggregate of 24,080,843 shares of its common stock in exchange for all of Internet Photonics outstanding common and preferred stock and for the assumption of certain outstanding options and warrants to purchase Internet Photonics capital stock. You should review Indemnification and Escrow Arrangement for a discussion of the CIENA common stock otherwise distributable at closing, that will not be delivered to the Internet Photonics stockholders but will instead be deposited into an escrow fund to secure certain indemnity claims CIENA may make for up to one year.

Because the consummation of the merger will constitute a sale event under the terms of the certificate of incorporation of Internet Photonics, at the effective time of the merger, holders of each series of Internet Photonics preferred stock will receive payment in shares of CIENA common stock of their respective liquidation preference. Each share of CIENA common stock to be issued in respect of each series of preferred stock's liquidation preference has a fixed value of \$6.127 per share pursuant to the terms of the merger agreement. Payment of the liquidation preference shall be made to holders of Internet Photonics preferred stock prior to any payment or allocation of merger consideration to holders of Internet Photonics common stock. The liquidation preference payable to each series of Internet Photonics preferred stock is set forth in the certificate of incorporation of Internet Photonics and based upon the original purchase price for such series, plus any declared but unpaid dividends in respect of such series. As of March 17, 2004, no dividends had been declared on any series of Internet Photonics preferred stock and

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the number of shares of CIENA common stock payable for each share of Internet Photonics preferred stock in respect of the liquidation preference was as follows:

Series of Internet Photonics Preferred Stock	Liquidation Preference(\$)	Shares of CIENA Common Stock per share of Internet Photonics Preferred Stock	Approximate Aggregate Shares of CIENA Common Stock in Payment of Liquidation Preference
Series A preferred stock	\$ 10.00	1.632	1,278,494
Series B preferred stock	\$ 10.00	1.632	1,958,543
Series C preferred stock	\$ 10.00	1.632	3,909,638
Series D preferred stock	\$ 1.00	0.163	5,059,571
Series E preferred stock	\$ 1.50	0.245	2,019,749
<b>Total number of shares of CIENA common stock in payment of the liquidation preference of all series of Internet Photonics preferred stock</b>			<b>14,225,995</b>

The amounts above represent the liquidation price payable to each series of Internet Photonics preferred stock divided by \$6.127, the average closing price per share of CIENA common stock reported on the Nasdaq National Market for the ten trading days prior to the date of the merger agreement. In addition to the amounts above, preferred stock warrants for 68,721 shares of series C preferred stock, 432,496 shares of series D preferred stock and 20,000 shares of series E preferred stock are outstanding and exercisable as of March 1, 2004. Any exercise of these preferred stock warrants would increase the number of shares to be issued in satisfaction of the aggregate liquidation preference in respect of outstanding Internet Photonics preferred stock and decrease the applicable common stock exchange ratio.

Following payment of approximately 14,225,995 shares of CIENA common stock in satisfaction of the aggregate liquidation preferences in respect of outstanding shares of Internet Photonics preferred stock, each share of Internet Photonics common stock and preferred stock (other than series A preferred stock), treating each series of Internet Photonics preferred stock on an as-converted into Internet Photonics common stock basis, shall be exchanged for a fraction of a share of CIENA common stock equal to the common stock exchange ratio. The common stock exchange ratio shall equal a fraction, the numerator of which is 24,080,843 shares minus the aggregate number of shares issued in payment of the foregoing liquidation preferences, and the denominator of which is the sum of the number of shares of Internet Photonics common stock outstanding plus the number of shares of Internet Photonics common stock issuable upon the exercise of all Internet Photonics common stock equivalents immediately prior to the effective time of the merger.

Under the terms of the merger agreement, Internet Photonics common stock equivalents means:

the number of shares of Internet Photonics common stock issuable upon exercise of all Internet Photonics stock options outstanding at the effective time, excluding (i) those options which by their terms will expire on or prior to the effective time of the merger without becoming exercisable due to vesting provisions, (ii) options with an exercise price per share equal to or greater than \$1.00, (iii) unvested options held by Internet Photonics employees terminated at the closing of the merger, and (iv) unvested options, held by Internet Photonics employees identified by CIENA for termination during the six month period following the merger, that are projected to be unvested at the end of the transitional period during which CIENA expects to continue to employ such person, plus,

the number of shares of Internet Photonics common stock that would be issuable upon conversion of all Internet Photonics preferred stock outstanding at the effective time of the merger (other than series A preferred stock), plus

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the number of shares of Internet Photonics common stock issuable upon the exercise of warrants to purchase Internet Photonics preferred stock outstanding at the effective time of the merger, and assuming the conversion of such shares into Internet Photonics common stock.

As of March 1, 2004, 485,141 shares of Internet Photonics common stock were issued and outstanding. In addition, as of such date, each series of Internet Photonics preferred stock was convertible into such number of shares of Internet Photonics common stock as set forth below:

<b>Series of Internet Photonics Preferred Stock</b>	<b>Number of Shares of Internet Photonics Common Stock Underlying each Share of Preferred Stock</b>	<b>Aggregate Number of Shares of Internet Photonics Common Stock Underlying such Series of Preferred Stock</b>
Series A preferred stock	1.419533	1,111,967
Series B preferred stock	1.419533	1,703,438
Series C preferred stock	3.316541	7,944,557
Series D preferred stock	1.0	30,999,994
Series E preferred stock	1.0	8,250,000

As of March 1, 2004, warrants exercisable for Internet Photonics preferred stock, representing 680,412 shares of Internet Photonics common stock on an as-converted basis, and stock options (excluding the options described in (i) through (iv) of the first bullet point above) exercisable for 9,117,066 shares of Internet Photonics common stock were issued and outstanding. As of March 1, 2004, therefore, there were a total of 60,292,575 shares of Internet Photonics common stock and Internet Photonics common stock equivalents outstanding.

Based on the aggregate liquidation preference payable on Internet Photonics preferred stock described above, the common stock exchange ratio, as of that date, would be ...1635 shares of CIENA common stock and a holder of 100 shares of Internet Photonics common stock would receive 16.35 shares of CIENA common stock in the merger. The following chart sets forth the dollar value of those 100 shares of CIENA common stock at a range of prices of CIENA common stock. The chart does not include cash received for fractional shares or cash paid in respect of dissenting shares.

<b>Illustrative Market Price of CIENA Common Stock at Closing</b>	<b>Value of Shares of CIENA Common Stock Issued at Closing to the Holder of 100 Shares of Internet Photonics Common Stock</b>
\$4.50	\$ 73.58
\$5.00	\$ 81.75
\$5.50	\$ 89.93
\$6.00	\$ 98.10
\$6.28*	\$102.68
\$6.50	\$106.28
\$7.00	\$114.45
\$7.50	\$122.63

\* The closing price of CIENA common stock on February 18, 2004, the last trading day prior to the announcement of the merger.

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Accordingly, after taking into account payment, in shares of CIENA common stock, in respect the liquidation preference applicable to each series of Internet Photonics preferred stock, the applicable exchange ratio per share of Internet Photonics capital stock as of such date is as set forth below:

<b>Class of Internet Photonics Stock</b>	<b>Exchange Ratio</b>
Common Stock	0.1635
Series A preferred stock*	1.6321
Series B preferred stock	1.8641
Series C preferred stock	2.1742
Series D preferred stock	0.3267
Series E preferred stock	0.4083

\* The exchange ratio for the series A preferred stock is fixed, and therefore not subject to adjustment based on changes in Internet Photonics fully-diluted outstanding capital stock.

The actual common stock exchange ratio will be calculated at the effective time of the merger and is subject to change as a result of changes in the number of shares of Internet Photonics common stock, preferred stock or Internet Photonics common stock equivalents outstanding and other adjustments. The actual common stock exchange ratio is subject to adjustment due to option issuances, exercise of preferred stock warrants, stock repurchases and similar events or because of the exercise of outstanding Internet Photonics stock options with an exercise price equal to or greater than \$1.00 per share. Any issuance of Internet Photonics capital stock due to the exercise of outstanding options with exercise prices less than \$1.00 per share will not affect the exchange ratios. Moreover, the value you will receive in exchange for your Internet Photonics capital stock is subject to the trading price per share of CIENA common stock at the effective time.

If, prior to the effective time of the merger, the outstanding shares of CIENA common stock are changed into or exchanged for a different number of shares or a different class as a result of any stock split, combination, reclassification or dividend, the nature of the consideration to be received by the holders of Internet Photonics capital stock and the exchange ratios will be appropriately and proportionately adjusted.

CIENA will assume each option or warrant to acquire Internet Photonics common stock and preferred stock granted under Internet Photonics stock plans or otherwise issued by Internet Photonics that is outstanding and unexercised immediately prior to the effective time of the merger. At the effective time of the merger, CIENA will replace each Internet Photonics option or warrant with an option or warrant, as the case may be, to purchase CIENA common stock. In each case, the number of shares of CIENA common stock subject to the new CIENA option or warrant will be equal to the number of shares of Internet Photonics common stock or preferred stock subject to the Internet Photonics stock option or warrant, multiplied by the common stock exchange ratio (and rounding any fractional share down to the nearest whole share) and the exercise price per share of CIENA common stock will be equal to the exercise price per share of Internet Photonics common stock subject to the Internet Photonics stock option or warrant divided by the exchange ratio. The duration and other terms of each such CIENA option or warrant, including the vesting schedule, will be the same as the prior Internet Photonics stock option or warrant, unless the vesting is accelerated by the terms of the instrument as a result of the merger. See [The Merger Interests of Executive Officers and Directors in the Merger](#) for a discussion of the treatment of the acceleration of vesting schedules of certain executive officers pursuant to the merger.

### **Exchange of Certificates; Fractional Shares**

CIENA has agreed to deposit with a bank or trust company designated as exchange agent by CIENA for the benefit of the holders of issued and outstanding shares of Internet Photonics common stock,

certificates representing the shares of CIENA common stock to be issued pursuant to the merger agreement.

At the earliest practicable date after the effective time of the merger, the exchange agent will mail a letter of transmittal to each holder of record of Internet Photonics common stock. The letter of transmittal will contain instructions with respect to the surrender of stock certificates to the exchange agent.

**You should not forward your stock certificates to the exchange agent unless and until you receive the letter of transmittal, at which time you should forward them only in accordance with the instructions specified in the letter of transmittal.**

Until the holders of certificates representing Internet Photonics capital stock to be converted into CIENA common stock in the merger surrender them for exchange at or after the effective time of the merger, they will accrue but will not receive dividends or other distributions declared after the effective time of the merger with respect to CIENA common stock into which their Internet Photonics stock has been converted. When they surrender such certificates, any unpaid dividends or other distributions will be paid, without interest. All stock certificates presented after the effective time of the merger will be canceled and exchanged for a certificate representing the applicable number of shares of CIENA common stock.

Any shares of CIENA common stock and cash that the exchange agent has not distributed six months after the effective time of the merger will be delivered to CIENA upon demand. Certificates representing Internet Photonics capital stock must thereafter be surrendered for exchange to CIENA. Neither CIENA, Internet Photonics, nor the exchange agent will be liable for any shares of CIENA common stock, dividends or distributions with respect thereto, or cash delivered to a public official pursuant to any abandoned property, escheat or similar laws.

If a certificate representing Internet Photonics capital stock is lost, stolen or destroyed, the exchange agent will issue the CIENA common stock in exchange for the certificate only upon the making of an affidavit of such loss, theft or destruction by the claimant and payment of any surety premium as required by the exchange agent with respect to such certificate.

CIENA will not issue any fractional shares of its common stock in the merger. Instead, each Internet Photonics stockholder who would otherwise have been entitled to receive a fractional share of CIENA common stock will receive cash, without interest, in an amount rounded to the nearest whole cent, determined by multiplying (1) the per share closing price of CIENA's common stock on the Nasdaq National Market on the date of the merger by (2) the fraction of a share of CIENA common stock to which the holder would otherwise be entitled.

For a description of the differences between the rights of the holders of CIENA common stock and holders of Internet Photonics capital stock, see Comparison of Stockholder Rights.

#### **Effective Time**

The merger will occur after specified conditions set forth in Article V of the merger agreement have been satisfied or waived. No later than the second business day after the satisfaction or waiver of these conditions, the parties will hold a scheduled closing. On the day the merger occurs, CIENA will file a certificate of merger with the Secretary of State of the State of Delaware. The effective time of the merger will be the date and time of such filing. CIENA and Internet Photonics each anticipate that the merger will be completed during CIENA's third fiscal quarter of 2004. However, a delay in obtaining governmental consents required prior to consummation of the transactions contemplated in the merger agreement could delay the merger. There can be no assurances as to if or when such governmental consents will be obtained or that the merger will be completed.

## Representations and Warranties

The merger agreement contains various representations of CIENA and Internet Photonics. Internet Photonics has made customary representations and warranties relating to, among other things:

the corporate organization and existence of Internet Photonics, including that it is duly organized, validly existing and in good standing with the corporate power and authority to own, operate and lease its properties and to carry on its business as currently conducted;

the certificate of incorporation and bylaws or other organizational documents of Internet Photonics;

the capitalization of Internet Photonics, including the number of shares of capital stock authorized, the number of shares and rights to acquire shares outstanding and the number of shares reserved for issuance;

the corporate power and authority of Internet Photonics to execute and deliver the merger agreement and related documents and to consummate the transactions contemplated by these documents;

the compliance of the merger agreement and related documents with (1) Internet Photonics' certificate of incorporation and bylaws, (2) applicable laws, and (3) material agreements of Internet Photonics, including the absence of events of default thereunder;

the required governmental and third-party consents;

Internet Photonics' financial statements through December 31, 2003, including that the information in the financial statements, are a fair presentation of the financial condition and results of operations of Internet Photonics and is in compliance with GAAP;

the absence of certain changes in Internet Photonics' business since December 31, 2003;

the ownership and condition of the assets owned by Internet Photonics;

material leases, contracts and agreements;

interests in real property;

compliance with environmental laws and the absence of environmental liabilities;

the absence of material legal proceedings, injunctions and disputes;

compliance with applicable laws, including relating to employees or the workplace;

the absence of intellectual property infringement or contests;

the filing and accuracy of Internet Photonics' tax returns;

employee benefit plans and related matters, including that the plans have been operated and administered in accordance with applicable laws;

related party transactions;

insurance;

the absence of undisclosed fees being paid to brokers;

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complete and correct books and records;

the absence of certain business practices of Internet Photonics;

knowledge regarding customer and supplier relationships; and

the truthfulness of information provided by Internet Photonics and its principal officers for inclusion in the information statement/prospectus.

Messrs. Greg Koss and Waszak have also made the representations and warranties made by Internet Photonics above, but are making these representations and warranties on the basis only of their actual knowledge as to the matters stated therein.

Internet Photonics' representations and warranties generally survive until the end of the first year after the effective time of the merger. After the effective time of the merger, the maximum liability of Internet Photonics stockholders for any breach of the representations, covenants or agreements generally will be limited to 10% of the shares issued in the merger transaction, except for liability for fraud. CIENA and certain other indemnified persons may make a claim for indemnification for any breach of any of the foregoing representations and warranties until the end of the first year after the effective time of the merger. For a description of indemnification obligations of Internet Photonics stockholders see Indemnification and Escrow Arrangement.

The merger agreement also contains customary representations and warranties of CIENA as to, among other things:

the corporate organization and existence of CIENA;

the certificate of incorporation and bylaws or other organizational documents of CIENA;

the corporate power and authority of CIENA;

the compliance of the merger agreement and related documents with CIENA's certificate of incorporation and bylaws, applicable laws, and certain material agreements of CIENA;

the required governmental and third-party consents;

absence of undisclosed fees being paid to brokers;

the valid issuance of the shares of CIENA common stock to be issued in the merger;

CIENA's filings with the SEC;

the absence of material legal proceedings, injunctions and disputes;

the capitalization of CIENA; and

the absence of undisclosed material adverse change or other specified changes in CIENA's business since October 31, 2003.

CIENA's representations and warranties will survive until the end of the first year after the effective date of the merger. CIENA has agreed to indemnify the former Internet Photonics stockholders for up to \$147.5 million against losses due to the breach or inaccuracy of CIENA's representations and warranties contained in the merger agreement.

#### **Business of Internet Photonics Pending the Merger; Other Agreements**

Pursuant to the merger agreement, Internet Photonics has agreed to:

maintain its existence in good standing;

conduct its business in the ordinary and usual manner consistent with past practices;

maintain business and accounting records consistent with past practices; and

use commercially reasonable efforts (1) to preserve its business intact, (2) to keep available to it the services of its present officers and employees, and (3) to preserve for it the goodwill of its suppliers, customers and others having business relations with it.























**SECURITY OWNERSHIP OF DIRECTORS, EXECUTIVE OFFICERS AND MORE THAN  
FIVE PERCENT STOCKHOLDERS OF INTERNET PHOTONICS**

The following table sets forth certain information regarding the beneficial ownership of Internet Photonics capital stock as of March 1, 2004: (i) by each person who is known by Internet Photonics to own beneficially more than 5% of each of the classes of Internet Photonics capital stock, on an as-converted basis; (ii) by each director of Internet Photonics; (iii) by the chief executive officer and the four most highly compensated executive officers, other than the chief executive officer, of Internet Photonics; and (iv) by all of the directors and all of the executive officers of Internet Photonics as a group. Except as noted below, the address of each person listed on the table is c/o Internet Photonics, Inc., 1030 Broad Street, Suite 200, Shrewsbury, New Jersey 07702.

As of March 1, 2004, 485,141 shares of Internet Photonics common stock were issued and outstanding. As of the same date, 783,333 shares of series A preferred stock, 1,199,999 shares of series B preferred stock, 2,395,435 shares of series C preferred stock, 30,999,994 shares of series D preferred stock and 8,250,000 shares of series E preferred stock of Internet Photonics were issued and outstanding.

Each share of Internet Photonics common stock is entitled to one vote. Each share of Internet Photonics preferred stock is entitled to a number of votes equal to the number of shares of Internet Photonics common stock into which such share may be converted into pursuant to Internet Photonics certificate of incorporation. Each share of series A preferred stock and series B preferred stock converts into 1.419533 shares of common stock. Each share of series C preferred stock converts into 3.316541 shares of common stock. Each share of series D preferred stock and series E preferred stock converts into one share of common stock. No other classes of capital stock are authorized under the Internet Photonics certificate of incorporation.

The following table is based on 1,111,967 shares of series A preferred stock, 1,703,438 shares of series B preferred stock, 7,944,557 shares of series C preferred stock, 30,999,994 shares of series D preferred stock and 8,250,000 shares of series E preferred stock outstanding, calculated on an as-converted to common stock basis as of March 1, 2004. Beneficial ownership is determined in accordance with the rules of the Securities and Exchange Commission and includes voting or investment power with respect to the shares of Internet Photonics capital stock and capital stock issuable upon conversion or exercise of other currently convertible or exercisable Internet Photonics securities or that will be so convertible or exercisable within 60 days of March 1, 2004.





















**Internet Photonics.** Internet Photonics certificate of incorporation provides that holders of preferred stock are entitled to receive non-cumulative dividends at the rate of 8% per annum on the original issue price of such series of preferred stock, with the amounts to be adjusted upon a stock split, reverse split or similar event, when and if declared by the board of directors out of funds legally available therefor. The original issue price of the series A, series B and series C preferred stock is \$10.00. The original issue price of the series D and series E preferred stock is \$1.00. Any dividends on the preferred stock are to be paid first to the holders of series E preferred stock, second to the holders of series D preferred stock, and lastly, to the holders of the series A, series B and series C preferred stock.

#### **Liquidation Rights**

**CIENA.** CIENA's certificate of incorporation provides that, in the event of a liquidation of CIENA, the holders of CIENA common stock shall receive all remaining assets of CIENA ratably in proportion to the number of shares of common stock held by them.

**Internet Photonics.** Internet Photonics certificate of incorporation provides that in the event Internet Photonics liquidates, dissolves, ceases or winds up its business or is sold, distributions shall be made to holders of Internet Photonics common stock and preferred stock as follows:

first, the holders of the series E preferred stock are entitled to receive, out of the assets of Internet Photonics available for distribution to stockholders, prior to any payment to the holders of any other series of preferred stock or common stock an amount per share equal to \$1.00 plus any declared but unpaid dividends in respect of such share;

second, the holders of the series D and series E preferred stock are entitled to receive, out of the assets of Internet Photonics available for distribution to stockholders an amount per share equal to:

in the case of the series D preferred stock, \$1.00 plus any declared but unpaid dividends in respect of such share; or

in the case of the series E preferred stock, \$0.50; and

such amounts are to be paid prior to any payment to the holders of any series A, series B or series C preferred stock or any common stock until such time as the series D preferred stock has been paid in full the foregoing liquidation preferential amount;

third, the holders of series A, series B, series C and series E preferred stock are entitled to receive, out of the assets of Internet Photonics available for distribution to stockholders, prior to any payment to the holders of common stock or any series of preferred stock designated after the initial issuance of the series E preferred stock an amount per share equal to:

in the case of any shares of series A, series B or series C preferred stock, \$10.00 plus any declared but unpaid dividends in respect of such share; or

in the case of the series E preferred stock, any remaining portion of the \$0.50 per share amount described above not previously paid to holders of series E preferred stock; and

lastly, any remaining assets of Internet Photonics are to be distributed pro rata to the holders of common stock, series B, series C, series D and series E preferred stock on an as-converted basis, provided that holders of series B preferred stock cease to participate in any distributions pursuant to this paragraph once they have received a total of \$50 per share under this paragraph and the foregoing paragraphs relating to distributions upon the liquidation, dissolution, winding up or sale of Internet Photonics.

Each of the following events is deemed a liquidation, dissolution, winding up or sale of the company:

any liquidation, dissolution, indefinite cessation of business or winding up of the company, whether voluntary or involuntary;

any consolidation, merger, combination, reorganization or other similar transaction, or a series of related transactions, in which Internet Photonics is not the surviving entity or as a result of which shares of capital stock of Internet Photonics constituting in excess of 50% of its voting power are owned beneficially by (i) AT&T Corp. or its affiliates or (ii) person or entities that were not stockholders of Internet Photonics immediately prior to such transaction; or

a sale or other disposition of all or substantially all of the assets of Internet Photonics, in one transaction or a series of related transactions.

### **Conversion and Redemption**

**CIENA.** Holders of CIENA common stock have no right to convert their shares into any other shares of the capital stock of CIENA or any other securities or to cause CIENA to redeem their shares.

#### ***Internet Photonics.***

**Conversion Rights.** Holders of preferred stock have the right at any time to convert their shares of preferred stock into shares of common stock based on the conversion rate applicable to such series of preferred stock. The following table sets forth the number of shares of common stock issuable upon conversion of one share of the applicable series of preferred stock:

<b>Series of Preferred Stock</b>	<b>Conversion Rate</b>
Series A preferred stock	1.419533
Series B preferred stock	1.419533
Series C preferred stock	3.316541
Series D preferred stock	1.0
Series E preferred stock	1.0

The Internet Photonics preferred stock will automatically convert into common stock, at the then effective applicable conversion ratio, upon the closing of an underwritten public offering of Internet Photonics common stock in which the net cash proceeds to Internet Photonics exceeds \$25 million and in which the offering price per share is at least \$5.00. Each series of preferred stock also is subject to automatic conversion into common stock, at the then effective applicable conversion ratio, at any time upon the affirmative election of the holders of at least 64% of the outstanding shares of preferred stock (voting together on an as-converted basis).

The number of shares of common stock into which preferred stock is convertible is subject to adjustment in the following circumstances, subject to certain exceptions:

if Internet Photonics issues or sells shares of its capital stock, or warrants, options or purchase rights without consideration or at a price less than the original issue price of a series of preferred stock;

any issuance of common stock for securities convertible into or exchangeable for common stock as a dividend or other distribution; or

any subdivision or combination of outstanding shares of common stock.

**Redemption Rights.** If at any time after October 1, 2008 the holders of more than 64% of Internet Photonics preferred stock, voting together on an as-converted basis, elect to redeem the preferred stock, Internet Photonics is required to redeem all of the outstanding shares of preferred stock, to the extent legally permissible, by paying in exchange for such shares of preferred stock an amount in cash equal to the applicable original issue price for such shares of preferred stock plus any declared but unpaid dividends on such shares.

## Registration Rights

*CIENA.* The common stock to be issued in the merger will be registered under the Securities Act of 1933.

*Internet Photonics.* Set forth below is a summary of the registration rights of certain holders of common stock and the holders of preferred stock pursuant to Internet Photonics' Second Amended and Restated Registration Rights Agreement, as amended, (the "Registration Rights Agreement") entered into among Internet Photonics and the holders of common stock and/or preferred stock named therein. The term "registrable securities," as used below, means Internet Photonics common stock issued or issuable upon conversion of the preferred stock. Registrable securities does not include any such common stock which have previously been registered, sold to the public or which have been sold in a private transaction to a permitted transferee that, together with its affiliates, does not hold at least 1 million shares of preferred stock (or shares of common stock issued upon conversion of preferred stock).

*Demand Registration Rights.* If holders of at least 20% of the registrable securities then outstanding and entitled to registration request in writing that Internet Photonics file a registration statement under the Securities Act covering the registration of at least 20% of the registrable securities then outstanding, then Internet Photonics is obligated to use commercially reasonable efforts to cause the requested shares to be registered. However, Internet Photonics is not obligated to effect any registration:

prior to the earlier of six months after the effective date of its initial public offering and December 1, 2004;

after it has initiated three such registrations which have either become effective and under which registrable securities have been sold or for which it has borne the expense of registration but has been withdrawn;

during the period starting 60 days prior to Internet Photonics' good faith estimate of the date of filing of, and ending on the earlier of (i) the completion of the sale of stock covered by or (ii) the date 90 days after the effective date of, a company-initiated registration.

*Incidental Registration Rights.* The holders of registrable securities are also entitled to registration rights on all Internet Photonics registrations, excluding registrations on Form S-4 or S-8 or another form not available for registering registrable securities for sale to the public. If the registration is an underwritten offering, then the holder's participation in such underwritten offering shall be conditioned upon the party agreeing to participate in the underwriting on the same terms and conditions as the shares of common stock otherwise being sold pursuant to such registration. If the underwriter of the registration determines that marketing factors require a limitation on the aggregate amount of securities sold on the market, Internet Photonics is required to include in the offering only the number of securities which the managing underwriter believes marketing factors allow.

*Form S-3 Registration Rights.* Any holder of registrable securities may also demand registrations on Form S-3 provided Form S-3 is available for such offering and the aggregate proceeds are not less than \$1 million. Internet Photonics may refuse to effect a Form S-3 registration if it has already effected one such registration in the preceding 12 months.

*Indemnification.* To the extent permitted by law, Internet Photonics will indemnify the other parties to the agreement and certain related parties against any losses, claims, damages or liabilities, joint or several, to which they may become subject based on any untrue statement or alleged untrue statement of material fact contained in, or material fact omitted from, a registration statement covering registrable securities, or any other violation or alleged violation of any state or federal securities laws by Internet Photonics.

To the extent permitted by law, each investor holding registrable securities included in a registration that Internet Photonics effected must indemnify Internet Photonics, its officers, directors, employees, agents, control persons and underwriters and any other parties and certain related parties selling securities in such registration against any losses, claims, damages or liabilities, joint or several, to which they may

become subject based on any of the violations enumerated above to the extent such violation occurs in reliance upon written information supplied by such investor for use in such registration.

*Transferability.* The aforementioned registration rights may be transferred by a holder of registrable securities to a transferee or assignee of such holder's registrable securities that holds together with its affiliates at least 1,000,000 shares of registrable securities.

*Expenses.* Internet Photonics is obligated to bear registration expenses, exclusive of underwriting discounts and commissions, for each of the above-described demand registrations, incidental registrations and S-3 registrations. Registration expenses not covered by Internet Photonics are to be borne pro rata by the holders of the securities so registered, based on the number of shares so registered.

*Market Standoff.* Each holder of registrable securities has agreed that it will not, upon the request of Internet Photonics or its underwriter, sell, transfer or otherwise dispose of any common stock or other securities of Internet Photonics, held by the holder, other than those included in the registration, for up to 180 days following the effective date of a registration statement filed under the Securities Act relating to Internet Photonics' initial public offering, provided each of Internet Photonics' officers and directors and each holder of at least 1% of Internet Photonics' voting securities is similarly bound.

*Termination.* The above registration rights with respect to any holder of registrable securities terminate upon the earlier of (i) such time as such holder is able to sell all of their shares pursuant to Rule 144(k) of the Securities Act or (ii) the closing of an acquisition or other transaction in which such holder's registrable securities are exchanged for publicly traded stock of another entity.

*Amendment.* Registration rights may be amended or waived upon Internet Photonics' consent and the consent of holders holding at least a majority in interest of the preferred stock registrable under the Registration Rights Agreement.

#### **Additional Rights of Certain Internet Photonics Stockholders**

Internet Photonics has entered into management rights agreements with certain securityholders who are venture capital operating companies. Pursuant to such agreements, the parties thereto have the right to:

consult with and advise management of Internet Photonics on significant business issues, including operating plans;

examine and inspect Internet Photonics' books, records and facilities; and

if such party is not represented on the board of directors of Internet Photonics, a representative of such party may attend all board of directors meetings as a nonvoting observer.

#### **Stockholder Proposals**

*CIENA.* All stockholder proposals intended to be presented at CIENA's 2005 Annual Meeting must be received by CIENA not later than September 29, 2004 and must otherwise comply with the rules of the SEC for inclusion in CIENA's information statement and form of proxy relating to that meeting. Proposals should be delivered to CIENA Corporation, 1201 Winterson Road, Linthicum, Maryland 21090, Attention: Corporate Secretary.

Except in the case of proposals made in accordance with Rule 14a-8, stockholders intending to bring any business before an annual meeting of stockholders must deliver written notice thereof to CIENA's Secretary not less than 45 days prior to the anniversary of the date on which CIENA first mailed its proxy materials for its immediately preceding annual meeting of stockholders. The deadline for matters sought to be presented at the 2005 Annual Meeting is December 13, 2004. If a stockholder gives notice of such a proposal after the December 13, 2004 deadline, CIENA's proxy holders will be allowed to use their discretionary voting authority to vote against the stockholder proposal when and if the proposal is raised at the Corporation's 2005 Annual Meeting.

## OTHER MATTERS

### Legal Matters

The legal validity of the CIENA common stock offered hereby will be passed upon by Hogan & Hartson L.L.P., counsel to CIENA.

The U.S. federal income tax consequences described in this information statement/prospectus are the subject of opinions issued by Hogan & Hartson L.L.P., counsel to CIENA, and Sonnenschein Nath & Rosenthal LLP, New York, New York, counsel to Internet Photonics.

### Experts

The consolidated financial statements of CIENA Corporation as of October 31, 2003 and 2002 and for each of the years in the three-year period ended October 31, 2003 incorporated in this information statement/prospectus by reference to CIENA's Annual Report on Form 10-K for the year ended October 31, 2003 have been so incorporated in reliance on the report of PricewaterhouseCoopers LLP, independent accountants, given on the authority of said firm as experts in auditing and accounting.

## WHERE YOU CAN FIND MORE INFORMATION

CIENA has filed the registration statement of which this information statement/prospectus is a part. The registration statement registers the distribution to Internet Photonics stockholders of the shares of CIENA common stock to be issued in connection with the merger.

CIENA files annual, quarterly and current reports, information statements and other information with the SEC. You may read and copy any of this information at the SEC's public reference room at 450 Fifth Street N.W., Room 1024, Washington, D.C. 20549. You may obtain information on the operation of the SEC's Public Reference Room by calling the SEC at 1-800-SEC-0330.

The SEC also maintains an Internet web site that contains reports, information statements and other information regarding issuers, like CIENA, that file electronically with the SEC. The address of that site is <http://www.sec.gov>. The SEC file number for CIENA documents filed under the Exchange Act is 0-21969.

The SEC allows CIENA to incorporate by reference information into this information statement/prospectus. This means that CIENA can disclose important information to you by referring you to another document filed separately with the SEC. The information incorporated by reference is considered to be a part of this information statement/prospectus, except for any information that is superseded by information that is included directly in this document.

This information statement/prospectus incorporates by reference the documents listed below that CIENA has previously filed or will file with the SEC. They contain important information about CIENA and its financial condition.

CIENA's annual report on Form 10-K for its fiscal year ended October 31, 2003, filed on December 12, 2003;

CIENA's quarterly report on Form 10-Q for the fiscal quarter ended January 31, 2004, filed on February 19, 2004;

CIENA's definitive proxy statement filed on January 28, 2004;

CIENA's current report on Form 8-K (Item 5 and Item 7 reported) filed on November 18, 2003;

CIENA's current report on Form 8-K (Item 5 and Item 7 reported) filed on December 22, 2003;

CIENA's current report on Form 8-K (Item 5 and Item 7 reported) filed on February 19, 2004;

CIENA's current report on Form 8-K (Item 5 and Item 7 reported) filed on February 19, 2004;

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All documents filed with the SEC by CIENA pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act after the date of this information statement/prospectus and prior to the date of the closing of the merger are incorporated by reference into this information statement/prospectus, effective the date such documents are filed; and

The description of CIENA common stock set forth in the CIENA registration statement filed under Section 12 of the Exchange Act on Form 8-A on January 13, 1997, including any amendment or report filed with the SEC for the purpose of updating such description. In the event of conflicting information in these documents, the information in the latest filed document should be considered correct.

You can obtain any of the documents incorporated by reference in this document through CIENA or from the SEC through the SEC's web site at the address described above. Documents incorporated by reference are available from CIENA without charge, excluding any exhibits to those documents unless the exhibit is specifically incorporated by reference as an exhibit in this information statement/prospectus. You can obtain documents incorporated by reference in this information statement/prospectus by requesting them in writing or by telephone from CIENA at the following address:

CIENA Corporation

1201 Winterson Road  
Linthicum, Maryland 21090  
Attn: General Counsel  
Telephone (410) 865-8500

You can also contact CIENA at its website, [www.ciena.com](http://www.ciena.com). If you request any incorporated document from CIENA, it will mail them to you by first class mail, or another equally prompt means, within two business days after it receives your request.

This document constitutes the prospectus of CIENA and the information statement of Internet Photonics. CIENA has supplied all information contained or incorporated by reference in this information statement/prospectus relating to CIENA and Internet Photonics has supplied all such information relating to Internet Photonics.

Neither CIENA nor Internet Photonics has authorized anyone to give any information or make any representation about the merger, CIENA or Internet Photonics that is different from, or in addition to, that contained in this information statement/prospectus or in any of the materials that CIENA has incorporated into this document. Therefore, if anyone does give you information of this sort, you should not rely on it. The information contained in this document speaks only as of the date of this document, unless the information specifically indicates that another date applies.

**AGREEMENT AND PLAN OF MERGER**

**AMONG**

**CIENA CORPORATION**

**GREGORY W. KOSS**

**STEVEN M. WASZAK**

**AND**

**INTERNET PHOTONICS, INC.**

**Dated as of February 18, 2004**

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EXHIBIT INDEX

Exhibit A	Form of Affiliate Letter
Exhibit B	Form of CEO/ CFO Certification
Exhibit C	Form of Bridge Loan Agreement
Exhibit D	Form of Escrow Agreement
Exhibit E	Opinion of Counsel to the Company
Exhibit F	Opinion of Counsel to CIENA



















Stock; (ii) approval by holders of a majority of the shares of the Company Common Stock and the Company Preferred Stock, voting as a single class on an as converted to Company Common Stock basis, and (iii) approval by the holders of not less than 64% of the then outstanding Company Preferred Stock, voting as a separate class on an as converted to Company Common Stock basis (the Company Requisite Stockholder Approval). Assuming due authorization, execution and delivery by CIENA, this Agreement constitutes, a legal, valid and binding obligation of the Company, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and other similar laws of general applicability relating to or affecting creditors' rights generally and by the application of general principles of equity.

(b) The Board of Directors of the Company has duly and unanimously approved this Agreement and the Merger and the other transactions contemplated hereby to which the Company is a party, and has recommended adoption thereof by the Stockholders.

**SECTION 2.5. No Conflict; Required Filings and Consents.**

(a) Except as set forth on **Schedule 2.5(a)**, the execution and delivery of this Agreement by the Company does not, and the performance by the Company of its obligations under this Agreement will not, (i) conflict with or violate the Company Certificate or the bylaws of the Company, (ii) conflict with or violate any Law applicable to the Company, or (iii) result in any breach of or constitute a default (or an event which with notice or lapse of time or both would become a default) under any note, bond, mortgage, indenture, contract, agreement, lease, license, permit, franchise or other instrument or obligation to which it is subject, except with respect to (ii) or (iii) above, for those instances which would not delay or affect the terms of the transactions contemplated hereby or would otherwise not reasonably be expected to have a Company Material Adverse Effect.

(b) Except as set forth in **Schedule 2.5(b)**, the execution and delivery of this Agreement by the Company does not, and the performance of this Agreement by the Company will not, require any consent, approval, authorization or permit of, or filing with or notification to, any Governmental Entity by the Company, except for (i) the filing of a Certificate of Merger under the DGCL, (ii) filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the Hart-Scott-Rodino Act), and (iii) state securities law filings.

(c) All consents and waivers required from any person in order to (i) carry out the transactions contemplated hereby under any contract, lease or agreement to which the Company is a party, or (ii) to assign such contract, lease or agreement to CIENA, are set forth on **Schedule 2.5(c)**, except for licenses of Widely Available Software.

**SECTION 2.6. Financial Statements.**

Attached hereto as **Schedule 2.6** are the audited balance sheets of the Company as of December 31, 2001, 2002 and 2003 and the audited statements of operations and cash flows for such periods (collectively, the Financial Statements). The audited financial statements referred to in this **Section 2.6** present fairly, in all material respects, the financial condition of the Company as of the respective dates and the results of operations and cash flows for the respective periods indicated and have been prepared in accordance with generally accepted accounting principles (GAAP) applied on a consistent basis. Except as set forth on **Schedule 2.6**, the Financial Statements are accompanied by unqualified audit reports of Deloitte & Touche LLP. Except as reflected in the most recent balance sheet of the Company contained in the Financial Statements, as of December 31, 2003 (the Balance Sheet Date), the Company had no liabilities, contingent or absolute, matured or unmatured, known or unknown, and knows of no basis for such liabilities, except for liabilities (a) not required under GAAP applied on a consistent basis with that of the preceding accounting periods to be reported on such Financial Statements, and (b) incurred in the Ordinary Course of Business.







(i) the current or past presence at any part of the Real Property of Hazardous Materials (as defined below) or any substances that pose a hazard, a harm or threatened harm to human health, the environment or an impediment to working conditions; (ii) the current or past release or threatened release into the environment from the Real Property (including, without limitation, into any storm drain, sewer, septic system or publicly owned treatment works) or arising from the Company's activities of any Hazardous Materials or any substances that pose a hazard, a harm or threatened harm to human health, the environment or an impediment to working conditions; (iii) the off-site disposal of Hazardous Materials originating on or from the Real Property or arising from the Company's activities; (iv) any facility operations or procedures of the Company which do not conform to requirements of the Environmental Laws; or (v) any violation of Environmental Laws at any part of the Real Property or otherwise arising from the Company's activities involving Hazardous Materials.

(b) The Company has been duly issued, and currently has all material permits, licenses, certificates and approvals required to be maintained by the Company under any Environmental Law with respect to the use of the Real Property by the Company and to conduct its activities. A true and complete list of such permits, licenses, certificates and approvals, all of which are valid and in full force and effect, is set out in **Schedule 2.12**. Except in accordance with such permits, licenses, certificates and approvals, there has been no discharge of any Hazardous Materials or any other material or substances regulated by such permits, licenses, certificates or approvals.

(c) To the Knowledge of the Company, none of the Real Property contains any underground or aboveground storage tanks, or underground or aboveground piping associated with such tanks, used currently or in the past for Hazardous Materials.

**SECTION 2.13. Litigation.**

Except as set forth on **Schedule 2.13**, the Company is not involved in any pending action, suit, investigation, claim, arbitration or litigation and, to the Knowledge of the Company, no such matter is threatened against or involving the Company or the Assets, at law or in equity, or before or by any court, arbitrator or Governmental Entity. The Company is not operating under, or subject to, any judgment, writ, order, injunction, award or decree of any court, judge, justice or magistrate, including any bankruptcy court or judge, or any order of or by any Governmental Entity. No property or Assets of the Company has been taken or expropriated by any federal, state, municipal or other Governmental Entity nor has any notice or proceeding with respect to thereof been given or commenced, nor, to the Company's Knowledge, is there any intent or proposal by any Governmental Entity to give any such notice or commence any such proceeding.

**SECTION 2.14. Compliance with Laws.**

The Company is in compliance in all respects with all Laws applicable to the Assets and its business and operations, including all Laws applicable to the Company's relationship with its employees except where noncompliance would not be reasonably expected to have a Company Material Adverse Effect.

**SECTION 2.15. Intellectual Property.**

(a) Except as set forth on **Schedule 2.15(a)**, the Company has all right, title, interest and license rights necessary to use all intellectual property used in the business of the Company as presently conducted and, to the Company's Knowledge, has the right, title, interest and license rights to use all intellectual property that is currently anticipated by the Company to be required to carry out the Company's product development and marketing plans through at least the next 6 months (the Intellectual Property Rights). Except as set forth on **Schedule 2.15(a)**, there are no claims or demands against the Company by any other Person pertaining to any of such Intellectual Property Rights and no proceedings have been instituted, or are pending or to the Knowledge of the Company, threatened, which challenge the rights of the Company in respect thereof. Except as set forth on **Schedule 2.15(a)**, the Company has the right to use, without infringing the rights of others, all customer lists, designs, manufacturing or other

processes, computer software, systems, data compilations, research results and other information required for or incident to its products or its business as presently conducted.

(b) **Schedule 2.15(b)** lists all patents, patent applications, registered trademarks, trademark applications and registrations and registered copyrights owned or licensed by or registered in the name of the Company or used by the Company in its business as presently conducted (other than registered copyrights in Widely Available Software (as defined below)). All of such patents, patent applications, registered trademarks, trademark applications and registrations and registered copyrights that are owned by the Company and, to the Company's Knowledge, all of such patents, patent applications, registered trademarks, trademark applications and registrations and registered copyrights that are licensed to the Company: (i) have been duly registered in, filed in or issued by the United States Patent and Trademark Office, the United States Register of Copyrights, or the corresponding offices of other jurisdictions as identified on **Schedule 2.15(b)**, and (ii) have been properly maintained and renewed in accordance with all applicable provisions of law and administrative regulations in the United States and each such jurisdiction except as set forth on **Schedule 2.15(b)**.

(c) All licenses or other agreements under which the Company is granted rights in Intellectual Property Rights are listed on **Schedule 2.15(c)** except for licenses of widely available shrink-wrap, click-wrap, freeware, open source or similarly licensed software (the foregoing being referred to collectively herein as Widely Available Software). All such licenses or other Agreements are in full force and effect, there is no material default by the Company or, to the Company's Knowledge, any party thereto. To the Knowledge of the Company, the licensors under such licenses and other agreements have and had all requisite power and authority to grant the rights purported to be conferred thereby. True and complete copies of all such licenses or other Agreements, and any amendments thereto, have been furnished to CIENA.

(d) All licenses or other agreements under which the Company has granted rights to others in Intellectual Property Rights owned or licensed by the Company are listed on **Schedule 2.15(d)** except for licenses of Widely Available Software. All of such licenses or other agreements are in full force and effect, there is no material default by the Company, or to the Company's Knowledge, by any party thereto. True and complete copies of all such licenses or other agreements, and any amendments thereto, have been furnished to CIENA.

(e) The Company has taken all reasonable steps it believes to be required in accordance with sound business practice to establish and preserve its ownership of all material copyright, trade secret and other proprietary rights with respect to its products and technology. The Company has required all professional and technical employees and independent contractors having access to valuable non-public information of the Company to execute agreements under which such persons are required to maintain the confidentiality of such information and appropriately restricting the use thereof. The Company does not have Knowledge of any infringement by others of any Intellectual Property Rights of the Company.

(f) To the Knowledge of the Company, except as set forth on **Schedule 2.15(f)**, the present business, activities and products of the Company do not infringe any Intellectual Property Rights of any other Person. No proceeding charging the Company with infringement of any Intellectual Property Rights has been filed or, to the Knowledge of the Company, is threatened or likely to be filed. Except as set forth on **Schedule 2.15(f)**, to the Knowledge of the Company, there exists no unexpired patent or patent application that includes claims that would be infringed by the products, activities or business of the Company. To the Knowledge of the Company, the Company is not making any unauthorized use of any confidential information or trade secrets of any Person, including without limitation, any customer of the Company, or any past or present employee of the Company. Except for customer contracts in the Ordinary Course of Business and confidentiality agreements by Employees with former employers, neither the Company nor, to the Knowledge of the Company, any of its employees have any agreements or arrangements with any Persons other than the Company related to confidential information or trade secrets of such Persons or restricting any such employee's engagement in business activities of any nature. The

activities of its employees on behalf of the Company do not violate any such agreements or arrangements known to the Company that would reasonably be expected to have a Material Adverse Effect.

(g) To the Knowledge of the Company, none of the current officers and employees of the Company has any issued patent or patent application pending for any device, process, design or invention of any kind used (currently or in the 12 months prior to the date hereof) by the Company, or is intended to be used by the Company or its successor in the future, which patent or patent application has not been assigned to the Company, with such assignment duly recorded in the patent office of the relevant jurisdiction. Binding, written assignments to the Company have been executed by all inventors for those patents and patent applications set forth on **Schedule 2.15(b)**.

**SECTION 2.16. Taxes and Assessments.**

Except as set forth on **Schedule 2.16**, the Company has (i) duly and timely paid all Taxes which have become due and payable by it, and there are no agreements, waivers or other arrangements providing for an extension of time with respect to the filing of any Tax Return or the payment of any Tax; (ii) received no written notice of, nor does the Company have any Knowledge of, any notice of deficiency or assessment or proposed deficiency or assessment from any taxing Governmental Entity; (iii) no Knowledge of any audits pending and there are no outstanding agreements or waivers by the Company that extend the statutory period of limitations applicable to any federal, state, local, or foreign tax returns or Taxes; and (iv) not entered into any discussions with any federal, state, local, or foreign authority with respect to any Tax asserted by such authority but not yet paid by the Company. Since the inception of the Company, the Tax Returns of the Company have never been audited by federal, state, local, or foreign authorities. There are no Liens for Taxes (other than Taxes not yet due and payable) on any property of the Company. The Company has withheld from each payment made to any of its past or present employees, officers or directors, and to any non-residents, the amount of Taxes and other deductions required to be withheld therefrom and have paid the same (or set aside for timely payment) to the proper Tax or other receiving officers within the time required under applicable Laws. The provision for Taxes of the Company, if any, as shown in the Financial Statements is adequate for Taxes due or accrued as of the date thereof.

**SECTION 2.17. Employment and Benefit Matters.**

(a) **Pension and Benefit Plans and Other Arrangements.** **Schedule 2.17(a)** lists each employee benefit plan, program, arrangement and contract (including, without limitation, any employee benefit plan as defined by Section 3(3) of ERISA), applicable to employees or former employees of the Company to which it has contributed or under which it has any material liability (collectively, the Company Benefit Plans ). The Company has made available to CIENA, to the extent they exist, a true and correct copy of (i) the most recent annual report (Form 5500 series) filed with the Internal Revenue Service (the IRS ) with respect to each Company Benefit Plan or similar report of the jurisdiction in which such employee benefit plan is located, (ii) each such Company Benefit Plan document and any amendments thereto, (iii) each trust agreement or other funding vehicle relating to each such Company Benefit Plan, (iv) the most recent summary plan description for each Company Benefit Plan for which a summary plan description is required, and (v) the most recent determination letter, if applicable, or opinion issued by the IRS with respect to any Company Benefit Plan qualified under Section 401(a) of the Code or similar report of the jurisdiction in which such employee benefit plan is located.

(b) **Compliance.** The Company has complied in all material respects with the terms of the Company Benefit Plans and all applicable provisions of the Code, ERISA, and all other applicable Laws pertaining to the Company Benefit Plans. The Company has no liability for any delinquent contributions within the meaning of Section 515 of ERISA (including, without limitation, related attorneys fees, costs, liquidated damages and interest) or for any arrearages of wages. The Company has no pending unfair labor practice charges, contract grievances under any collective bargaining agreement, other administrative charges, claims, grievances or lawsuits before any court, governmental agency, regulatory body, or arbiter

arising under any Law governing any Company Benefit Plan, and, to the Knowledge of the Company, there exist no facts that could reasonably be expected to give rise to such a claim.

(c) Collective Bargaining Agreements. There are no collective bargaining agreements applicable to the Company's employees and the Company has no duty to bargain with any labor organization with respect to any such persons. There is no pending demand for recognition or any other request or demand from a labor organization for representative status with respect to any persons employed by the Company.

(d) Employee Information. The Company has made available to CIENA a list of the names, positions and rates of compensation of all officers, directors, employees and consultants of the Company, as of the date hereof, showing each such person's name, positions, and annual remuneration, bonuses, accrued vacation, material fringe benefits and any severance or change of control agreement in place for the current fiscal year and the most recently completed fiscal year. With respect to any persons employed by the Company, the Company is in material compliance with all Laws respecting employment conditions and practices, has withheld all amounts required by any applicable Laws to be withheld and paid from wages, and the Company does not have any liability for any Taxes or penalties for failure to comply with any of the foregoing.

(e) Employment Practices. Except as set forth on **Schedule 2.17(e)**, with respect to any persons employed by the Company, (i) the Company has not engaged in any unfair labor practice within the meaning of the National Labor Relations Act and has not violated any legal requirement prohibiting discrimination on the basis of race, color, national origin, sex, religion, age, marital status, or handicap in its employment conditions or practices; and (ii) there are no pending or, to the Knowledge of the Company, threatened unfair labor practice charges or discrimination complaints relating to race, color, national origin, sex, religion, age, marital status, or handicap against the Company before any Governmental Entity nor, to the Knowledge of the Company, does any basis therefor exist.

(f) Contributions to the Company Benefit Plans. All contributions to, and payments from, each Company Benefit Plan which may have been required to be made in accordance with the terms of such plan, and, where applicable, the laws of the jurisdiction which govern such plan, have been made in a timely manner, and all material reports, returns and similar documents (including applications for approval of contributions) with respect to any Company Benefit Plan required to be filed with any Governmental Entity or distributed to any participant of such plan have been duly filed on a timely basis or properly distributed. No Company Benefit Plan is subject to Title IV of ERISA.

(g) Immigration Laws. The Company has complied, in all material respects, with all Laws governing the employment of personnel by U.S. companies and the employment of non-U.S. nationals in the United States, including, but not limited to, the Immigration and Nationality Act 8 U.S.C. Sections 1101 et seq. and its implementing regulations.

(h) Parachute Payments. Except as set forth on **Schedule 2.17(h)**, no amount required to be paid or payable to or with respect to any employee or other service provider of the Company in connection with the transactions contemplated hereby (either solely as a result thereof or as a result of such transactions in conjunction with any other event) will be an excess parachute payment within the meaning of Section 280G of the Code. **Schedule 2.17(h)** sets forth the name of each such employee or other service provider, any payments that may be classified as parachute payments and the agreements pursuant to which such payments may be made. No employee or other service provider of the Company is entitled to, or shall become entitled to, in connection with the transactions contemplated hereby, a tax gross-up payment from the Company with regard to parachute payments under Section 280G of the Code.

(i) COBRA. **Schedule 2.17(i)** sets forth a list of all persons who are current qualified beneficiaries (as defined in Section 4980B of the Code) as of the date hereof.

**SECTION 2.18. Transactions with Related Parties.**

Except (i) for standard confidentiality, assignment of invention and non-competition agreements, and stock option awards and restricted stock grants and awards on standard forms under the Company Stock

Plan, (ii) as set forth on **Schedule 2.18** and (iii) for any transactions between the Company and CIENA, neither any present or former officer, director, stockholder of the Company or person known by the Company to be an Affiliate of any of them, is currently a party to any transaction or agreement with the Company, including, without limitation, any loan, extension of credit or arrangement for the extension of credit, any agreement providing for the employment of, furnishing of services by, rental of Assets from or to, or otherwise requiring payments to, any such officer, director, stockholder or Affiliate.

**SECTION 2.19. Insurance and List of Claims.**

**Schedule 2.19** contains a list of all policies of title, property, fire, casualty, liability, life, workmen's compensation, libel and slander, and other forms of insurance of any kind relating to the business and operations of the Company in each case which are in full force and effect as of the date hereof. The Company has made available to CIENA true and correct copies of all such policies. All such policies: (a) are sufficient for compliance by the Company with all requirements of applicable Law and of all licenses, franchises and other agreements to which the Company is a party, except for instances in which non-compliance could not reasonably be expected to have a Company Material Adverse Effect and (b) are valid, outstanding, and enforceable policies. All premiums due and payable on all such policies have been paid. A true and complete list of all claims made since January 1, 2001 under any of the policies (or their predecessors) listed on **Schedule 2.19** is included on **Schedule 2.19**.

**SECTION 2.20. Brokers and Transaction Fees.**

Except for arrangements with Credit Suisse First Boston that are fully described in the engagement letter set forth on **Schedule 2.20**, no broker, finder, investment banker or other person is entitled to any brokerage, finder's or other fee or commission of any kind in connection with the transactions contemplated by this Agreement based upon arrangements made by or on behalf of any of the Company or any of its Affiliates.

**SECTION 2.21. Disclosure.**

True and complete copies of all documents listed in the Schedules have been made available or provided to CIENA. The books of account, stock record books and other financial and corporate records of the Company, including the minute books of the Company's Stockholders and Board of Directors, all of which have been made available to CIENA, are complete and correct in all material respects and have been maintained in accordance with good business practices, including the maintenance of an adequate system of internal accounting controls (as compared to similarly situated non-public companies), and such book and records are accurately reflected in the Financial Statements.

**SECTION 2.22. Absence of Violation.**

To the Knowledge of the Company, neither the Company, nor any of its officers, directors, employees or agents (or stockholders, distributors, representatives or other persons acting on the express, implied or apparent authority of any of the Company) has paid, given or received or have offered or promised to pay, give or receive, any bribe or other unlawful payment of money or other thing of value, any extraordinary discount, or any other unlawful inducement, to or from any person, business association or governmental official or entity in the United States or elsewhere in connection with or in furtherance of the business of the Company (including, without limitation, any unlawful offer, payment or promise to pay money or other thing of value (i) to any foreign official or political party (or official thereof) for the purposes of influencing any act, decision or omission in order to assist the Company in obtaining business for or with, or directing business to, any person, or (ii) to any person, while knowing that all or a portion of such money or other thing of value will be offered, given or promised to any such official or party for such purposes). To the Knowledge of the Company, the business of the Company is not in any manner dependent upon the making or receipt of such unlawful payments, discounts or other inducements.

**SECTION 2.23. Customers and Suppliers.**

Except as set forth on **Schedule 2.23**, the Company does not have Knowledge of (i) any termination or cancellation of (or any intent to terminate or cancel) the business relationship of the Company with (y) any single customer or any group of affiliated customers who represented five percent (5%) or more of the revenues or potential revenues of the business of the Company during the fiscal year ended December 31, 2003, or (z) any single supplier or any group of affiliated suppliers who accounted for five percent (5%) or more of the amounts payable to suppliers of the Company incurred during the fiscal year ended December 31, 2003, or (ii) any existing condition, state of facts or circumstances that in the reasonable judgment of the Company will cause the Company or any of its customers to terminate their relationships. To the Knowledge of the Company, none of the business or prospective business of the Company is in any manner dependent upon the making or receipt of any payments, discounts or other inducements to any officers, directors, employees, representatives or agents of any customer.

**SECTION 2.24. Information Supplied.**

The information provided by the Company and the Principal Officers to CIENA in writing specifically for use in the Prospectus (as defined below) does not and will not contain any untrue statements of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements contained therein not misleading.

**ARTICLE III**

**REPRESENTATIONS AND WARRANTIES OF CIENA**

CIENA represents and warrants to the Company as follows:

**SECTION 3.1. Organization and Qualification.**

CIENA is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. CIENA has the requisite power and authority to own, lease and operate its Assets and properties, to carry on its business as now being conducted and to perform the terms of this Agreement and the transactions contemplated hereby. CIENA is duly authorized or qualified to conduct its business in each jurisdiction where the ownership or leasing of its properties or the nature of its activities in connection with the conduct of its business makes such qualification necessary.

**SECTION 3.2. Certificate of Incorporation and Bylaws.**

CIENA has previously made available to Company complete and correct copies of CIENA's Certificate of Incorporation and its Bylaws, as amended to date (together, the CIENA Charter Documents). Such CIENA Charter Documents and equivalent organizational documents of each of its Subsidiaries are in full force and effect.

**SECTION 3.3. Authority.**

The execution and delivery of this Agreement by CIENA and the consummation by CIENA of the transactions contemplated hereby have been duly and validly authorized by all necessary corporate action and no other corporate proceedings on the part of CIENA are necessary to authorize this Agreement or to consummate the transactions contemplated hereby. This Agreement has been duly executed and delivered by CIENA and, assuming the due authorization, execution and delivery by the Company, constitutes a legal, valid and binding obligation of CIENA, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and other similar laws of general applicability relating to or affecting creditors' rights generally and by the application of general principles of equity.

**SECTION 3.4. No Conflict; Required Filings and Consents.**

(a) The execution and delivery of this Agreement by CIENA does not, and the performance by CIENA of its obligations under this Agreement will not, (i) conflict with or violate the CIENA Charter Documents, (ii) conflict with or violate any Law applicable to CIENA or its Assets and properties, or (iii) result in any breach of or constitute a default (or an event which with the notice or lapse of time or both would become a default) under any note, bond, mortgage, indenture, contract, agreement, lease, license, permit, franchise or other instrument or obligation to which CIENA is a party or by which CIENA is bound, or by which any of its properties or Assets is subject.

(b) The execution and delivery of this Agreement by CIENA does not, and the performance of this Agreement by CIENA will not, require any consent, approval, authorization or permit of, or filing with or notification to, any Governmental Entity other than (i) the filing of the Certificate of Merger under the DGCL, (ii) required filings with the Securities and Exchange Commission and NASDAQ, and (iii) filings under the Hart-Scott-Rodino Act.

**SECTION 3.5. Brokers.**

No broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission in connection with the transactions contemplated by this Agreement based upon arrangements made by or on behalf of CIENA, except for the fee to be paid by CIENA to Morgan, Stanley & Co. Incorporated.

**SECTION 3.6. Issuance of CIENA Common Stock.**

Upon consummation of the Merger, and as of the Effective Time, the CIENA Common Stock to be issued in the Merger will be duly and validly issued, fully paid and non-assessable, free and clear of all Encumbrances imposed by CIENA, except as contemplated hereby.

**SECTION 3.7. SEC Filings.**

CIENA has filed all reports required to be filed by it with the Securities and Exchange Commission (the "SEC") during the last twelve months (the "SEC Filings"). The SEC Filings (i) were prepared in accordance with the requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and (ii) did not, at the time they were filed, contain any untrue statements 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 light of the circumstances under which they were made, not misleading. Since the date of CIENA's last periodic report filed with the SEC there has been no event that has resulted in, or development that would reasonably be expected to result in, a CIENA Material Adverse Effect. The financial statements (including the related notes) of CIENA included in the SEC Filings complied, when filed, as to form in all material respects with applicable accounting requirements and the published rules and regulations of the SEC with respect thereto, were prepared in accordance with GAAP (except, in the case of unaudited statements, as permitted by Form 10-Q of the SEC) applied on a consistent basis during the periods involved (except as may be indicated in the notes thereto) and fairly presented in all material respects the consolidated financial position of CIENA and its consolidated Subsidiaries as of the dates thereof and their consolidated results of operations and cash flows for the periods then ended (subject, in the case of unaudited statements, to normal and recurring year-end audit adjustments and the absence of footnotes).

**SECTION 3.8 Litigation.**

Except as disclosed in CIENA's SEC Filings filed prior to the date hereof, there is no action, suit, investigation, claim, arbitration or litigation pending or, to the Knowledge of CIENA, threatened against or involving CIENA or its Assets or the business and operations of CIENA, at law or in equity, or before or by any court, arbitrator or Governmental Entity that would reasonably be expected to result in a CIENA Material Adverse Effect. Except under proceedings that have been disclosed in CIENA's SEC Filings filed

prior to the date hereof, CIENA is not operating under nor is it subject to any judgment, writ, order, injunction, award or decree of any court, judge, justice or magistrate, including any bankruptcy court or judge, or any order of or by any Governmental Entity. No property or Assets of CIENA has been taken or expropriated by any federal, state, provincial, municipal or other Governmental Entity nor has any notice or proceeding with respect to thereof been given or commenced nor is CIENA aware of any intent or proposal to give any such notice or commence any such proceeding.

**SECTION 3.9      Capitalization.**

The authorized capital stock of CIENA consists of 980,000,000 shares of common stock, \$0.01 par value per share, of which 474,947,608 shares are issued and outstanding as of February 17, 2004 and 20,000,000 shares of Preferred Stock, par value \$0.01 per share, none of which are issued and outstanding. Except (i) as described in public announcements by CIENA or in its SEC Filings, (ii) for shares issuable in the Merger Agreement, and (iii) for 50,836,231 shares issuable under outstanding stock options and 18,512,811 shares issuable under stock purchase plans and the shares issuable under the terms of the Rights Agreement, there are no options, warrants or other agreements obligating CIENA to issue or sell any shares of capital stock of, or other equity interests in CIENA. Except as disclosed in the SEC Filings, there are no outstanding obligations of CIENA to repurchase, redeem or otherwise acquire any shares of its capital stock. All of the issued and outstanding shares of CIENA capital stock have been duly authorized and validly issued in accordance with applicable laws and are fully paid and non-assessable and not subject to preemptive rights.

**SECTION 3.10      Absence of Certain Changes or Events.**

Since October 31, 2003, except as described in public announcements by CIENA or in its SEC Filings, announced or filed, as the case may be, prior to the date of this Agreement, there has not been: (i) any CIENA Material Adverse Effect, (ii) any declaration, setting aside or payment of any dividend on, or other distribution (whether in cash, stock or property) in respect of any of CIENA's capital stock, or any purchase, redemption or other acquisition by CIENA of any of CIENA's capital stock or any other securities of CIENA or any options, warrants, calls or rights to acquire any such shares or other securities except for repurchases from employees following their termination pursuant to the terms of their pre-existing stock option or purchase agreements, (iii) any split, combination or reclassification of any of CIENA's capital stock, or (iv) any material change by CIENA in its accounting methods, principles or practices, except as required by concurrent changes in GAAP, SEC rules and regulations and related interpretations.

**ARTICLE IV**

**COVENANTS**

**SECTION 4.1.      Conduct of Business Pending Closing.**

From the date hereof until the Closing or the termination of this Agreement, the Company shall:

- (i) maintain its existence in good standing;
- (ii) conduct its business in the Ordinary Course of Business, except as expressly permitted by this Agreement;
- (iii) maintain business and accounting records consistent with past practices, except as required by concurrent changes in GAAP and the application of SEC rules and regulations and related interpretations; and
- (iv) use commercially reasonable efforts (a) to preserve its business intact, (b) to keep available to the Company the services of its present officers and employees, and (c) to preserve for the Company the goodwill of its suppliers, customers and others having business relations with the Company.

**SECTION 4.2. Prohibited Actions Pending Closing.**

(a) Unless approved by the Company in writing (unless such approval would violate legal requirements) or if necessary in order to comply with applicable Laws, from the date hereof until Closing or termination of this Agreement, CIENA shall not:

(i) declare, set aside, or pay any dividends or make any other distributions (whether in cash, stock, equity securities or property) in respect to CIENA's capital stock, except where (A) an adjustment is made to the Exchange Ratios in accordance with **Section 1.6** (in the case of a dividend or distribution payable in shares of Company Common Stock only) or (B) the holders of Company Capital Stock will otherwise receive an equivalent, proportional dividend or distribution (based on the respective Exchange Ratios, as adjusted pursuant to **Section 1.6**) in connection with the Merger as if they had been holders of CIENA Common Stock on the record date for such dividend or distribution; or

(ii) agree in writing or otherwise take any of the actions described in **Section 4.2(a)(i)** above.

(b) Unless otherwise provided for herein or otherwise necessary in order to comply with Laws or the Company's obligations hereunder or approved by CIENA in writing (unless such approval would violate legal requirements), including, without limitation, by electronic mail, (which approval shall not be unreasonably withheld or delayed), from the date hereof until the Closing, the Company shall not:

(i) amend or otherwise change the Company Certificate or the bylaws of the Company, other than the Company Charter Amendment as set forth on **Schedule 4.2(b)** hereto;

(ii) issue or sell or authorize for issuance or sale (other than any issuance of Company Capital Stock upon the exercise of any outstanding option or warrant to purchase Company Capital Stock which option or warrant was issued prior to the date hereof in accordance with the terms of the relevant stock option or warrant agreement and the terms of which are disclosed on **Schedule 2.3** or which are subsequently issued in accordance with the succeeding limitations of this **Section 4.2(b)**), or grant any options or restricted stock or make other agreements with respect to, any shares of its capital stock or any other of its securities or modify the terms of existing stock options to purchase Company Capital Stock or restricted stock grants which have been issued under the Company Stock Plan, except that (A) stock options to purchase Company Common Stock or restricted stock grants may be granted under the Company Stock Plan to new hires in accordance with past practices, provided the exercise price per share of each such option is not less than the fair market value per share of Company Common Stock on the grant date, (B) the Company may carry out those provisions of any agreement with the Exchange Agent which provisions are in furtherance of this Agreement; and (C) the Company may enter into stock restriction agreements with employees of the Company upon the exercise of outstanding Company Options in the Ordinary Course of Business;

(iii) declare, set aside, make or pay any dividend or other distribution, payable in cash, stock, property or otherwise with respect to any of its capital stock;

(iv) reclassify, combine, split, subdivide or redeem, purchase or otherwise acquire, directly or indirectly, any of its capital stock except for repurchases of shares in connection with the termination of any employee or consultant pursuant to stock option, restricted stock purchase agreements or stock award agreements;

(v) incur any indebtedness for borrowed money or issue any debt securities (other than indebtedness owed to, or notes issued to CIENA pursuant to the Bridge Loan Agreement) or assume, guarantee or endorse, or otherwise as an accommodation become responsible for, the obligations of any Person, or make any loans or advances, except in the Ordinary Course of Business;

(vi) acquire (including, without limitation, by merger, consolidation, or acquisition of stock or Assets) any corporation, partnership, other business organization or any division thereof or any material amount of Assets;

- (vii) enter into any contract or agreement other than in the Ordinary Course of Business;
- (viii) authorize any capital commitment or capital lease which is in excess of \$100,000 or capital expenditures which are, in the aggregate, in excess of \$500,000;
- (ix) mortgage, pledge or subject to Encumbrance other than Permitted Encumbrances, any of its Assets or properties or agree to do so other than in the Ordinary Course of Business;
- (x) assume, guarantee or otherwise become responsible for the obligations of any other Person, or agree to do so;
- (xi) enter into or agree to enter into any employment agreement (other than offer letters for non-executive new hires entered into in the Ordinary Course of Business);
- (xii) except as required by any written agreement set forth on **Schedule 2.10 or 2.17** hereto, increase the compensation payable or to become payable to its officers or employees, or grant any severance or termination pay to, or enter into any severance agreement with any director, officer or other employee of the Company, or establish, adopt, enter into or amend any collective bargaining, bonus, profit sharing, thrift, compensation, stock option, restricted stock, pension, retirement, deferred compensation, employment, termination, severance or other plan, agreement, trust, fund, policy or arrangement for the benefit of any such director, officer or employee, except that the Company may make any amendments to existing employee benefit plans to the extent necessary to maintain their compliance with applicable Laws;
- (xiii) take any action to change in any respect its accounting policies or procedures (including, without limitation, procedures with respect to the payment of accounts payable and collection of accounts receivables), except as required by concurrent changes in GAAP and the application of SEC rules and regulations and related interpretations;
- (xiv) make any Tax election or settle or compromise any federal, state, local or foreign income Tax liability in excess of \$50,000;
- (xv) settle or compromise any pending or threatened suit, action or claim or initiate any litigation against any third party;
- (xvi) pay, discharge or satisfy any claim, liability or obligation (absolute, accrued, asserted or unasserted, contingent or otherwise), other than the payment, discharge or satisfaction (a) in the Ordinary Course of Business, of liabilities reflected or reserved against in the latest balance sheet included in the Financial Statements provided to CIENA or subsequently incurred in the Ordinary Course of Business in amounts not in excess of \$100,000, (b) of that Loan and Security Agreement between the Company and Comerica Bank, or (c) of that promissory note dated October 3, 2001 in the amount of \$1,500,000 payable by the Company to AT&T Corp., when and as the same becomes due in accordance with its terms;
- (xvii) sell, assign, transfer, license or sublicense, pledge or otherwise encumber any of the Intellectual Property Rights (other than in the Ordinary Course of Business); or
- (xviii) announce an intention, commit or agree to do any of the foregoing.

**SECTION 4.3. Access; Documents; Supplemental Information.**

(a) From and after the date hereof until the Closing, the Company shall afford, and, with respect to clause (ii) below, shall use its commercially reasonable best efforts to cause the independent certified public accountants for the Company to afford, (i) to the officers, independent certified public accountants, counsel and other representatives of CIENA, upon reasonable notice, free and full access at all reasonable times to the properties, books and records including tax returns filed and those in preparation of the Company and the right to consult with the officers, accountants, counsel and other representatives of the Company in order that CIENA may have full opportunity to make such investigations as it shall deem necessary of the operations, properties, business, financial condition and prospects of the Company, (ii) to

the independent certified public accountants of CIENA, free and full access at all reasonable times to the work papers and other records of the accountants relating to the Company, and (iii) to CIENA and its representatives, such additional financial and operating data and other information as to the properties, operations, business, financial condition and prospects of the Company as CIENA shall reasonably require from time to time.

(b) From the date of this Agreement until the Closing, the Company will furnish to CIENA copies of any notices, documents, requests, court papers, or other materials received from any governmental agency or any other third party with respect to the transactions contemplated by this Agreement.

**SECTION 4.4. No Solicitation.**

The Company shall not, nor shall it authorize or permit any of its Affiliates or any officer, director, employee, investment banker, attorney or other adviser or representative of the Company or any of its Affiliates to (a) solicit, initiate or encourage any Acquisition Proposal (as hereinafter defined), (b) enter into any agreement with respect to any Acquisition Proposal or (c) participate in any discussions or negotiations regarding, or furnish to any Person any information for the purpose of facilitating the making of, or take any other action to facilitate any inquiries or the making of, any proposal that constitutes, or may reasonably be expected to lead to, any Acquisition Proposal other than the transactions contemplated hereby; *provided, however*, that nothing contained in this Agreement shall prevent the Company or its Board of Directors or any officer, director, employee, investment banker, attorney or other adviser or representative of the Company, acting at the direction of and on behalf of the Company, at any time prior to the time the Merger has been approved by the Company's Stockholders from (aa) providing information in response to a request therefor by a Person who has delivered to the Company an unsolicited bona fide written Acquisition Proposal if the Company receives from the Person so requesting such information an executed confidentiality agreement the terms of which are (without regard to the terms of the Acquisition Proposal) (i) no less favorable to the Company and (ii) no less restrictive on the Person requesting such information than those contained in the Confidentiality Agreement; or (bb) engaging in negotiations or discussions with a Person who has delivered to the Company an unsolicited bona fide written Acquisition Proposal; if, and only to the extent that, in each such case referred to in clause (aa) or (bb) above, (x) the Board of Directors of the Company determines in good faith (after consultation with its financial advisor and outside legal counsel) that the Acquisition Proposal, if accepted, is reasonably likely to be consummated, (y) the Board of Directors of the Company determines in good faith (after consultation with its financial advisor) that the Acquisition Proposal would, if consummated, result in a transaction that is more favorable to the Company's Stockholders than the Merger (any Acquisition Proposal as to which such determinations are made being referred to in this Agreement as a Superior Proposal) and (z) the Board of Directors determines in good faith (after consultation with outside legal counsel) that the failure by the Board of Directors to require the Company to take such action would be inconsistent with the fiduciary duties of the Board of Directors to the Company's Stockholders under applicable law. Without limiting the foregoing, it is understood that any violation of the restrictions set forth in the immediately preceding sentence by any officer, director, employee, investment banker, attorney, employee, or other adviser or representative of the Company or any of its Affiliates, whether or not such Person is purporting to act on behalf of the Company or any of its Affiliates or otherwise, shall be deemed to be a breach of this **Section 4.4** by the Company, provided, however, that any action by a Person purporting to act on behalf of the Company without actual authority in violation of the restrictions in the immediately preceding sentence shall not be deemed to be a breach of this **Section 4.4** by the Company if the Company provides written notice to CIENA within one Business Day of the discovery of such action taken or being taken, disavows the actions taken or being taken by such Person in writing to CIENA and any third parties associated with the actions of such Person in violation of this **Section 4.4**, and promptly thereafter uses all commercially reasonable available means to cause such Person to refrain from taking any further action in violation of this **Section 4.4**. Nothing in this **Section 4.4** shall permit the Company to enter into any agreement, orally or in writing, with respect to an Acquisition Proposal during the term of this Agreement (other than a confidentiality agreement as described above). The Company promptly shall advise CIENA of any Acquisition Proposal (including the terms thereof and the identity of

the person making the Acquisition Proposal except to the extent the Company is prohibited from doing so by any applicable contractual confidentiality obligations) and inquiries with respect to any Acquisition Proposal and shall keep CIENA informed on a current basis of the status of any discussions regarding an Acquisition Proposal. Nothing herein shall prevent the Board of Directors from complying with Rule 14e-2 under the Exchange Act. Acquisition Proposal means any proposal for a merger or other business combination involving the Company or any proposal or offer to acquire in any manner, directly or indirectly, 20% or more of the equity securities or Assets of the Company (except for sales of products in the Ordinary Course of Business). Except as otherwise provided in this Agreement, the Company will, and will cause its Affiliates to, immediately cease any activities, discussions or negotiations existing as of the date of this Agreement with any Persons (other than CIENA and its representatives) conducted heretofore with respect to any Acquisition Proposal, and will not pursue, directly or indirectly, any Acquisition Proposal received on or prior to the date of this Agreement from any Person (other than CIENA and its representatives). The Company shall not release any third party from, or waive any provisions of, any confidentiality or standstill agreement relating to an Acquisition Proposal to which such party is a party.

**SECTION 4.5. Information Supplied.**

Each of the Company and CIENA agree that none of the information supplied or to be supplied by it for inclusion or incorporation by reference in (a) the Registration Statement on Form S-4 to be filed with the SEC by CIENA in connection with the issuance of shares of CIENA Common Stock in the Merger (including the proxy statement or information statement and prospectus (the Prospectus) constituting a part thereof) (the S-4 Registration Statement) will, at the time the S-4 Registration Statement becomes effective under the Securities Act of 1933, as amended (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, and (b) the Prospectus and any amendment or supplement thereto will, at the date of mailing to the Company's Stockholders, 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 were made, not misleading.

**SECTION 4.6. Stockholders Meeting.**

Whether or not the Board of Directors of the Company shall take any action permitted by the third sentence of this Section 4.6, the Company shall cause a meeting of its Stockholders (the Stockholders Meeting) to be duly called and held as soon as practicable after the date of this Agreement for the purpose of voting on the adoption of this Agreement and the Company Charter Amendment, or, subject to approval of CIENA, the Company shall solicit written consents of stockholders in lieu of a Stockholders Meeting. The Board of Directors of the Company shall (i) include in the Prospectus prepared therefor its recommendation in favor of adoption of the Merger Agreement and the Company Charter Amendment (the Board Recommendation) and (ii) use its reasonable best efforts to obtain the Company Requisite Stockholder Approval in favor of the adoption of this Agreement and the Company Charter Amendment. The Board of Directors of the Company shall not withdraw, amend, modify or qualify in a manner adverse to CIENA the Board Recommendation (or announce its intention to do so), except that, prior to the receipt of the Company Requisite Stockholder Approval, the Board of Directors of the Company shall be permitted to withhold, withdraw, amend, modify or materially qualify in a manner adverse to CIENA the Board Recommendation, following three Business Days prior notice to CIENA, but only if (A) the Company has complied in all respects with this Agreement, including Section 4.4, and (B) after consulting with outside legal counsel, the Board of Directors determines in good faith that to include the Board Recommendation or not withhold, withdraw, amend, modify or qualify the Board Recommendation would be inconsistent with its fiduciary duties to the Stockholders of the Company under applicable law.

**SECTION 4.7.  Filings; Other Actions; Notification.**

(a) CIENA shall prepare and file with the SEC the S-4 Registration Statement as promptly as practicable. CIENA shall use its reasonable best efforts to have the S-4 Registration Statement declared effective under the Securities Act as promptly as practicable after such filing, and promptly thereafter mail the Prospectus to the Stockholders of the Company. CIENA shall also use its reasonable best efforts to obtain prior to the effective date of the S-4 Registration Statement all necessary state securities law or blue sky permits and approvals required in connection with the Merger and to consummate the other transactions contemplated by this Agreement.

(b) The Company and CIENA each shall from the date hereof until the Effective Time cooperate with the other and use its reasonable best efforts to cause to be done all things necessary, proper or advisable on its part under this Agreement and applicable Laws to consummate and make effective the Merger and the other transactions contemplated by this Agreement as soon as practicable, including preparing and filing as promptly as practicable all documentation to effect all necessary notices, reports and other filings and to obtain as promptly as practicable all consents, registrations, approvals, permits and authorizations necessary or advisable to be obtained from any third party and/or any Governmental Entity, including filings under the Hart-Scott-Rodino Act, in order to consummate the Merger or any of the other transactions contemplated by this Agreement. CIENA and the Company will each advise the other promptly in respect of any understandings or arguments which either proposes to make or has made with applicable federal, state or foreign Governmental Entities having jurisdiction over or rights of review with respect to antitrust Laws, in connection with the Merger, and CIENA and the Company shall use their reasonable best efforts to seek to resolve any objections to the Merger as may be asserted by a Governmental Entity under applicable laws. Notwithstanding, the foregoing, nothing herein shall require CIENA, in connection with the receipt of any regulatory approval, to agree to sell or divest any material assets or business or agree to restrict in any material way any business conducted by or proposed to be conducted by CIENA or to litigate or formally contest any proceeding relating to any regulatory approval process in connection with the Merger.

(c) The Company and CIENA each shall, upon request by the other, furnish the other with all information concerning itself, its Subsidiaries, directors, executive officers and stockholders and such other matters as may be reasonably necessary or advisable in connection with the Prospectus, the S-4 Registration Statement or any other statement, filing, notice or application made by or on behalf of CIENA, the Company or any of their respective Subsidiaries to any third party and/or any Governmental Entity in connection with the Merger and the transactions contemplated by this Agreement.

(d) The Company shall cause Sonnenschein Nath & Rosenthal LLP, counsel to the Company, and CIENA shall cause Hogan & Hartson L.L.P., counsel to CIENA, to deliver a tax opinion for inclusion in the S-4 Registration Statement in the form required by the SEC. In rendering such opinions, Sonnenschein Nath & Rosenthal LLP, and Hogan & Hartson L.L.P. may require delivery of and rely upon representation letters delivered by CIENA and the Company in customary form.

(e) The Company and CIENA each shall keep the other apprised of the status of matters relating to completion of the transactions contemplated hereby.

**SECTION 4.8.  NASDAQ Listing.**

To the extent required by the rules of the National Association of Securities Dealers, Inc., as soon as practicable after the date hereof and in any event prior to the Effective Time, CIENA shall list on NASDAQ the shares of CIENA Common Stock to be issued in connection with the Merger and upon exercise of the Assumed Options and the Company Preferred Warrants (each as defined below).

**SECTION 4.9.  Company Options; Company Preferred Warrants.**

(a) Concurrent with the Effective Time, each Company Option which is outstanding immediately prior to the Effective Time pursuant to the Company Stock Plan in effect on the date hereof shall,

together with the Company Stock Plan, be assumed by CIENA and shall thereby be converted into an option (an Assumed Option ) to purchase the number of shares of CIENA Common Stock (decreased to the nearest full share) determined by multiplying (i) the number of shares of Company Common Stock subject to such Company Option immediately prior to the Effective Time by (ii) the Common Stock Exchange Ratio, at an exercise price per share of CIENA Common Stock (increased to the nearest whole cent) equal to the exercise price per share of Company Common Stock in effect under such Company Options immediately prior to the Effective Time divided by the Common Stock Exchange Ratio. Except for the foregoing adjustments and the Rights and except as contemplated by this **Section 4.9(a)**, all the terms and conditions in effect for each Assumed Option immediately prior to the Effective Time, including the vesting thereof under the Company Stock Plan, shall continue in effect following the assumption of such option in accordance with this Agreement. The Company agrees that it will not grant any stock appreciation rights or limited stock appreciation rights and will not permit cash payments to holders of Company Stock Options in lieu of the substitution therefor of Assumed Options. The Company shall take all actions necessary to assure that no acceleration of vesting of Assumed Options shall occur solely as a result of the Merger, except with respect to any Company Options, the terms of which are described on **Schedule 2.3(c)**, outstanding on the date of this Agreement that specifically provide for such acceleration of vesting. Notwithstanding the foregoing, any Continuing Employee terminated following the Closing under the circumstances described on **Schedule 4.9(a)** attached hereto shall be entitled to acceleration of vesting as described thereon.

(b) CIENA shall take all corporate action necessary to reserve for issuance a sufficient number of shares of CIENA Common Stock for delivery upon the exercise of the Assumed Options and the Company Preferred Warrants. As soon as practicable after the Effective Time, CIENA shall deliver to the holders of Company Options appropriate notices setting forth such holders' rights pursuant to CIENA's stock option plans and the agreements evidencing the grants of such Assumed Options and that such Assumed Options shall continue in effect on the same terms and conditions as the Company Options (subject to the adjustment set forth in this **Section 4.9**).

(c) As soon as practicable after the Effective Time, CIENA shall prepare and file with the SEC a registration statement on Form S-8 (or another appropriate form) registering a number of shares subject to the Assumed Options. Such registration statement shall be kept effective (and the current status of the prospectus required thereby shall be maintained in accordance with the relevant requirements of the Securities Act and the Exchange Act) at least for so long as any Assumed Options remain outstanding.

(d) Concurrent with the Effective Time, each warrant to purchase Company Preferred Stock that is then outstanding and exercisable described in **Schedule 2.3** (each, a Company Preferred Warrant ), without any action on the part of the holder, shall be deemed assumed by CIENA and shall constitute a warrant to acquire, on the same terms and conditions as were applicable under such Company Preferred Warrant, a number of shares of CIENA Common Stock equivalent to (A) the number of shares of Company Preferred Stock that could have been purchased immediately prior to the Effective Time under such Company Preferred Warrant multiplied by (b) the Preferred Stock Exchange Ratio for the series of Company Preferred Stock into which such Company Preferred Warrant is exercisable (rounded down to the nearest whole number), at a price per share of CIENA Common Stock (rounded up to the nearest whole cent) equal to the exercise price per share pursuant to such Company Preferred Warrant immediately prior to the Effective Time divided by the applicable Preferred Stock Exchange Ratio for the series of Company Preferred Stock into which such Company Preferred Warrant is exercisable. At or prior to the Effective Time, the Company shall make all necessary arrangements with respect to the Company Preferred Warrants to permit the assumption of the unexercised Company Preferred Warrants by CIENA pursuant to this **Section 4.9(d)**.

**SECTION 4.10. Notification of Certain Matters.**

The Company shall give prompt notice to CIENA, and CIENA shall give prompt notice to the Company, of (a) the occurrence, or non-occurrence, of any event which would be likely to cause (i) any representation or warranty contained in this Agreement to be untrue or inaccurate in any material respect

or (ii) any covenant, condition or agreement contained in this Agreement not to be complied with or satisfied; and (iii) any failure of the Company or CIENA, as the case may be, to comply with or satisfy any covenant, condition or agreement to be complied with or satisfied by it hereunder; provided that the delivery of any notice pursuant to this **Section 4.10** shall not limit or otherwise affect the remedies available to the party receiving such notice.

**SECTION 4.11. Reorganization.**

(a) Each of CIENA and the Company shall use its best efforts to cause the business combination to be effected by the Merger to be qualified as a reorganization described in Section 368(a) of the Code. CIENA shall not take or fail to take, or cause any Person to take or fail to take, any action which action or failure would reasonably be expected to cause the Merger to fail to qualify as a reorganization within the meaning of Section 368(a) of the Code.

(b) The Merger shall be reported as a reorganization within the meaning of Section 368(a) of the Code in all federal, and to the extent permitted, state and local Tax Returns filed after the Effective Time.

**SECTION 4.12. Indemnification.**

(a) From and after the Effective Time for a period of six years, CIENA shall fulfill the obligations of the Company to indemnify each person who is or was a director or officer of the Company against losses such person may incur based upon matters existing or occurring prior to the Effective Time pursuant to any applicable indemnification agreements and any indemnification provision of the Company Certificate or its bylaws as each is in effect on the date hereof.

(b) In the event a current or former director or officer of the Company is entitled to indemnification under this **Section 4.12**, such director or officer shall be entitled to reimbursement from CIENA (from and after the Closing Date) for reasonable attorney fees and expenses incurred by such director or officer in pursuing such indemnification, including payment of such fees and expenses by CIENA, in advance of the final disposition of such action upon receipt of an undertaking by such current or former director or officer to repay such payment if it shall be adjudicated that such current or former director or officer was not entitled to such payment.

(c) If CIENA or any of its successors or assigns (i) consolidates with or merges into any other Person and shall not be the continuing or surviving corporation or entity of such consolidation or merger, or (ii) transfers all of substantially all of its properties and assets to any Person, then, and in each such case, proper provision shall be made so that the successors and assigns of CIENA assume, as a matter of law or otherwise, the obligations set forth in this **Section 4.12**.

**SECTION 4.13. Employee Benefits Matters.**

(a) The Company will adopt, or will cause to be adopted, all necessary corporate resolutions to terminate the Company 401(k) Retirement Plan, and any other 401(k) Plan maintained by the Company, effective as of no later than one day prior to Closing. Immediately prior to such termination, the Company will make all necessary payments to fund the contributions: (i) necessary or required to maintain the tax-qualified status of the 401(k) Plan; (ii) for elective deferrals made pursuant to the 401(k) Plan for the period prior to termination; and (iii) for employer matching contributions for the period prior to termination. A 401(k) Plan means a qualified plan under Code Section 401(a) sponsored and maintained by the Company, which includes a qualified cash or deferred arrangement, as defined in Section 401(k) of the Code. The Company shall provide CIENA with a copy of resolutions duly adopted by the Company's board of directors terminating the 401(k) Plan. CIENA will take such steps as are reasonably necessary to ensure that CIENA's 401(k) Plan will permit Company employees to make individual rollover contributions to CIENA's 401(k) Plan of any eligible rollover distributions, as such term is defined in CIENA's 401(k) Plan, distributed by the Company 401(k) Plan. Effective as of the Closing Date, Continuing Employees (as defined below) will be eligible to participate in the CIENA 401(k) Plan.

(b) Following the Closing Date, CIENA shall arrange for employees of the Company who continue employment with CIENA ( Continuing Employees ) and Transitional Employees to participate in the benefit plans of CIENA ( CIENA Benefit Plans ) on terms no less favorable than those offered to similarly situated employees of CIENA, and CIENA shall use commercially reasonable efforts to ensure that Continuing Employees and Transitional Employees who are actually employed (or on approved absence or leave) and currently working for the Company at the Effective Time do not have a lapse of coverage in the transition from Company Benefit Plans to CIENA Benefit Plans. For purposes of any length of service requirements, waiting periods, vesting periods or differential benefits based on length of service under any CIENA Benefit Plan (including the CIENA 401(k) Plan) for which a Continuing Employee or a Transitional Employee may be eligible after the Closing Date, CIENA shall use its commercially reasonable efforts to ensure that service by such Continuing Employee or Transitional Employee, as the case may be, with the Company shall be deemed to have been service with CIENA.

(c) CIENA shall identify and submit to the Company a list of all Terminated Employees and Transitional Employees no later than 10 days prior to Closing. If a person is not listed as a Terminated Employee or a Transitional Employee on such list, then such person shall be a Continuing Employee.

**SECTION 4.14. Section 16.**

Assuming that the Company delivers to CIENA the Section 16 Information (as defined below) in a timely fashion, the Board of Directors of CIENA, or a committee of two or more Non-Employee Directors thereof (as such item is defined for purposes of Rule 16b-3 under the Exchange Act), shall adopt resolutions prior to the consummation of the Merger, providing that the receipt by the Company Insiders (as defined below) of CIENA Common Stock in exchange for capital stock of the Company pursuant to the transactions contemplated hereby and to the extent such securities are listed in the Section 16 Information, are intended to be exempt from liability pursuant to Section 16(b) under the Exchange Act. Such resolutions shall comply with the approval conditions of Rule 16b-3 under the Exchange Act for purposes of such Section 16(b) exemption, including, but not limited to, specifying the name of the Company Insiders, the numbers of securities to be acquired or disposed of for each such person, the material terms of any derivative securities, and that the approval is intended make the receipt of such securities exempt pursuant to Rule 16b-3(d). Section 16 Information shall mean information accurate in all respects regarding the Company Insiders, as well as the number of shares of capital stock of the Company held by each such Company Insider and expected to be exchanged for CIENA Common Stock in the Merger. Company Insiders shall mean those officers and directors of the Company whom CIENA notifies the Company prior to the Merger will be subject to the reporting requirements of Section 16(b) of the Exchange Act with respect to CIENA.

**ARTICLE V**

**CONDITIONS PRECEDENT**

**SECTION 5.1. Conditions Precedent to Each Party's Obligation to Effect the Merger.**

The respective obligations of each party hereto to effect the Merger shall be subject to the fulfillment or satisfaction, prior to or on the Closing Date of the following conditions:

(a) Approvals. All authorizations, consents, orders, declarations or approvals of, or filings with, or terminations or expirations of waiting periods imposed by (including without limitation, expiration of any Hart-Scott-Rodino waiting period), any Governmental Entity, shall be in effect, except where the failure to obtain, make or occur would not have the effect of making the Merger or any of the transactions contemplated hereby illegal or would not have a CIENA Material Adverse Effect or a Company Material Adverse Effect.

(b) Litigation. No court or Governmental Entity of competent jurisdiction shall have enacted, issued, promulgated, enforced or entered any Law, judgment, decree, injunction or other order (whether temporary, preliminary or permanent) that is in effect and restrains, enjoins or otherwise prohibits the

consummation of the Merger (collectively, an Order ) and no Governmental Entity shall have instituted any proceeding which continues to be pending seeking any such Order.

(c) S-4. The S-4 Registration Statement shall have become effective under the Securities Act. No stop order suspending the effectiveness of the S-4 Registration Statement shall have been issued, and no proceeding for that purpose shall have been initiated, or be threatened, by the SEC.

(d) Stockholder Approval. The Merger and the Company Charter Amendment shall have been duly approved by holders of Company Capital Stock constituting the Company Requisite Stockholder Approval. The Company Charter Amendment shall have been filed and become effective with the Secretary of State of the State of Delaware.

**SECTION 5.2. Conditions Precedent to CIENA's Obligations.**

The obligations of CIENA to effect the Merger shall be subject to the fulfillment or satisfaction, prior to or on the Closing Date, of each of the following conditions precedent:

(a) Performance of Obligations; Representations and Warranties. The Company shall have performed in all material respects and complied in all material respects with all agreements and covenants contained in this Agreement that are required to be performed or complied with by it prior to or at the Closing. The Company's representations and warranties contained in **Article II** of this Agreement shall be true and correct on and as of the Closing except (i) for changes permitted by this Agreement, (ii) to the extent that such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall be true and correct as of such earlier date and (iii) to the extent such failures to be true and correct would not, individually or in the aggregate, have a Company Material Adverse Effect. CIENA shall have received a certificate dated the Closing Date and signed by the Chief Executive Officer, President or a Vice President of the Company, certifying that the conditions specified in this **Section 5.2(a)** have been satisfied. In addition, the Company's Chief Executive Officer and Chief Financial Officer shall execute and deliver to CIENA a bring-down certification dated the Closing Date in the form attached as **Exhibit B** attached hereto.

(b) Consents. The Company shall have received consents or waivers, in form and substance reasonably satisfactory to CIENA from the other parties to the contracts, leases or agreements to which the Company is a party and which are set forth on **Schedule 5.2(b)**.

(c) Escrow Agreement. The Stockholder Representative shall have executed and delivered the Escrow Agreement substantially in the form attached hereto as **Exhibit D**, on behalf of all Stockholders other than the holders of Dissenting Shares.

(d) Opinion of Counsel. CIENA shall have received the favorable written opinions, dated the Closing Date, of (i) Sonnenschein Nath & Rosenthal LLP, counsel to the Company, in form satisfactory to CIENA, to the effect set forth in **Exhibit E** attached hereto, and (ii) the opinion of Hogan & Hartson L.L.P., counsel to CIENA, to the effect that the Merger will not result in taxation to CIENA under the Code. In rendering such opinion, Hogan & Hartson L.L.P. may require delivery of and rely upon representation letters delivered by CIENA in customary form.

(e) Affiliate Letters. CIENA shall have received an executed Affiliate Letter from each director and executive officer of the Company in substantially in the form attached hereto as **Exhibit A**, as applicable, and each such Affiliate Letter shall remain in effect as of the Closing Date.

(f) Comerica Loan. The Company shall have repaid all amounts outstanding under that certain Loan and Security Agreement between the Company and Comerica Bank dated as of December 20, 2002.

**SECTION 5.3. Conditions Precedent to the Company's Obligations.**

The obligations of the Company to effect the Merger shall be subject to the fulfillment or satisfaction, prior to or on the Closing Date, of each of the following conditions precedent:

(a) Performance of Obligations; Representations and Warranties. CIENA shall have performed in all material respects and complied in all material respects with all agreements and conditions contained in this Agreement that are required to be performed or complied with by it prior to or at the Closing. The representations and warranties of CIENA contained in Article III of this Agreement shall be true and correct except (i) for changes permitted by this Agreement, (ii) to the extent that such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall be true and correct as of such earlier date and (iii) to the extent such failures to be true and correct would not, individually or in the aggregate, have a CIENA Material Adverse Effect. The Company shall have received certificates dated the Closing Date and signed by the Chairman, President or a Senior Vice-President of CIENA, certifying that the conditions specified in this **Section 5.3(a)** have been satisfied.

(b) NASDAQ Listing. To the extent required by the rules of the National Association of Securities Dealers, Inc., CIENA shall have timely filed a Notification Form: Listing of Additional Shares with respect to the CIENA Common Stock to be issued in the Merger.

(c) Opinions of Counsel. The Company shall have received the favorable written opinions, dated the Closing Date, of (i) Hogan & Hartson L.L.P., counsel to CIENA, in form satisfactory to the Company, to the effect set forth in **Exhibit F** attached hereto, and (ii) Sonnenschein Nath & Rosenthal LLP, counsel to the Company, to the effect that the Merger will not result in the taxation to the Company Stockholders under the Code. In rendering such opinion, Sonnenschein Nath & Rosenthal LLP may require delivery of and rely upon representation letters delivered by the Company in customary form.

(d) Escrow Agreement. CIENA shall have executed and delivered the Escrow Agreement substantially in the form attached hereto as **Exhibit D**.

**ARTICLE VI**

**SURVIVAL OF REPRESENTATIONS AND WARRANTIES;  
INDEMNIFICATION**

**SECTION 6.1. Survival of Representations and Warranties.**

All of the Company's and CIENA's representations and warranties in this Agreement or in any instrument delivered pursuant to this Agreement shall survive the Merger and continue until the date which is one year following the Closing Date (the Indemnification Expiration Date), provided, however, that the Company's representations set forth in **Section 2.16** hereof shall survive until 60 days after the expiration (including extensions) of the applicable statute of limitations and the Company's representations set forth in the second sentence of **Section 2.3** shall survive indefinitely.

**SECTION 6.2. Indemnification by Stockholders; Escrow Agreement.**

(a) Indemnification. CIENA and its respective officers, directors and Affiliates (the CIENA Indemnified Parties) shall be indemnified and held harmless by the Stockholders (other than those dissenting stockholders exercising rights of appraisal under Section 262 of the DGCL who do not receive CIENA Common Stock in the Merger) against all claims, losses, liabilities, damages, deficiencies, costs and expenses, including reasonable attorneys' fees and expenses of investigation (hereinafter individually a Loss and collectively Losses) incurred prior to the Indemnification Expiration Date by the CIENA Indemnified Parties directly or indirectly as a result of: (i) any inaccuracy or breach of a representation or warranty of the Company or the Principal Officer's contained in this Agreement or contained in a certificate of any officer of the Company delivered pursuant to this Agreement (it being understood that, notwithstanding the Closing, CIENA shall be entitled to indemnification for any breach or inaccuracy of the Company's or Principal Officer's representations and warranties when made and as if made again on

the Closing Date except to the extent that such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall be as of such earlier date), (ii) any failure by the Company to perform or comply with any covenant or agreement contained in this Agreement, (iii) costs incurred by CIENA in responding to any exercise of dissenters' rights by any holder of Company Capital Stock, provided, however, that if any holders of Dissenting Shares successfully exercises dissenters' rights pursuant to **Section 1.7** and the DGCL, the Stockholders shall be responsible hereunder solely for the incremental costs incurred by the CIENA Indemnified Parties above and beyond the value of the CIENA Common Stock (determined on the basis of the average closing price thereof for the 10 days preceding the date hereof) that such holders would have received hereunder if such holder did not exercise dissenters' rights, or (iv) fees and expenses incurred by or on behalf of the Company or its Stockholders in excess of the amount set forth in **Section 7.1** hereof. Nothing herein shall limit the liability of the Company for any breach of any representation, warranty, covenant or agreement if the Merger is not consummated.

(b) Indemnification Threshold and Limitations.

(i) Except as set forth below, there shall be no liability for any Stockholder under **Section 6.2** unless the aggregate amount of Losses incurred by the CIENA Indemnified Parties exceeds \$500,000 (the CIENA Indemnification Threshold ) in the aggregate, in which event the entire aggregate amount of the Losses shall be indemnifiable pursuant to **Section 6.2(a)**, provided that any Loss incurred pursuant to clause (iv) of **Section 6.2(a)** shall be payable without reference to the CIENA Indemnification Threshold.

(ii) Subject to the last sentence of **Section 6.2(a)** and **Section 6.6**, the CIENA Indemnified Parties' sole and exclusive remedy for any Losses incurred directly or indirectly as a result of any of the items referred to in clauses (i) (other than Losses resulting from fraud or willful misrepresentation or Losses resulting from a breach of the representations contained in the second sentence of **Section 2.3**, in **Section 2.4(a)** or in **Section 2.16**), (ii), (iii), and (iv) of **Section 6.2(a)** shall be indemnification pursuant to this **Article VI**. Subject to the last sentence of **Section 6.2(a)** and **Section 6.6**, the liability of the Stockholders under and the right of the CIENA Indemnified Parties to seek such indemnification shall be limited solely and exclusively to the Escrow Amount (other than with respect to Losses resulting from fraud or willful misrepresentation or Losses resulting from a breach of the representations contained in the second sentence of **Section 2.3**, **Section 2.4(a)** or in **Section 2.16**).

(c) Satisfaction of Indemnification Obligations; Escrow Fund; Reimbursement Fund.

Each of the Stockholders (other than holders of Dissenting Shares) receiving CIENA Common Stock in the Merger will be deemed to have received and deposited with the Escrow Agent (as defined below) the Escrow Amount and the Reimbursement Amount (plus, in each case, any additional shares as may be issued upon any stock split, stock dividend or recapitalization effected by CIENA after the Effective Time with respect to the Escrow Amount or the Reimbursement Amount, as applicable). The Escrow Amount will be deposited with and will be held by an institution mutually acceptable to CIENA and the Stockholders' Representative (as defined in **Section 6.4**) as Escrow Agent (the Escrow Agent ), such deposit to constitute an escrow fund (the Escrow Fund ) to be governed by the terms set forth in the Escrow Agreement. Payment of any Loss from the Escrow Amount shall be taken ratably from the Escrow Shares (as defined in the Escrow Agreement). The Reimbursement Amount will be deposited with and will be held by the Escrow Agent, such deposit to constitute a reimbursement fund (the Reimbursement Fund ) to be governed by the terms set forth in the Escrow Agreement. Payment of any amount out of the Reimbursement Amount shall be taken ratably from the Reimbursement Shares (as defined in the Escrow Agreement).

**SECTION 6.3. Indemnification by CIENA.**

(a) Indemnification. The Stockholders and the Company and its respective officers, directors and Affiliates (the Company Indemnified Parties ) shall be indemnified and held harmless by CIENA

against all Losses incurred prior to the Indemnification Expiration Date by the Company Indemnified Parties directly or indirectly as a result of: (i) any inaccuracy or breach of a representation or warranty of CIENA contained in this Agreement or contained in a certificate of any officer of CIENA delivered pursuant to this Agreement (it being understood that, notwithstanding the Closing, the Stockholders shall be entitled to indemnification for breach or inaccuracies of representations and warranties when made and as if made again on the Closing Date except to the extent that such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall be as of such earlier date), or (ii) any failure by CIENA to perform or comply with any covenant or agreement contained in this Agreement. Nothing herein shall limit the liability of CIENA for any breach of any representation, warranty, covenant or agreement if the Merger is not consummated.

(b) Indemnification Threshold and Limitations.

(i) Except as set forth below, there shall be no liability for CIENA under **Section 6.3** unless the aggregate amount of Losses incurred by the Company Indemnified Parties exceeds \$500,000 (the Company Indemnification Threshold ) in the aggregate, in which event the entire aggregate amount of the Losses shall be indemnifiable pursuant to **Section 6.3(a)**, provided that the aggregate amount of Losses for which CIENA shall be liable shall in no event exceed the product of Aggregate Share Consideration and the Per Share Price, and provided further that any Loss incurred that is recovered or recoverable pursuant to **Section 4.12** hereunder shall be payable without reference to the Company Indemnification Threshold.

(ii) Subject to the last sentence of **Section 6.3(a)** and **Section 6.6**, the Company Indemnified Parties' sole and exclusive remedy for any Losses incurred directly or indirectly as a result of any of the items referred to in clauses (i) and (ii) of **Section 6.3(a)** shall be indemnification pursuant to this **Article VI**.

**SECTION 6.4. Stockholders Representative.**

(a) Appointment. Effective upon receipt of the Requisite Company Stockholder Approval and without any further action by the Stockholders, the Company and, by their approval and adoption of this Agreement, the Stockholders hereby appoint Sprout Capital IX, L.P. as agent and attorney-in-fact (the Stockholders Representative ) for each Stockholder receiving CIENA Common Stock in the Merger, for and on behalf of the Stockholders. The Stockholders Representative shall have full power and authority to represent all of the Stockholders and their successors with respect to all matters arising under this Agreement and the Escrow Agreement and all actions taken by the Stockholders Representative hereunder and thereunder shall be binding upon all such Stockholders and their successors as if expressly confirmed and ratified in writing by each of them and no Stockholder shall have the right to object, dissent, protest or otherwise contest the same. The Stockholders Representative shall take any and all actions which it believes are necessary or appropriate under this Agreement and the Escrow Agreement for and on behalf of the Stockholders, as fully as if the Stockholders were acting on their own behalf, including, without limitation, executing the Escrow Agreement as Stockholders Representative, giving and receiving any notice or instruction permitted or required under this Agreement or the Escrow Agreement by the Stockholders Representative or any Stockholder, interpreting all of the terms and provisions of this Agreement and the Escrow Agreement, authorizing payments to be made with respect hereto or thereto, obtaining reimbursement as provided for herein for all out-of-pocket fees and expenses and other obligations of or incurred by the Stockholders Representative in connection with this Agreement and the Escrow Agreement, defending all indemnity claims against the Stockholders pursuant to **Section 6.2** of this Agreement (an Indemnity Claim ), consenting to, compromising or settling all Indemnity Claims, conducting negotiations with CIENA and its agents regarding such claims, dealing with CIENA and the Escrow Agent under this Agreement and the Escrow Agreement with respect to all matters arising under this Agreement and the Escrow Agreement, taking any and all other actions specified in or contemplated by this Agreement and the Escrow Agreement, and engaging counsel, accountants or other Stockholders Representatives in connection with the foregoing matters. Without limiting the generality of the foregoing, the Stockholders Representative shall have full power and authority to interpret all the terms and

provisions of this Agreement and the Escrow Agreement and to consent to any amendment hereof or thereof on behalf of all such Stockholders and such successors. Notwithstanding the foregoing, each Stockholder shall have the right to exercise any voting rights appertaining to the Escrow Shares and the Reimbursement Shares.

(b) Authorization. The Company hereby authorizes the Stockholders Representative, on its and the Stockholders behalf (and by their approval of this Agreement and the Merger, the Stockholders hereby authorize the Stockholders Representative), to:

(i) Receive all notices or documents given or to be given to any of the Stockholders by CIENA pursuant hereto or to the Escrow Agreement or in connection herewith or therewith and to receive and accept service of legal process in connection with any suit or proceeding arising under this Agreement or the Escrow Agreement;

(ii) Deliver to CIENA at the Closing all certificates and documents to be delivered to CIENA by any of the Stockholders pursuant to this Agreement, together with any other certificates and documents executed by any of the Stockholders and deposited with the Stockholders Representative for such purpose;

(iii) Engage counsel, and such accountants and other advisors for any of the Stockholders and incur such other expenses on behalf of any of the Stockholders in connection with this Agreement or the Escrow Agreement and the transactions contemplated hereby or thereby as the Stockholders Representative may in its sole discretion deem appropriate; and

(iv) Take such action on behalf of any of the Stockholders as the Stockholders Representative may in its sole discretion deem appropriate in respect of:

(A) waiving any inaccuracies in the representations or warranties of CIENA contained in this Agreement or in any document delivered by CIENA pursuant hereto;

(B) waiving the fulfillment of any of the conditions precedent to the Company's obligations hereunder or pursuant to the Escrow Agreement;

(C) taking such other action as the Stockholders Representative or any of the Stockholders is authorized to take under this Agreement or the Escrow Agreement;

(D) receiving all documents or certificates and making all determinations, on behalf of any of the Stockholders, required under this Agreement or the Escrow Agreement;

(E) all such other matters as the Stockholders Representative may in its sole discretion deem necessary or appropriate to consummate this Agreement or the Escrow Agreement and the transactions contemplated hereby and thereby; and

(F) all such action as may be necessary after the Closing Date to carry out any of the transactions contemplated by this Agreement and the Escrow Agreement, including, without limitation, the defense and/or settlement of any claims for which indemnification is sought pursuant to **Article VI** and any waiver of any obligation of CIENA.

All actions, decisions and instructions of the Stockholders Representative shall be conclusive and binding upon all of the Stockholders and no Stockholder nor any other Person shall have any claim or cause of action against the Stockholders Representative, and the Stockholders Representative shall have no liability to any Stockholder or any other Person, for any action taken, decision made or instruction given by the Stockholders Representative in connection with the Escrow Agreement or this Agreement, except in the case of his own gross negligence or willful misconduct.

(c) Indemnification of Stockholders Representative. The Stockholders Representative shall incur no liability to the Stockholders or the Escrow Agent or any other person with respect to any action taken or suffered by it in reliance upon any note, direction, instruction, consent, statement or other documents reasonably believed by the Stockholders Representative to be genuinely and duly authorized by holders of

not less than a 61% interest in the Escrow Fund, nor for other action or inaction taken or omitted in good faith in connection herewith or with the Escrow Agreement, in any case except for liability to the Stockholders for its own gross negligence or willful misconduct. The Stockholders Representative shall be indemnified for and shall be held harmless against any loss, liability or expense incurred by the Stockholders Representative or any of its Affiliates and any of their respective partners, directors, officers, employees, agents, stockholders, consultants, attorneys, accountants, advisors, brokers, representatives or controlling persons, in each case relating to the Stockholders Representative's gross negligence or willful misconduct in connection with its performance under this Agreement and the Escrow Agreement. This indemnification shall survive the termination of this Agreement. The costs of such indemnification (including the costs and expenses of enforcing this right of indemnification) shall be paid from the principal portion of the Reimbursement Fund (or, to the extent the Reimbursement Fund is insufficient to satisfy such costs and expenses, from the Escrow Fund). For all purposes hereunder, a majority in interest of the Stockholders shall be determined on the basis of each Stockholder's ownership of Company Common Stock immediately prior to the Effective Time (assuming the exercise or conversion of all Company Preferred Stock and Company Warrants outstanding immediately prior to the Effective Time). The Stockholders Representative may, in all questions arising under this Agreement, rely on the advice of counsel, independent public accountants and other experts selected by it, and for anything done, omitted or suffered in good faith by the Stockholders Representative in accordance with such advice, the Stockholders Representative shall not be liable to the Stockholders or the Escrow Agent or any other person. In no event shall the Stockholders Representative be liable hereunder or in connection herewith for (i) any indirect, punitive, special or consequential damages, or (ii) any amounts other than those that are satisfied out of the Reimbursement Fund or, to the extent provided for herein, the Escrow Fund. The Escrow Agent shall from time to time sell such amount of the Escrow Shares as necessary to pay such Stockholders Representative's costs and expenses, to the extent that the Reimbursement Fund is insufficient for such purpose.

(d) Access to Information. The Stockholders Representative shall have reasonable access to information of and concerning any Indemnity Claim and which is in the possession, custody or control of CIENA and the reasonable assistance of CIENA's officers and employees for purposes of performing the Stockholders Representative's duties under this Agreement or the Escrow Agreement and exercising its rights under this Agreement and the Escrow Agreement, including for the purpose of evaluating any Indemnity Claim against the Escrow Amount by CIENA; provided that the Stockholders Representative shall treat confidentially and not, except in connection with enforcing its rights or the rights of the Stockholders hereunder or under this Agreement and the Escrow Agreement, disclose any nonpublic information from or concerning any Indemnity Claim to anyone (except to the Stockholders Representative's attorneys, accountants or other advisers, to Stockholders, to the arbitrators appointed to resolve disputes pursuant to this Agreement, and on a need-to-know basis to other individuals who agree to keep such information confidential).

(e) Reasonable Reliance. In the performance of his duties hereunder, the Stockholders Representative shall be entitled to rely upon any document or instrument reasonably believed by him to be genuine, accurate as to content and signed by any Stockholder or CIENA. The Stockholders Representative may assume that any person purporting to give any notice in accordance with the provisions hereof has been duly authorized to do so.

(f) Attorney-in-Fact.

(i) The Stockholders Representative is hereby appointed and constituted the true and lawful attorney-in-fact of each Stockholder other than a holder of Dissenting Shares, with full power in his, her or its name and on his, her or its behalf to act according to the terms of this Agreement and the Escrow Agreement in the absolute discretion of the Stockholders Representative; and in general to do all things and to perform all acts including, without limitation, executing and delivering the Escrow Agreement and any other agreements, certificates, receipts, instructions, notices or instruments contemplated by or deemed advisable in connection with the Escrow Agreement.

(ii) This power of attorney and all authority hereby conferred is granted and shall be irrevocable and shall not be terminated by any act of any Stockholder, by operation of law, whether by such Stockholder's death, disability or protective supervision or by any other event. Without limitation to the foregoing, this power of attorney is to ensure the performance of a special obligation and, accordingly, each Stockholder hereby renounces its, his or her right to renounce this power of attorney unilaterally any time before the end of the Escrow Period (as such term is defined in the Escrow Agreement).

(iii) Each Stockholder hereby waives any and all defenses which may be available to contest, negate or disaffirm the action of the Stockholders' Representative taken in good faith under the Escrow Agreement.

(iv) Notwithstanding the power of attorney granted in this **Section 6.4**, no agreement, instrument, acknowledgement or other act or document shall be ineffective by reason only of the Stockholders having signed or given such directly instead of the Stockholders' Representative.

(g) **Liability.** If the Stockholders' Representative is required by the terms hereof or the Escrow Agreement to determine the occurrence of any event or contingency, the Stockholders' Representative shall, in making such determination, be liable to the Stockholders only for his proven gross negligence or willful misconduct as determined in light of all the circumstances, including the time and facilities available to him in the ordinary conduct of business. In determining the occurrence of any such event or contingency, the Stockholders' Representative may request from any of the Stockholders or any other person such reasonable additional evidence as the Stockholders' Representative in his sole discretion may deem necessary to determine any fact relating to the occurrence of such event or contingency, and may at any time inquire of and consult with others, including any of the Stockholders, and the Stockholders' Representative shall not be liable to any Stockholder for any damages resulting from his delay in acting hereunder pending his receipt and examination of additional evidence requested by him.

(h) **Orders.** The Stockholders' Representative is authorized, in his sole discretion, to comply with final, nonappealable orders or decisions issued or process entered by any court of competent jurisdiction or arbitrator with respect to the Escrow Fund or the Reimbursement Fund. If any portion of the Escrow Fund or the Reimbursement Fund is disbursed to the Stockholders' Representative and is at any time attached, garnished or levied upon under any court order, or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such property or any part thereof, then and in any such event, the Stockholders' Representative is authorized, in his sole discretion, but in good faith, to rely upon and comply with any such order, writ, judgment or decree which he is advised by legal counsel selected by him is binding upon him without the need for appeal or other action; and if the Stockholders' Representative complies with any such order, writ, judgment or decree, he shall not be liable to any Stockholder or to any other Person by reason of such compliance even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

(i) **Removal of Stockholders' Representative; Authority of Successor Stockholders' Representative.** Stockholders (or the successors or assigns thereto) who in the aggregate hold not less than a 61% interest in the Escrow Fund shall have the right at any time during the term of the Escrow Agreement to remove the then-acting Stockholders' Representative and to appoint a successor Stockholders' Representative; provided, however, that neither such removal of the then acting Stockholders' Representative nor such appointment of a successor Stockholders' Representative shall be effective until the delivery to the Escrow Agent of executed counterparts of a writing signed by each such Stockholder with respect to such removal and appointment, together with an acknowledgment signed by the successor Stockholders' Representative appointed in such writing that he or she accepts the responsibility of successor Stockholders' Representative and agrees to perform and be bound by all of the provisions of this Agreement and the Escrow Agreement applicable to the Stockholders' Representative. Each successor Stockholders' Representative shall have all of the power, authority, rights and privileges conferred by this Agreement upon the original Stockholders' Representative, and the term Stockholders' Representative as used

herein and in the Escrow Agreement shall be deemed to include any interim or successor Stockholders Representative.

(j) Expenses of the Stockholders Representative. The Stockholders Representative shall be entitled to withdraw cash amounts held in the Reimbursement Fund (or as provided for in the Escrow Agreement from the Escrow Fund) in reimbursement for out-of-pocket fees and expenses (including legal, accounting and other advisors fees and expenses, if applicable) incurred by the Stockholders Representative in performing under this Agreement and the Escrow Agreement. The Stockholders (i) shall have no claim or cause of action against, may not assert any claim against, and shall indemnify and hold harmless the Stockholders Representative and each of its Affiliates and any of their respective partners, directors, officers, employees, agents, stockholders, consultants, attorneys, accountants, advisors, brokers, representatives or controlling persons, as provided for in **Section 6.4(c)** above; and (ii) shall pay to the Stockholders Representative, promptly upon request, such Stockholders pro rata share of any amounts paid by the Stockholders Representative on behalf of the Stockholders and all costs and expenses (including legal, accounting and other advisors fees and expenses, if applicable) incurred by the Stockholders Representative in connection with the protection, defense or enforcement of any rights under this Agreement or the Escrow Agreement to the extent such costs, expenses and other amounts exceed the amount available to the Stockholders Representative in the Reimbursement Fund or the Escrow Fund.

(k) Irrevocable Appointment. Subject to **Section 6.4(i)**, the appointment of the Stockholders Representative hereunder is irrevocable and any action taken by the Stockholders Representative pursuant to the authority granted in this **Section 6.4** shall be effective and absolutely binding on the Company and each stockholder thereof notwithstanding any contrary action of, or direction from, the Company or any Stockholder, except for actions taken by the Stockholders Representative which are in bad faith.

(l) CIENA's Reliance. CIENA shall not be obliged to inquire into the authority of the Stockholders Representative, and CIENA shall be fully protected in dealing with the Stockholders Representative in good faith.

(m) Binding Appointment. The provisions of this Agreement, including without limitation **Article VI** hereof, shall be binding upon each Stockholder and the executors, heirs, legal representatives and successors of each Stockholder, and any references in this Agreement to a Stockholder or the Stockholders shall mean and include the successors to the Stockholders rights hereunder, whether pursuant to testamentary disposition, the laws of descent and distribution or otherwise.

#### **SECTION 6.5. Defense of Third Party Claims.**

With respect to any claims or demands by third parties as to which CIENA may seek indemnification hereunder, whenever CIENA will have received a written notice that such a claim or demand has been asserted or threatened, CIENA will promptly notify the Stockholders Representative of such claim or demand and of the facts within CIENA's knowledge that relate thereto within a reasonable time after receiving such written notice. The Stockholders Representative will then have the right to defend, contest, negotiate or settle any such claim or demand through counsel of its own selection (who shall be reasonably acceptable to CIENA), at the Stockholders own cost and expense, which costs and expenses will be payable out of the Reimbursement Fund and the Escrow Fund as provided for in the Escrow Agreement, and CIENA shall cooperate with and assist the Stockholders Representative in the defense of such claim or demand. Notwithstanding the preceding sentence, the Stockholders Representative will not settle, compromise, or offer to settle or compromise any such claim or demand unless CIENA and the CIENA Indemnified Parties are unconditionally released or without the prior written consent of CIENA, which consent will not be unreasonably withheld. If the Stockholders Representative gives notice to CIENA within twenty Business Days after CIENA has notified the Stockholders Representative that any such claim or demand has been made in writing, that the Stockholders Representative elects to have CIENA defend, contest, negotiate, or settle any such claim or demand, then CIENA will have the right to contest and/or settle any such claim or demand and the Stockholders Representative shall cooperate with and assist CIENA in the defense of such claim or demand, *provided, however*, that CIENA will not settle,

compromise, or offer to settle or compromise any such claim or demand without the prior written consent (which may include a general or limited consent) of the Stockholders' Representative, which consent will not be unreasonably withheld. In the event that the Stockholders' Representative has consented to any settlement, the Stockholders shall have no power or authority to object under any provision of this Agreement to the amount of such settlement.

**SECTION 6.6. Maximum Payments; Remedy.**

Notwithstanding anything to the contrary herein, the existence of this Article and of the rights and restrictions set forth herein do not limit any legal remedy against the parties hereto for claims based on fraud. No Stockholder shall have any right to contribution from the Company for any claim made by CIENA or the Surviving Company with respect to any Loss claimed by CIENA after the Effective Time.

**ARTICLE VII**

**GENERAL; TERMINATION**

**SECTION 7.1. Expenses.**

Regardless of whether or not the transactions contemplated hereby have been consummated at the Closing, each party hereto shall pay its own expenses incidental to the preparation of this Agreement, the carrying out of the provisions of this Agreement and the consummation of the transactions contemplated hereby. Following the Effective Time, CIENA will not be liable for the Company's expenses in connection with the Merger (including bankers, accountants and lawyers, as well as any payments required in connection with consents to be obtained, employee entitlements as a result of change in control or non-standard severance provisions (excluding customary and usual severance and any accelerated vesting of Company Options required by **Section 4.9** hereof or pursuant to any agreement between CIENA and any holder of Company Options to be effective as of the Effective Time), tax gross-ups or otherwise) in excess of \$3,000,000, and any expenses in excess thereof shall be recoverable by CIENA to the extent necessary from the Escrow Amount.

**SECTION 7.2. Press Releases.**

Neither the Company nor CIENA shall issue any press release or otherwise make public any information with respect to this Agreement nor the transactions contemplated hereby, prior to the Closing, without the prior written consent of the other, except as may be required by law or Nasdaq regulations. Notwithstanding the prior sentence, the parties shall issue a joint initial press release announcing the execution of this Agreement as may be mutually agreed.

**SECTION 7.3. Contents of Agreement; Parties in Interest; Etc.**

This Agreement and the agreements referred to or contemplated herein and the letter agreement dated June 1, 2003, concerning confidentiality (the Confidentiality Agreement) set forth the entire understanding of the parties hereto with respect to the transactions contemplated hereby, and, except as set forth in this Agreement, such other agreements and the Exhibits hereto and the Confidentiality Agreement, there are no representations or warranties, express or implied, made by any party to this Agreement with respect to the subject matter of this Agreement and the Confidentiality Agreement. Except for the matters set forth in the Confidentiality Agreement, any and all previous agreements and understandings between or among the parties regarding the subject matter hereof, whether written or oral, are superseded by this Agreement and the agreements referred to or contemplated herein.

**SECTION 7.4. Assignment and Binding Effect.**

This Agreement may not be assigned by either party hereto without the prior written consent of the other party. All the terms and provisions of this Agreement shall be binding upon and inure to the benefit of and be enforceable by the respective successors and assigns of the parties hereto.

**SECTION 7.5. Termination.**

(a) Termination by Mutual Consent. This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time, whether before or after the approval by Stockholders of the Company referred to in **Section 5.1(d)**, by mutual written consent of the Company and CIENA.

(b) Termination by Either CIENA or the Company. This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time by action of the Board of Directors of either CIENA or the Company if (i) the Merger shall not have been consummated by July 31, 2004, whether such date is before or after the date of approval by the Stockholders of the Company (the Termination Date ); (ii) the approval of Stockholders required by **Section 5.1(d)** shall not have been obtained at the Stockholders Meeting or at any adjournment or postponement thereof, or, subject to **Section 4.6**, by the Company s solicitation of the written consent of Stockholders in lieu of the Stockholders Meeting, or (iii) any Order permanently restraining, enjoining or otherwise prohibiting consummation of the Merger shall become final and non-appealable; provided, that the right to terminate this Agreement pursuant to clause (i) above shall not be available to any party that has breached its obligations under this Agreement in any manner that shall have caused the occurrence of the failure of the Merger to be consummated or the stockholder approval to be obtained.

(c) Termination by the Company. This Agreement may be terminated and the Merger may be abandoned at any time prior to the receipt of the approval of the Company s Stockholders required by **Section 5.1(d)**, by action of the Board of Directors of the Company:

(i) if (A) the Company is not in material breach of any of the terms of this Agreement, (B) the Board of Directors of the Company authorizes the Company, subject to complying with the terms of this Agreement, to enter into a binding written agreement concerning a transaction that constitutes a Superior Proposal and the Company notifies CIENA in writing that it intends to enter into such an agreement, attaching the most current version of such agreement to such notice if available or, if not available, including all material terms and conditions of such agreement in the notice, (C) CIENA does not make, within two Business Days of receipt of the Company s written notification of its intention to enter into a binding agreement for a Superior Proposal, an offer that the Board of Directors of the Company determines, in good faith after consultation with its outside legal counsel and its financial advisors, is at least as favorable to the Stockholders of the Company as the Superior Proposal, and (D) the Company prior to such termination pays to CIENA in immediately available funds the fees required to be paid pursuant to **Section 7.5(e)**. The Company agrees (1) that it will not enter into a binding agreement referred to in clause (B) above until at least the third Business Day after it has provided the notice to CIENA required thereby and (2) to notify CIENA promptly if its intention to enter into a written agreement referred to in its notification shall change at any time after giving such notification; or

(ii) if it is not in material breach of its obligations under the Agreement and there is a breach by CIENA of any material representation, warranty, covenant or agreement contained in this Agreement and such breach has not been cured within ten (10) days after written notice thereof to CIENA, or such breach cannot be cured, and would cause a condition set forth in **Section 5.3** to be incapable of being satisfied.

(d) Termination by CIENA. This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time, whether before or after the receipt of the approval of the Company s Stockholders required by **Section 5.1(d)**, by written notice given to the Company by CIENA:

(i) if the Company or its Board of Directors shall have (A) withdrawn, modified or amended in any respect adverse to CIENA its recommendation of the adoption of this Agreement or failed to reconfirm its recommendation of this Agreement or the Merger within three Business Days after a written request by CIENA to do so ( Change in the Board Recommendation ), or

(B) recommended or entered into an agreement with respect to, or consummated, any Acquisition Proposal from a person other than CIENA or any of its Affiliates; or

(ii) if it is not in material breach of its obligations under the Agreement and there is a breach by the Company of any material representation, warranty, covenant or agreement contained in this Agreement and such breach has not been cured within ten (10) days after written notice thereof to the Company or such breach cannot be cured and would cause a condition set forth in **Section 5.2** to be incapable of being satisfied.

(e) Effect of Termination and Abandonment.

(i) In the event of termination of this Agreement and the abandonment of the Merger pursuant to this **Section 7.5**, this Agreement (other than as set forth in this **Section 7.5(e)**) shall become void and of no effect with no liability on the part of any party hereto (or of any of its directors, officers, employees, agents, legal and financial advisors or other representatives); provided, however, except as otherwise provided herein, no such termination shall relieve any party hereto of any liability or damages resulting from any willful breach of this Agreement.

(ii) In the event that this Agreement is terminated (A) by the Company pursuant to **Section 7.5(c)(i)** or (B) by CIENA pursuant to **Section 7.5(d)(i)**, then the Company shall (1) promptly, but in no event later than the earlier of the date of such termination or date of entrance into an agreement concerning an Acquisition Proposal or such earlier time as required by this Agreement, pay to CIENA a termination fee of \$6,000,000 (the Termination Fee) payable by wire transfer of same day funds and (2) in no event later than two Business Days after CIENA shall have requested payment of its charges and expenses incurred in connection with the transactions contemplated hereby, pay to CIENA the amount of such charges and expenses up to a maximum of \$500,000 payable by wire transfer of same day funds.

(iii) In the event that this Agreement is terminated pursuant to **Section 7.5(b)(ii)** and at or prior to the time of the Company Stockholders Meeting, or subject to **Section 4.6**, at or prior to the expiration date in connection with the Company's solicitation of written consents of Stockholders in lieu of the Stockholders Meeting, any Person shall have made an Acquisition Proposal to the Company or any of its Stockholders or shall have publicly announced an intention (whether or not conditional) to make an Acquisition Proposal with respect to the Company (the Triggering Proposal), if within 12 months of such termination the Company enters into an agreement concerning a transaction with the person that made that Triggering Proposal, the Company shall (A) at the time of entering into such agreement, pay to CIENA the Termination Fee payable by wire transfer of same day funds and (B) in no event later than two Business Days after CIENA shall have requested payment of its charges and expenses incurred in connection with the transactions contemplated hereby, pay to CIENA the amount of such charges and expenses incurred in connection with the transactions contemplated hereby up to a maximum of \$500,000 payable by wire transfer of same day funds.

(iv) The Company and CIENA each acknowledge that the agreements contained in **Sections 7.5(e)(ii) and (iii)** are an integral part of the transactions contemplated by this Agreement, and that, without these agreements, the Company and CIENA would not enter into this Agreement; accordingly, if the Company fails to promptly pay the amounts due pursuant to this Section, and, in order to obtain such payment, CIENA commences a suit which results in a judgment against the Company for the fees set forth in this **Section 7.5**, the Company shall pay to CIENA its costs and expenses (including attorneys' fees) in connection with such suit, together with interest from the date of termination of this Agreement on the amounts owed at the prime rate of Wachovia Bank, N.A. in effect from time to time during such period plus two percent.

**SECTION 7.6. Definitions.**

As used in this Agreement the terms set forth below shall have the following meanings:

(a) *Affiliate* of a Person means any other Person who directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with such Person. Control means the possession of the power, directly or indirectly, to direct or cause the direction of the management and policies of a Person whether through the ownership of voting securities, by contract or otherwise.

(b) *Assets* means assets of every kind and everything that is or may be available for the payment of liabilities (whether inchoate, tangible or intangible), including, without limitation, real and personal property but excluding Intellectual Property Rights.

(c) *Business Day* means a day other than Saturday or Sunday or a day on which banks are required or authorized to close in the State of Maryland or Delaware.

(d) *CIENA Material Adverse Effect* means a material adverse effect on the business, financial condition, Assets, liabilities or results of operations of CIENA and its Subsidiaries, taken as a whole; provided, however, that none of the following shall be deemed in themselves, either alone or in combination, to constitute, and none of the following shall be taken into account in determining whether there has been or will be, a CIENA Material Adverse Effect: (a) any adverse change, effect, event, occurrence, state of facts or development to the extent attributable to the announcement of the Merger (including any cancellations of or delays in customer orders, any reduction in sales, any disruption in supplier, distributor, partner or similar relationships or any loss of employees but only to the extent attributable to the announcement of the Merger); (b) any adverse change, effect, event, occurrence, state of facts or development attributable to conditions generally affecting the industries in which CIENA participates, the U.S. economy as a whole or foreign economies in any locations where CIENA has material operations, sales, suppliers or customers; or (c) any adverse change, effect, event, occurrence, state of facts or development resulting from or relating to compliance with the terms of, or the taking of any action required by, this Agreement.

(e) *Code* means the Internal Revenue Code of 1986, as amended.

(f) *Company Material Adverse Effect* means a material adverse effect on the business, financial condition, Assets, liabilities or results of operations of the Company; provided, however, that none of the following shall be deemed in themselves, either alone or in combination, to constitute, and none of the following shall be taken into account in determining whether there has been or will be, a Company Material Adverse Effect: (a) any adverse change, effect, event, occurrence, state of facts or development to the extent attributable to the announcement of the Merger (including any cancellations of or delays in customer orders, any reduction in sales, any disruption in supplier, distributor, partner or similar relationships or any loss of employees but only to the extent attributable to the announcement of the Merger); (b) any adverse change, effect, event, occurrence, state of facts or development attributable to conditions generally affecting the industries in which Company participates, the U.S. economy as a whole or foreign economies in any locations where Company has material operations, sales, suppliers or customers; or (c) any adverse change, effect, event, occurrence, state of facts or development resulting from or relating to compliance with the terms of, or the taking of any action required by, this Agreement.

(g) *Encumbrances* means Liens, security interests, deeds of trust, encroachments, reservations, orders of Governmental Entities, decrees, judgments, contract rights, claims or equity of any kind.

(h) *Environmental Laws* means all applicable federal, state, provincial, municipal, local or foreign laws, rules and regulations, bylaws, orders, decrees, judgments, common law theories based on nuisance, trespass, negligence or other tortious conduct, permits, filings and licenses relating (i) to protection and clean-up of the environment and activities or conditions related thereto, including those relating to the generation, handling, disposal, recycling, transportation or release of Hazardous

Materials and (ii) the health or safety of employees in the workplace environment, all as amended from time to time.

(i) *ERISA* means the Employee Retirement Income Security Act of 1974, as amended, and all Laws promulgated pursuant thereto or in connection therewith.

(j) *Exchange Agent* means a bank or trust company designated as the exchange agent by CIENA (which designation shall be reasonably acceptable to the Stockholders Representative).

(k) *Exchange Ratios* means the respective exchange ratios set forth in **Section 1.5(c)**.

(l) *Governmental Entity* means any United States or other national, state, provincial, municipal or local government, domestic or foreign, any subdivision, agency, entity, commission or authority thereof, or any quasi-governmental or private body exercising any regulatory, taxing, importing or other governmental or quasi-governmental authority.

(m) *Hazardous Materials* means any and all hazardous and toxic substances, wastes or materials, any pollutants, contaminants, radioactives or dangerous materials (including, but not limited to, polychlorinated biphenyls, PCBs, friable asbestos, volatile and semi-volatile organic compounds, oil, petroleum products and fractions, and any materials which include hazardous constituents or become hazardous, toxic, or dangerous when their composition or state is changed), or any other similar substances or materials which are included under or regulated by any Environmental Laws, provided, however, that such term shall not include any such substances intended for routine consumer or household use to the extent used in reasonable quantities and in material compliance with Environmental Laws.

(n) *Knowledge of the Company* or *Company's Knowledge* means the actual knowledge of the Company's Chief Executive Officer, Chief Financial Officer or Chief Technology Officer.

(o) *Laws* means all foreign, federal, state, provincial, municipal and local statutes, laws, ordinances, regulations, rules, policies, codes, resolutions, orders, determinations, writs, injunctions, awards (including, without limitation, awards of any arbitrator), judgments and decrees applicable to the specified persons or entities.

(p) *Liens* means any mortgage, pledge, lien, security interest, conditional or installment sale agreement, encumbrance, charge or other claims of third parties of any kind.

(q) *Ordinary Course of Business* means all actions taken by a Person if such action is consistent with the past practices of such Person and is taken in the ordinary course of the normal day-to-day operations of such Person.

(r) *Out of Money Options* means any Company Options outstanding at Closing, vested or unvested, with an exercise price equal to or greater than \$1.00 per share of Company Common Stock.

(s) *Permitted Encumbrances* means (i) Liens for Taxes not yet due or which are being contested in good faith by appropriate proceedings and for which adequate reserves have been established in accordance with applicable generally accepted accounting principles; (ii) such minor encumbrances, easements or reservations of, or rights of others for, sewers, electric lines, telegraph and telephone lines and other similar purposes, or zoning restrictions as to the use of real properties, which do not materially interfere with the use, occupation and enjoyment of the property subject to the Lien by and in connection with the applicable business; (iii) Liens incurred in the Ordinary Course of Business in connection with workers' compensation, unemployment insurance and other types of social security; (iv) Liens in favor of customs authorities arising as a matter of law to secure payment of customs duties in connection with the importation of goods to the extent accrued on the relevant Financial Statements, and (v) mechanic's and materialmen's Liens arising by operation of law for sums not in default.

(t) *Person* means any individual, corporation, partnership, limited partnership, limited liability company, trust, association or entity or government agency or authority.

(u) *Principal Officers* means the Company's Chief Executive Officer and Chief Financial Officer.

(v) *Tax* (and, with correlative meaning, *Taxes* and *Taxable*) means any federal, state, local or foreign net income, gross income, gross receipts, windfall profit, severance, property, production, sales, use, license, excise, franchise, employment, payroll, withholding, alternative or add-on minimum, ad valorem, value-added, transfer, stamp, or environmental tax, or any other tax, custom, duty, governmental fee or other like assessment or charge of any kind whatsoever, together with any interest or penalty, addition to tax or additional amount imposed by any taxing governmental entity.

(w) *Tax Return* means any return, report or similar statement required to be filed with respect to any Tax (including any attached schedules), including, without limitation, any information return, claim for refund, amended return or declaration of estimated Tax.

(x) *Terminated Employees* means any employees of the Company identified by CIENA as employees expected to be terminated by CIENA as of the Effective Time, and any other employees who are terminated by CIENA immediately following the Effective Time.

(y) *Transitional Employees* means any employees of the Company identified by CIENA as employees expected to remain employed by CIENA or the Surviving Company for a period not exceeding six (6) months following the Effective Time.

**SECTION 7.7. Notices.**

Any notice, request, demand, waiver, consent, approval, or other communication which is required or permitted to be given to any party hereunder shall be in writing and shall be deemed given only if delivered to the party personally or by nationally recognized overnight courier, or sent to the party by facsimile transmission (promptly followed by a hard-copy delivered in accordance with this **Section 7.7**) or by registered or certified mail (return receipt requested), with postage and registration or certification fees thereon prepaid, addressed to the party at its address set forth below:

*If to CIENA:*

CIENA Corporation  
1201 Winterson Road  
Linthicum, Maryland 21090  
Attention: General Counsel

*with a copy to:*

Hogan & Hartson L.L.P.  
111 South Calvert Street, 16th Floor  
Baltimore, Maryland 21202  
Attention: Michael J. Silver

*If to the Company:*

Internet Photonics, Inc.  
1030 Broad Street, Suite 200  
Shrewsbury, NJ 07702-4330  
Attention: Steven M. Waszak

*with a copy to:*

Sonnenschein Nath & Rosenthal LLP  
1221 Avenue of the Americas  
New York, NY 10020  
Attention: Michael R. Flynn

*If to the Stockholders Representative:*

Sprout Capital IX, L.P.  
Eleven Madison Avenue, 26th Floor  
New York, New York 10010  
Attention: Wayne Nemeth  
Telecopy: (212) 538-8245

or to such other address or Person as any party may have specified in a notice duly given to the other party as provided herein. Such notice, request, demand, waiver, consent, approval or other communication will be deemed to have been given as of the date so delivered, faxed or mailed.

**SECTION 7.8. Amendment.**

This Agreement may be amended, modified or supplemented (i) at any time prior to the Effective Time, by mutual agreement of the respective Boards of Directors of the Company and CIENA, except as provided in Section 251(d) of the DGCL and (ii) at any time after the Effective Time, by mutual agreement of CIENA and the Stockholders Representative. Any amendment, modification or revision of this Agreement and any waiver of compliance or consent with respect hereto shall be effective only if in a written instrument executed by the parties hereto.

**SECTION 7.9. Governing Law.**

This Agreement shall be governed by and interpreted and enforced in accordance with the laws of the State of Delaware as applied to contracts made and fully performed in such state.

**SECTION 7.10. No Benefit to Others.**

The representations, warranties, covenants and agreements contained in this Agreement are for the sole benefit of the parties hereto, and their respective successors and assigns, and they shall not be construed as conferring, and are not intended to confer, any rights on any other Person except as provided in **Articles I, IV and VI**.

**SECTION 7.11. Severability.**

If any term or other provision of this Agreement is determined to be invalid, illegal or incapable of being enforced by any rule of law or public policy, all other terms and provisions of the Agreement shall remain in full force and effect. Upon such determination, the parties hereto shall negotiate in good faith to modify this Agreement so as to give effect to the original intent of the parties to the fullest extent permitted by applicable law.

**SECTION 7.12. Section Headings.**

All section headings are for convenience only and shall in no way modify or restrict any of the terms or provisions hereof.

**SECTION 7.13. Schedules and Exhibits.**

All Schedules and Exhibits referred to herein are intended to be and hereby are specifically made a part of this Agreement.

**SECTION 7.14. Extensions.**

At any time prior to the Effective Time, CIENA, on the one hand, and the Company on the other may by corporate action, extend the time for compliance by or waive performance of any representation, warranty, condition or obligation of the other party subject to the provisions of **Section 7.8** regarding the manner of waiver.

**SECTION 7.15. Counterparts.**

This Agreement may be executed, including by facsimile, in two or more counterparts, each of which shall be deemed an original, and the Company and CIENA may become a party hereto by executing a counterpart hereof. This Agreement and any counterpart so executed shall be deemed to be one and the same instrument.

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**IN WITNESS WHEREOF**, the parties hereto, intending to be legally bound hereby, have duly executed this Agreement and Plan of Merger as of the date first above written.

**CIENA CORPORATION**

By: /s/ GARY B. SMITH

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Name: Gary B. Smith  
Title: President and Chief Executive Officer

**INTERNET PHOTONICS, INC.**

By: /s/ STEVEN M. WASZAK

---

Name: Steven M. Waszak  
Title: Chief Financial Officer

**PRINCIPAL OFFICERS**

By: /s/ GREGORY W. KOSS

---

Gregory W. Koss

By: /s/ STEVEN M. WASZAK

---

Steven M. Waszak

**STOCKHOLDERS REPRESENTATIVE**

Solely with respect to Section 6.4:  
Sprout Capital IX, L.P.

By: DLJ Capital Corporation,  
its managing general partner

By: /s/ WAYNE L. NEMETH

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Name: Wayne L. Nemeth  
Title: Director

**GLOSSARY OF DEFINED TERMS**

<i>DEFINED TERM</i>	<i>LOCATION OF DEFINITION</i>
Acquisition Proposal	Section 4.4
Affiliate	Section 7.6
Agreement	Preamble
Assets	Section 7.6
Assumed Option	Section 4.9
Balance Sheet Date	Section 2.6
Board Recommendation	Section 4.6
Business Day	Section 7.6
Certificate of Merger	Section 1.1
Certificates	Section 1.8
Change in Board Recommendation	Section 7.5
CIENA	Preamble
CIENA Benefit Plans	Section 4.13
CIENA Charter Documents	Section 3.2
CIENA Common Stock	Section 1.5
CIENA Indemnification Threshold	Section 6.2
CIENA Indemnified Parties	Section 6.2
CIENA Material Adverse Effect	Section 7.6
Closing	Section 1.1
Closing Date	Section 1.1
Code	Section 7.6
Common Stock Exchange Ratio	Section 1.5
Company	Preamble
Company Benefit Plans	Section 2.17
Company Capital Stock	Recitals
Company Certificate	Section 2.2
Company Charter Amendment	Section 2.2
Company Common Stock	Recitals
Company Indemnification Threshold	Section 6.3
Company Indemnified Parties	Section 6.3
Company Material Adverse Effect	Section 7.6
Company Options	Section 2.3
Company Preferred Stock	Recitals
Company Preferred Warrants	Section 4.9
Company Requisite Stockholder Approval	Section 2.4
Company Stock Plan	Section 2.3
Confidentiality Agreement	Section 7.3
Continuing Employees	Section 4.13
Contracts	Section 2.10
DGCL	Recitals
Dissenting Shares	Section 1.7
Effective Time	Section 1.1
Encumbrances	Section 7.6
Environmental Laws	Section 7.6
ERISA	Section 7.6
Escrow Agent	Section 6.2
Escrow Amount	Section 1.8
Escrow Fund	Section 6.2
Exchange Act	Section 3.7

<i>DEFINED TERM</i>	<i>LOCATION OF DEFINITION</i>
Exchange Agent	Section 7.6
Exchange Fund	Section 1.8
Exchange Ratios	Section 7.6
Financial Statements	Section 2.6
GAAP	Section 2.6
Governmental Entity	Section 7.6
Hart-Scott-Rodino Act	Section 2.5
Hazardous Materials	Section 7.6
Indemnification Expiration Date	Section 6.1
Indemnity Claim	Section 6.4
Intellectual Property Rights	Section 2.15
IRS	Section 2.17
Knowledge of the Company or Company's Knowledge	Section 7.6
Laws	Section 7.6
Liens	Section 7.6
Loss	Section 6.2
Losses	Section 6.2
Merger	Recitals
NASDAQ	Section 1.5
Order	Section 5.1
Ordinary Course of Business	Section 7.6
Out of Money Options	Section 7.6
Permitted Encumbrances	Section 7.6
Per Share Price	Section 1.5
Person	Section 7.6
Principal Officers	Section 7.6
Prospectus	Section 4.5
Reimbursement Amount	Section 1.8
Reimbursement Fund	Section 6.2
Real Property	Section 2.11
Right	Section 1.5
Rights Agreement	Section 1.5
S-4 Registration Statement	Section 4.5
SEC	Section 3.7
SEC Filings	Section 3.7
Securities Act	Section 4.5
Series A Preferred Stock	Recitals
Series B Preferred Stock	Recitals
Series C Preferred Stock	Recitals
Series D Preferred Stock	Recitals
Series E Preferred Stock	Recitals
Stockholders	Section 1.5
Stockholders Meeting	Section 4.6
Stockholders Representative	Section 6.4
Superior Proposal	Section 4.4
Surviving Corporation	Section 1.1
Tax	Section 7.6
Tax Return	Section 7.6
Terminated Employees	Section 7.6
Termination Date	Section 7.5

*DEFINED TERM*

Termination Fee  
Transitional Employees  
Triggering Proposal

*LOCATION OF DEFINITION*

Section 7.5  
Section 7.6  
Section 4.6

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**FIRST AMENDMENT TO AGREEMENT AND PLAN OF MERGER**

**THIS FIRST AMENDMENT TO AGREEMENT AND PLAN OF MERGER** (this First Amendment ) is made as of March 17, 2004 by and among **CIENA CORPORATION**, a Delaware corporation ( CIENA ), and **INTERNET PHOTONICS, INC.**, a Delaware corporation (the Company ).

**RECITALS**

**WHEREAS**, CIENA, the Principal Officers and the Company are parties to that certain Agreement and Plan of Merger dated as of February 18, 2004 (the Merger Agreement );

**WHEREAS**, the Company desires to adopt the INTERNET PHOTONICS, INC. RETENTION PLAN in the form attached hereto as Schedule A (the Plan ) and to make payments pursuant to the terms of the Plan to the persons indicated therein;

**WHEREAS**, CIENA and the Company desire to amend certain terms of the Merger Agreement to permit the adoption of the Plan and payment of such amounts contemplated thereunder; and

**NOW, THEREFORE**, in consideration of the foregoing and the mutual representations, warranties, covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto intending to be legally bound do hereby agree as follows:

**SECTION 1. Amendments to Merger Agreement**

The following amendments to the Merger Agreement are made hereby:

1.1 Amendment to Section 1.5(c) of the Merger Agreement. The definition of Aggregate Share Consideration in Section 1.5(c) is hereby deleted and the following inserted in lieu thereof:

24,080,843 shares of CIENA Common Stock

1.2 Amendment to Sections 4.2(b)(vii), (viii), (xi) and (xii) of the Merger Agreement. Sections 4.2(b)(vii), (viii), (xi) and (xii) are hereby amended to read in their entirety as follows:

(vii) enter into any contract or agreement other than in the Ordinary Course of Business except for the Internet Photonics, Inc. Retention Plan and the payment obligations thereunder (the Plan );

(viii) authorize any capital commitment or capital lease which is in excess of \$100,000 or capital expenditures which are, in the aggregate, in excess of \$500,000 (other than pursuant to the Plan);

(xi) enter into or agree to enter into any employment agreement (other than the Plan or any offer letters for non-executive new hires entered into in the Ordinary Course of Business);

(xii) except as required by any written agreement set forth on **Schedule 2.10** or **2.17** hereto, increase the compensation payable or to become payable to its officers or employees other than pursuant to the Plan, or grant any severance or termination pay to, or enter into any severance agreement with any director, officer or other employee of the Company, or establish, adopt, enter into or amend any collective bargaining, bonus, profit sharing, thrift, compensation, stock option, restricted stock, pension, retirement, deferred compensation, employment, termination, severance or other plan, agreement, trust, fund, policy or arrangement for the benefit of any such director, officer or employee other than the Plan, except that the Company may make any amendments to existing employee benefit plans to the extent necessary to maintain their compliance with applicable Laws;

1.3 Amendment to Section 5.2(a) of the Merger Agreement. Section 5.2(a) is hereby amended to read in its entirety as follows:

(a) Performance of Obligations; Representations and Warranties. The Company shall have performed in all material respects and complied in all material respects with all agreements and covenants



contained in this Agreement that are required to be performed or complied with by it prior to or at the Closing. The Company's representations and warranties contained in **Article II** of this Agreement shall be true and correct on and as of the Closing except (i) for changes permitted by this Agreement, (ii) to the extent that such representations and warranties expressly relate to an earlier date, in which case such representations and warranties shall be true and correct as of such earlier date, (iii) to the extent that such representations and warranties would be rendered untrue or incorrect solely as a result of the adoption of the Plan and payment of any amounts thereunder expressly permitted under **Sections 4.2(b)(xi) and (xii)**, and (iv) to the extent such failures to be true and correct would not, individually or in the aggregate, have a Company Material Adverse Effect. CIENA shall have received a certificate dated the Closing Date and signed by the Chief Executive Officer, President or a Vice President of the Company, certifying that the conditions specified in this **Section 5.2(a)** have been satisfied. In addition, the Company's Chief Executive Officer and Chief Financial Officer shall execute and deliver to CIENA a bring-down certification dated the Closing Date in the form attached as **Exhibit B** attached hereto.

1.4 Amendment to Section 6.2(b) of the Merger Agreement. Section 6.2(b) is hereby amended by inserting a new clause (iii) as follows:

(iii) Notwithstanding anything in this Agreement to the contrary, the CIENA Indemnified Parties shall not be entitled to indemnification for any Losses incurred directly or indirectly as a result of (A) any inaccuracy or a representation or breach of a warranty of the Company contained in this Agreement or contained in any certificate described in **Section 5.2(a)**, or (B) any failure by the Company to perform or comply with any covenant or agreement contained in this Agreement, in each case to the extent that such inaccuracy, breach or failure is the result of the adoption of the Plan and payment of any amounts thereunder expressly permitted under **Sections 4.2(b)(xi) and (xii)** of this Agreement.

## **SECTION 2. Representations and Warranties**

2.1 (a) Authority of the Company. On or prior to the date of this First Amendment, the Board of Directors of the Company has declared the Merger (on terms and conditions set forth in the Merger Agreement as amended by this First Amendment) advisable and fair to and in the best interest of the Company and its stockholders, approved and adopted this First Amendment in accordance with the DGCL, confirmed its resolution to recommend the approval and adoption of the Merger Agreement (as amended hereby) by the Company's Stockholders and directed that the Merger Agreement (as amended hereby) be submitted to the Company's Stockholders for approval and adoption. The Company has all requisite corporate power and authority to enter into this First Amendment and to consummate the transactions contemplated by the Merger Agreement, as amended hereby. The execution and delivery of this First Amendment by the Company and the consummation by the Company of the transactions contemplated by the Merger Agreement, as amended hereby, have been duly authorized by all necessary corporate action on the part of the Company, subject, in the case of the Merger Agreement, as amended hereby, only to (x) approval of holders of Company Capital Stock representing the Company Requisite Stockholder Approval, and (y) the filing of appropriate Merger documents as required by the DGCL. This First Amendment has been duly executed and delivered by the Company and, assuming the due authorization, execution and delivery of this First Amendment by CIENA, constitutes a legal, valid and binding obligation of the Company, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and other similar laws of general applicability relating to or affecting creditors' rights generally and by the application of general principles of equity.

(b) Parachute Payments by the Company. No amount required to be paid or payable to or with respect to any employee or other service provider of the Company in connection with the Plan, together with any amounts required to be paid or payable with respect to the transactions contemplated by the Merger Agreement (either solely as a result thereof or as a result of such transactions in conjunction with any other event) will be an excess parachute payment within the meaning of Section 280G of the Code. No employee or other service provider of the Company is entitled to a tax gross-up payment from the

Company with regard to parachute payments under Section 280G of the Code in connection with the amounts required to be paid or payable under the Plan, together with any amounts required to be paid or payable with respect to the transactions contemplated the Merger Agreement.

2.2 Authority of CIENA. The execution and delivery of this First Amendment by CIENA and the consummation by CIENA of the transactions contemplated by the Merger Agreement, as amended hereby, have been duly and validly authorized by all necessary corporate action and no other corporate proceedings on the part of CIENA are necessary to authorize this First Amendment or to consummate the transactions contemplated by the Merger Agreement, as amended hereby. This First Amendment has been duly executed and delivered by CIENA and, assuming the due authorization, execution and delivery by the Company, constitutes a legal, valid and binding obligation of CIENA, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and other similar laws of general applicability relating to or affecting creditors' rights generally and by the application of general principles of equity.

**SECTION 3. Miscellaneous**

3.1 Merger Agreement. The terms and provisions of the Merger Agreement, except as specifically amended hereby, shall remain in full force and effect. All references to the Merger Agreement contained therein shall mean the Merger Agreement, as amended hereby. Except as otherwise defined or modified herein, all capitalized terms used in this First Amendment shall have the meanings set forth in the Merger Agreement.

3.2 Counterparts. This First Amendment may be executed in two or more counterparts, each of which shall be deemed an original, and the Company and CIENA may become a party hereto by executing a counterpart hereof. This Agreement and any counterpart so executed shall be deemed to be one and the same instrument.

3.3 Governing Law. This First Amendment shall be governed by and interpreted and enforced in accordance with the laws of the State of Delaware as applied to contracts made and fully performed in such state.

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**IN WITNESS WHEREOF**, the parties hereto, intending to be legally bound hereby, have duly executed this First Amendment to Agreement and Plan of Merger as of the date first above written.

**CIENA CORPORATION**

By: /s/ RUSSELL B. STEVENSON, JR.

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Name: Russell B. Stevenson, Jr.  
Title: Senior Vice President, General  
Counsel and Secretary

**INTERNET PHOTONICS, INC.**

By: /s/ STEVEN M. WASZAK

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Name: Steven M. Waszak  
Title: Chief Financial Officer

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DELAWARE GENERAL CORPORATION LAW

SECTION 262

§ 262 Appraisal rights.

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in one or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger or consolidation to be effected pursuant to § 251 (other than a merger effected pursuant to § 251(g) of this title), § 252, § 254, § 257, § 258, § 263 or § 264 of this title:

(1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of § 251 of this title.

(2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§ 251, 252, 254, 257, 258, 263 and 264 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;

b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or held of record by more than 2,000 holders;

c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a. and b. of this paragraph; or

d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a., b. and c. of this paragraph.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 253 of this title is not owned by the parent corporation immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders who was such on the record date for such meeting with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) hereof that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to § 228 or § 253 of this title, then, either a constituent corporation before the effective date of the merger or consolidation, or the surviving or resulting corporation within ten days thereafter, shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given,

provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) hereof and who is otherwise entitled to appraisal rights, may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder's written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) hereof, whichever is later.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, permit discovery or other pretrial proceedings and may proceed to trial upon the appraisal prior to the final determination of the stockholder entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may

participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Interest may be simple or compound, as the Court may direct. Payment shall be so made to each such stockholder, in the case of holders of uncertificated stock forthwith, and the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of such stockholder's demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

**CERTIFICATE OF AMENDMENT TO FIFTH AMENDED  
AND RESTATED CERTIFICATE OF INCORPORATION  
OF INTERNET PHOTONICS, INC.**

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**Pursuant to Section 242 of the General Corporation Law**

Steven Waszak, Secretary and Chief Financial Officer of Internet Photonics, Inc. hereby certifies that:

**ONE:** The original Certificate of Incorporation of the Corporation was filed with the Secretary of State of Delaware on August 22, 2000 under the name Internet Photonics, Inc. The Amended and Restated Certificate of Incorporation of the Corporation was filed with the Secretary of State of Delaware on September 29, 2000. The Amended and Restated Certificate of Incorporation was amended by a Certificate of Amendment filed with the Secretary of State of Delaware on October 4, 2001. The Second Amended and Restated Certificate of Incorporation of the Corporation was filed with the Secretary of State of the State of Delaware on November 27, 2001. The Third Amended and Restated Certificate of Incorporation of the Corporation was filed with the Secretary of State of the State of Delaware on July 3, 2002. The Fourth Amended and Restated Certificate of Incorporation of the Corporation was filed with the Secretary of State of the State of Delaware on August 20, 2002. The Fifth Amended and Restated Certificate of Incorporation of the Corporation was filed with the Secretary of State of the State of Delaware on September 26, 2003.

**TWO:** He is duly elected and acting as Secretary and Chief Financial Officer of the Corporation.

**THREE:** Section 3(c) of Paragraph D of ARTICLE FOURTH of the Fifth Amended and Restated Certificate of Incorporation is amended by adding the following clause at the end thereof: ; provided, however, that in the case of a Sale Event where the definitive transaction agreement effecting such Sale Event specifically provides for a means of valuing the non-cash consideration so to be paid (for example, by providing that stock consideration shall be valued by averaging closing prices during a specified trading period), the valuation provisions of such transaction agreement shall instead apply.

**FOUR:** This Amendment to the Fifth Amended and Restated Certificate of Incorporation of the Corporation has been duly adopted in accordance with the provisions of Sections 228 and 242 of the Delaware General Corporation Law by a written consent executed by the holders of (i) a majority of the outstanding shares of capital stock of the Corporation and (ii) a Majority of the Preferred Stock (as defined in the Fifth Amended and Restated Certificate of Incorporation) of the Corporation.

IN WITNESS WHEREOF, the Corporation has caused this certificate to be signed on its behalf by its Secretary and Chief Financial Officer this third day of February, 2004.

INTERNET PHOTONICS, INC.

By /s/ STEVEN WASZAK

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Steven Waszak  
Secretary and Chief Financial Officer

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**Escrow Agreement**

**THIS ESCROW AGREEMENT** (the **Agreement** ) is made and dated as of \_\_\_\_\_, 2004 by and among **CIENA CORPORATION**, a Delaware corporation ( **CIENA** ), **U.S. BANK TRUST NATIONAL ASSOCIATION**, a national banking association, as Escrow Agent (the **Escrow Agent** ), and **SPROUT CAPITAL IX, L.P.**, a Delaware limited partnership, acting as Stockholders Representative (the **Stockholders Representative** ) by virtue of the Agreement and Plan of Merger dated as of February 18, 2004 (the **Merger Agreement** ).

**WITNESSETH:**

**WHEREAS**, CIENA, Internet Photonics, Inc., a Delaware corporation (the **Company** ) and certain principal officers of the Company have entered into the Merger Agreement, providing for the merger of the Company with and into CIENA, and in connection with which the Stockholders of the Company shall receive as consideration a number of shares of Common Stock of CIENA (the **CIENA Common Stock** ) as set forth in the Merger Agreement;

**WHEREAS**, pursuant to the Merger Agreement, CIENA and the Company have agreed that the rights of indemnification under Article VI of the Merger Agreement shall survive the consummation of the transactions contemplated by the Merger Agreement for a period of twelve months from the Closing Date, and shall be secured, pursuant to this Agreement, by certain shares of CIENA Common Stock (together with any accumulations thereto as provided herein, the **Escrow Shares** ), to be registered in the name of the Escrow Agent, as escrow agent hereunder, and deposited in escrow with the Escrow Agent;

**WHEREAS**, pursuant to the Merger Agreement, the Stockholders Representative is entitled to full reimbursement for out-of-pocket fees and expenses and other obligations of or incurred by the Stockholders Representative in connection with the Merger Agreement and this Agreement, which reimbursement shall be satisfied out of the Escrow Shares if satisfaction is not sufficient from the proceeds from certain shares of CIENA Common Stock (together with any accumulations thereto as provided herein, the **Reimbursement Shares** ), to be registered in the name of the Escrow Agent, as escrow agent hereunder, and deposited in escrow with the Escrow Agent;

**WHEREAS**, the Escrow Agent is willing to act in the capacity of Escrow Agent hereunder subject to, and upon the terms and conditions of this Agreement;

**WHEREAS**, pursuant to the Merger Agreement, the Stockholders Representative has been appointed as the Stockholders attorney-in-fact and authorized and empowered to act, for and on behalf of any or all of the Stockholders (with full power of substitution in the premises) in connection with the indemnity provisions of the Merger Agreement, this Escrow Agreement, and such other matters as are reasonably necessary for the consummation of the transactions contemplated hereby and thereby; and

**WHEREAS**, capitalized terms used and not defined herein have the meanings assigned to such terms in the Merger Agreement.

**NOW, THEREFORE**, in consideration of the promises, covenants and agreements set forth in this Agreement and of other good and valuable consideration, the receipt and legal sufficiency of which they hereby acknowledge, and intending to be legally bound hereby, and as an inducement for the execution and delivery of the Merger Agreement, CIENA, the Escrow Agent and the Stockholders Representative hereby agree as follows:

**ARTICLE I**

**DESIGNATION OF ESCROW AGENT AND CAPITAL SHARES  
SUBJECT TO ESCROW**

**1.1 Designation of Escrow Agent.** CIENA and the Stockholders Representative hereby mutually designate and appoint U.S. Bank Trust National Association, a national banking association, having an office and place of business located at 100 Wall Street, New York, New York 10005, as Escrow Agent for the purposes set forth herein. The Escrow Agent hereby accepts such appointment in accordance with the terms and conditions provided in this Agreement.

**1.2 Capital Stock Subject to Escrow.** In accordance with Section 6.2 of the Merger Agreement, upon execution of this Agreement CIENA has issued and delivered, or caused to be delivered, on behalf of the Stockholders to the Escrow Agent one or more stock certificates (the **Escrow Certificates** ), each of which is registered in the name of the Escrow Agent as escrow agent hereunder evidencing the Escrow Amount. The Escrow Agent shall hold and distribute the Escrow Certificates and Escrow Shares in accordance with the terms hereof.

**1.3 Value of Escrow Shares.** For all purposes pursuant to this Agreement, including without limitation the distribution of Escrow Shares, the value of each Escrow Share (but not each Reimbursement Share) shall be equal to the Per Share Price (as adjusted for stock dividends, stock splits or combinations affecting the Escrow Shares).

**ARTICLE II**

**TREATMENT OF ACCUMULATIONS TO ESCROW SHARES**

**2.1 Escrow Period; Distribution Upon Termination of Escrow Periods.** Subject to the following requirements, the Escrow Fund shall be in existence immediately following the Closing Date and shall terminate on such date as there are not Escrow Shares or other funds or assets held by the Escrow Agent in the Escrow Fund (the **Escrow Period** ).

(i) On the first anniversary of the date hereof, \_\_\_\_\_, 2005 (the **Escrow Release Date** ), the Escrow Fund shall be delivered by the Escrow Agent in accordance with the provisions of Section 2.1(ii) below, provided, however, that the Escrow Release Date shall not apply with respect to any amount which, in the reasonable judgment of CIENA, is necessary to satisfy any Losses incurred by CIENA (or properly accrued in accordance with GAAP applied on a consistent basis for a Loss that CIENA reasonably believes it will have to pay with respect to a third-party claim of which CIENA has received notice prior to the Escrow Release Date and specified in any Officer's Certificate (as defined below) delivered to the Escrow Agent prior to the Escrow Release Date with respect to facts and circumstances existing prior to the Escrow Release Date.

(ii) The Escrow Agent shall promptly deliver to EquiServe Trust Company, N.A., as exchange agent, for distribution to the Stockholders, the remaining portion of the Escrow Fund not required to satisfy the claims referred to in Section 2.1(i) above following the Escrow Release Date (less the amount of any out-of-pocket fees and expenses and other obligations to (or anticipated obligations to) or obligations incurred or anticipated to be incurred by the Stockholders Representative in connection with the Merger Agreement and this Agreement, and which are not covered by the Reimbursement Fund and were not previously paid to the Stockholders Representative out of the Reimbursement Fund (as defined below), and for which the Stockholders Representative has provided notice to the Escrow Agent prior to such distribution). The number of Escrow Shares to be released to each Stockholder shall be rounded down to the next whole share to avoid the release of fractional shares. As soon as all such claims have been resolved and obligations have been satisfied, the Escrow Agent shall deliver to EquiServe Trust Company, N.A., as exchange agent, for distribution to the Stockholders all portions of the Escrow Fund not required to satisfy such claims (less the amount of any out-of-pocket fees and expenses and other obligations to (or anticipated obligations to) or obligations incurred or anticipated to be incurred by the Stockholders Representative in connection with the Merger Agreement and this Agreement, and not previously paid to

the Stockholders Representative out of the Reimbursement Fund, and for which the Stockholders Representative has provided notice to the Escrow Agent prior to such delivery). Any amounts withheld from Stockholders of any distribution of the Escrow Fund (or any portion thereof) to satisfy anticipated out-of-pocket fees and expenses and other obligations of or to the Stockholders Representative shall be paid to the Stockholders Representative or delivered to EquiServe Trust Company, N.A., as exchange agent, for distribution to the Stockholders in accordance with the written instruction of the Stockholders Representative to the Escrow Agent.

## **2.2 Protection of Escrow Fund.**

(a) The Escrow Agent shall hold and safeguard the Escrow Fund during the Escrow Period, shall treat such fund as a trust fund for the benefit of the Stockholders in accordance with the terms of this Agreement and not as the property of CIENA, and shall hold and dispose of the Escrow Fund only in accordance with the terms hereof.

(b) Any shares of CIENA Common Stock or other equity securities issued or distributed by CIENA (including shares issued upon a stock split) ( **New Shares** ) in respect of CIENA Common Stock in the Escrow Fund which have not been released from the Escrow Fund shall be added to the Escrow Fund and become a part thereof. New Shares issued in respect of shares of CIENA Common Stock which have been released from the Escrow Fund shall not be added to the Escrow Fund but shall be distributed to the record holders thereof. Cash dividends, if any, on CIENA Common Stock shall not be added to the Escrow Fund but shall be distributed to the Stockholders in proportion to their respective original contributions to the Escrow Fund.

(c) Each Stockholder shall have voting rights and the right to distributions of cash dividends with respect to the Escrow Shares contributed to the Escrow Fund by such Stockholder (and on any voting securities added to the Escrow Fund in respect of such shares of CIENA Common Stock). As the record holder of such shares, the Escrow Agent shall vote such shares in accordance with the instructions of the Stockholders having the beneficial interest therein and shall ensure that copies of all proxy solicitation materials are promptly delivered to such Stockholders.

**2.3 Additional Property Subject to Escrow.** If at any time after the date hereof and prior to the distribution of the Escrow Shares any of the Stockholders shall become entitled to receive or shall receive in connection with the Escrow Shares any (i) non-taxable distribution of securities of CIENA or of any other entity including, without limitation, any certificate in connection with any increase or reduction of capital, reclassification, recapitalization, merger, business combination, consolidation, sale of assets, stock split-up or spin-off; or (ii) any non-taxable distribution of stock options, warrants or rights, whether as an addition to or in substitution of or exchange for any of the Escrow Shares; or (iii) non-taxable stock dividend or other non-taxable distribution payable in securities or property of any description, all of the shares of capital stock, or other property resulting from any such distribution, stock option, warrant, right or stock dividend shall be deemed to be Escrow Shares and shall be subject to the terms hereof to the same extent as the original Escrow Shares. Any cash dividends and any taxable stock dividends paid with respect to the Escrow Shares shall be paid to the Stockholders in accordance with their respective proportionate interests in the Escrow Shares and any taxable stock dividends. Each of the Stockholders shall recognize as income on a current basis all of the cash dividends which such Stockholder is entitled to receive and for any non-cash dividend and any other non-taxable distribution shall, through the Stockholders Representative, execute stock powers or other appropriate instruments of transfer for all shares, options, warrants or rights as required for transfer.

**2.4 Retained Voting and Other Rights.** The Escrow Agent shall hold the Escrow Shares and any additional property acquired with respect thereto pursuant to Section 2.3 above in safekeeping and dispose thereof only in accordance with the terms of this Agreement. The Escrow Agent may treat the Stockholders Representative as the duly authorized agent and representative of the Stockholders with respect to any additional property related to the Escrow Shares. The Escrow Agent shall hold the Escrow Shares in accordance with each Stockholder's proportionate interest in the Escrow Shares and shall (to the

extent legally permissible) vote the Escrow Shares in accordance with the written instructions of the Stockholder for whose account such Escrow Shares are held.

### **ARTICLE III**

#### **DISTRIBUTION OF ESCROW SHARES UPON TERMINATION OF THE AGREEMENT**

**3.1 Third-Party Claims.** In the event CIENA becomes aware of an event that CIENA reasonably believes may result in a demand against the Escrow Fund, CIENA will notify the Stockholders Representative of such claim. The Stockholders Representative will then have the right to defend, contest, negotiate or settle any such claim or demand through counsel of its own selection (who shall be reasonably acceptable to CIENA), at the Stockholders own cost and expense, which costs and expenses will be payable out of the Reimbursement Fund and the Escrow Fund and CIENA shall cooperate with and assist the Stockholders Representative in the defense of such claim or demand. Notwithstanding the preceding sentence, the Stockholders Representative will not settle, compromise, or offer to settle or compromise any such claim or demand without the prior written consent of CIENA, which consent will not be unreasonably withheld, provided that no such consent shall be required if such settlement, offer to settle or compromise includes an unconditional release of CIENA. Upon receipt by the Escrow Agent of a written instrument that is executed by the Stockholders Representative and that instructs the Escrow Agent as to the disbursement of some or all of the Reimbursement Fund (or, to the extent the Reimbursement Fund is insufficient to satisfy such costs and expenses, from the Escrow Fund), the Escrow Agent shall within five (5) business days of such instruction disburse to the Stockholders Representative the amount so instructed in such written instrument whereupon the then current Reimbursement Fund balance or Escrow Fund balance, as applicable, shall be reduced by such amount. If the Stockholders Representative gives notice to CIENA within twenty Business Days after CIENA has notified the Stockholders Representative that any such claim or demand has been made in writing, that the Stockholders Representative elects to have CIENA defend, contest, negotiate, or settle any such claim or demand, then CIENA will have the right to contest and/or settle any such claim or demand and the Stockholders Representative shall cooperate with and assist CIENA in the defense of such claim or demand, *provided, however*, that CIENA will not settle, compromise, or offer to settle or compromise any such claim or demand without the prior written consent (which may include a general or limited consent) of the Stockholders Representative, which consent will not be unreasonably withheld. Notwithstanding the foregoing, any conflict or ambiguity between this Section 3.1 and the terms of the Merger Agreement will be determined in favor of the provisions set forth in the Merger Agreement. In the event that the Stockholders Representative has consented to any settlement, the Stockholders shall have no power or authority to object under any provision of this Agreement to the amount of such settlement.

#### **3.2 Claims Upon Escrow Fund.**

(a) Upon receipt by the Escrow Agent at any time on or before the Escrow Release Date of a certificate signed by any officer of CIENA (an **Officer s Certificate**): (A) stating that CIENA (i) has incurred a Loss for which CIENA is entitled to indemnification under the Merger Agreement, or (ii) has properly accrued (or reasonably anticipates that it will have to accrue) in accordance with GAAP applied on a consistent basis, for a Loss that CIENA reasonably believes it will have to pay with respect to a third-party claim of which CIENA or the Company has received notice prior to the Escrow Release Date with respect to facts and circumstances existing prior to the Escrow Release Date, and (B) specifying in reasonable detail the matter for which it claims entitlement for indemnification and/or the individual items of Losses included in the amount so stated, the date each such item was paid or properly accrued or the basis for such anticipated accrual, and the nature of the misrepresentation, breach of warranty or covenant to which such item is related, the Escrow Agent shall deliver to CIENA, as promptly as practicable, but subject to Section 3.3 below, an amount equal to the Escrow Payment (as defined below) in the manner set forth in the immediately following sentence; provided, however, that in the event of a third party claim that is the subject of the demand on the Escrow Fund, no Escrow Payment shall be delivered until the claim is settled or adjudicated unless the Stockholders Representative and CIENA otherwise agree. The

Escrow Agent shall allocate any amount of Loss it is required to reimburse to CIENA in accordance with this Agreement based on the number of shares of CIENA Common Stock held in the Escrow Fund for the benefit of each Stockholder (each of which shall be valued at the Per Share Price in accordance with Section 1.3 hereof). Any Escrow Shares used to satisfy an Escrow Payment and delivered to CIENA out of the Escrow Fund shall reduce each such Stockholder's interest in the Escrow Fund in the form of CIENA Common Stock in proportion to such Stockholder's respective original contributions to the Escrow Fund. Notwithstanding anything herein to the contrary, the Escrow Agent shall rely conclusively on the Officer's Certificate and shall have no responsibility to determine whether the information set forth therein is accurate or correct, or whether the claim has been specified in reasonable detail.

(b) **Escrow Payment** shall mean, at CIENA's election, either (i) such number of Escrow Shares out of the Escrow Fund (each of which shall be valued at the Per Share Price in accordance with Section 1.3 hereof) with an aggregate value equal to the Losses for which the Escrow Payment is being made, rounded up to the next whole share to avoid the release of fractional shares (the Payment Shares), or (ii) the proceeds from the sale of such Payment Shares (valued as aforesaid) by the Escrow Agent on behalf of each Stockholder's account; provided, however that in no event shall the Escrow Payment exceed the number of Escrow Shares in the Escrow Fund at the time of such Escrow Payment.

**3.3 Notification of Stockholders Representative.** At the time of delivery of any Officer's Certificate to the Escrow Agent, a duplicate copy of such certificate shall be delivered to the Stockholders Representative (with proof of such delivery to the Escrow Agent (which proof of delivery may consist of a photocopy of the registered or certified mail or overnight courier receipt of the signed receipt if delivered by hand)(the **Proof of Delivery**)), and for a period of thirty (30) days after such delivery, the Escrow Agent shall make no delivery to CIENA of any Escrow Payment unless the Escrow Agent shall have received written authorization from the Stockholders Representative to make such delivery. After the expiration of thirty (30) days following the Escrow Agent's receipt of the Officer's Certificate, the Escrow Agent shall make delivery of the Escrow Payment; provided, however, that no such payment or delivery may be made if the Stockholders Representative shall object in a written statement to the claim made in the Officer's Certificate, and such statement shall have been delivered to the Escrow Agent prior to the expiration of such thirty (30) day period. The Escrow Agent shall have no responsibility to determine whether a copy of the Officer's Certificate was delivered to the Stockholders Representative other than confirming it has received the Proof of Delivery from CIENA.

**3.4 Resolution of Conflicts.** In case the Stockholders Representative shall object in writing to any claim or claims made in any Officer's Certificate, the Escrow Agent shall make no delivery of any Escrow Payment requested in the applicable Officers Certificate to CIENA and shall continue to hold the Escrow Fund until the Escrow Agent shall have received, with respect thereto either (i) joint written instructions of CIENA and the Stockholders Representative or (ii) a final unappealable order or award of a court of competent jurisdiction. The Stockholders Representative and CIENA shall attempt in good faith to agree upon the rights of the respective parties with respect to each of such claims. If the Stockholders Representative and CIENA should so agree, a memorandum setting forth such agreement shall be prepared and signed by both parties and shall be furnished to the Escrow Agent.

## ARTICLE IV

### ESCROW AGENT

#### **4.1 Escrow Agent's Duties.**

(a) The Escrow Agent (i) shall be obligated only for the performance of such duties as are specifically set forth herein, and as set forth in any additional written escrow instructions which the Escrow Agent may receive after the date of this Agreement which are signed by an officer of CIENA and the Stockholders Representative, and shall have no duty to exercise any greater degree of care with respect to the Escrow Fund and the Reimbursement Fund that it would for its own property and this Agreement shall not be deemed to create a fiduciary duty between the parties under state or federal law, (ii) may rely and shall be protected in relying or refraining from acting on any instrument reasonably believed to be

genuine and to have been signed or presented by the proper party or parties, and (iii) shall not be obligated to take any legal or other action hereunder which might in its judgment involve or cause it to incur any expense or liability unless it shall have been provided with acceptable indemnification. The Escrow Agent may rely on the Stockholders Representative as the exclusive agent of the Stockholders under this Agreement and the Merger Agreement and shall incur no liability to any party with respect to any action taken or suffered by it in good faith in reliance thereon. The Escrow Agent shall not be liable for any act done or omitted hereunder as Escrow Agent while acting in good faith and in the exercise of reasonable judgment, and any act done or omitted pursuant to the advice of counsel shall be conclusive evidence of such good faith. The Escrow Agent is not a party to nor shall be liable for any of the agreements referred to or described herein (including, without limitation, the Merger Agreement).

(b) The Escrow Agent is hereby expressly authorized to disregard any and all warnings given by any of the parties hereto or by any other person, and is hereby expressly authorized to comply with and obey any final non-appealable orders, judgments or decrees of any court. In case the Escrow Agent obeys or complies with any such order, judgment or decree of any court, the Escrow Agent shall not be liable to any of the parties hereto or to any other person by reason of such compliance, notwithstanding any such order, judgment or decree being subsequently reversed, modified, annulled, set aside, vacated or found to have been entered without jurisdiction.

(c) The Escrow Agent shall not be liable in any respect on account of the identity, authority or rights of the parties executing or delivering or purporting to execute or deliver this Agreement or any documents or papers deposited or called for hereunder.

(d) The Escrow Agent shall not be liable for the expiration of any rights under any statute of limitations with respect to this Agreement or any documents deposited with the Escrow Agent.

(e) In performing any duties under this Agreement, the Escrow Agent shall not be liable to any party for damages, losses, or expenses, except for negligence or willful misconduct on the part of the Escrow Agent. The Escrow Agent shall not incur any such liability for any action taken or omitted in reliance upon any instrument, including any written statement or affidavit provided for in this Agreement that the Escrow Agent shall in good faith believe to be genuine, nor will the Escrow Agent be liable or responsible for forgeries, fraud, impersonations, or determining the scope of any representative authority. In addition, the Escrow Agent may consult with legal counsel in connection with Escrow Agent's duties under this Agreement and shall be fully protected in any act taken, suffered, or permitted by it in good faith in accordance with the advice of counsel. The Escrow Agent is not responsible for determining and verifying the authority of any person acting or purporting to act on behalf of any party to this Agreement, provided such determination or verification is in good faith.

(f) If any controversy arises between the parties to this Agreement, or with any other party, concerning the subject matter of this Agreement, its terms or conditions, the Escrow Agent will not be required to resolve the controversy or to take any action regarding it. The Escrow Agent may hold all documents and Escrow Shares and may wait for settlement of any such controversy by final appropriate legal proceedings or other means as, in the Escrow Agent's discretion, the Escrow Agent may reasonably require, despite what may be set forth elsewhere in this Agreement. In such event, the Escrow Agent will not be liable for any damages. Furthermore, the Escrow Agent may at its option, file an action of interpleader requiring the parties to answer and litigate any claims and rights among themselves. The Escrow Agent is authorized to deposit with the clerk of the court all documents and Escrow Shares held in escrow, except all costs, expenses, charges and reasonable attorney's fees incurred by the Escrow Agent due to the interpleader action and which the parties jointly and severally agree to pay. Upon initiating such action, the Escrow Agent shall be fully released and discharged of and from all obligations and liability by the terms of this Agreement with regard to the Escrow Shares.

(g) The parties and their respective successors and assigns agree jointly and severally to indemnify and hold Escrow Agent harmless against any and all losses, claims, damages, liabilities, and expenses, including reasonable costs of investigation, counsel fees, including allocated costs of in-house counsel and disbursements that may be imposed on Escrow Agent or incurred by Escrow Agent in connection with the

performance of its duties under this Agreement, including but not limited to any litigation or arbitration arising from this Agreement or involving its subject matter other than arising out of its negligence or willful misconduct.

(h) The Escrow Agent may resign at any time upon giving at least thirty (30) days written notice to the parties; provided, however, that no such resignation shall become effective until the appointment of a successor escrow agent which shall be accomplished as follows: the parties shall use their reasonable best efforts to mutually agree on a successor escrow agent within thirty (30) days after receiving such notice. If the parties fail to agree upon a successor escrow agent within such time, the Escrow Agent shall have the right to appoint a successor escrow agent authorized to do business in the State of Delaware or the Escrow Agent may apply to a court of competent jurisdiction for appointment of a successor escrow agent. The successor escrow agent shall execute and deliver an instrument accepting such appointment and it shall, without further acts, be vested with all the estates, properties, rights, powers, and duties of the predecessor escrow agent as if originally named as Escrow Agent. Upon appointment of a successor escrow agent, the Escrow Agent shall be discharged from any further duties and liability under this Agreement.

**4.2 Fees.** All fees of the Escrow Agent for performance of its duties hereunder shall be paid by CIENA in accordance with the fee schedule of the Escrow Agent attached hereto, which schedule may be subject to change hereafter on an annual basis subject to CIENA's prior approval. It is understood that the fees and usual charges agreed upon for services of the Escrow Agent shall be considered compensation for ordinary services as contemplated by this Agreement. In the event that the conditions of this Agreement are not promptly fulfilled, or if the Escrow Agent renders any service not provided for in this Agreement, or if the parties request a substantial modification of its terms, or if any controversy arises, or if the Escrow Agent is made a party to, or intervenes in, any litigation or arbitration pertaining to the Escrow Fund or its subject matter, the Escrow Agent shall be reasonably compensated for such extraordinary services and reimbursed for all costs, attorney's fees, including allocated costs of in-house counsel, and expenses occasioned by such default, delay, controversy or litigation or arbitration.

**4.3 Consequential Damages.** Subject to the provisions of Section 4.1(c) hereof, in no event shall the Escrow Agent be liable for special, indirect or consequential loss or damage of any kind whatsoever (including but not limited to lost profits), even if the Escrow Agent has been advised of the likelihood of such loss or damage and regardless of the form of action.

**4.4 Successor Escrow Agents.** Any corporation into which the Escrow Agent in its individual capacity may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Escrow Agent in its individual capacity shall be a party, or any corporation to which substantially all the corporate trust business of the Escrow Agent in its individual capacity may be transferred, shall be the Escrow Agent under this Escrow Agreement without further act.

## **ARTICLE V**

### **THE STOCKHOLDERS REPRESENTATIVE**

#### **5.1 Stockholders Representative Powers and Authority.**

(a) The Stockholders Representative shall have full power and authority to represent all of the Stockholders and their successors with respect to all matters arising under this Agreement and the Merger Agreement and all actions taken by the Stockholders Representative hereunder and thereunder shall be binding upon all such Stockholders and their successors as if expressly confirmed and ratified in writing by each of them and no Stockholder shall have the right to object, dissent, protest or otherwise contest the same. The Stockholders Representative shall take any and all actions which it believes are necessary or appropriate under this Agreement and the Merger Agreement for and on behalf of the Stockholders, as fully as if the Stockholders were acting on their own behalf, including, without limitation, executing this Agreement as Stockholders Representative, giving and receiving any notice or instruction permitted or required under this Agreement or the Merger Agreement by the Stockholders Representative or any

Stockholder, interpreting all of the terms and provisions of this Agreement and the Merger Agreement, authorizing payments to be made with respect hereto or thereto, obtaining reimbursement as provided for herein for all out-of-pocket fees and expenses and other obligations of or incurred by the Stockholders Representative in connection with this Agreement and the Merger Agreement, defending all indemnity claims by or against the Stockholders pursuant to Article VI of the Merger Agreement (an **Indemnity Claim**), consenting to, compromising or settling all Indemnity Claims, conducting negotiations with CIENA and its agents regarding such claims, dealing with CIENA and the Escrow Agent under this Agreement and the Merger Agreement with respect to all matters arising under this Agreement and the Merger Agreement, taking any and all other actions specified in or contemplated by this Agreement and the Merger Agreement, and engaging counsel, accountants or other Stockholders Representative in connection with the foregoing matters. Without limiting the generality of the foregoing, the Stockholders Representative shall have full power and authority to interpret all the terms and provisions of this Agreement and the Merger Agreement and to consent to any amendment hereof or thereof on behalf of all such Stockholders and such successors. Notwithstanding the foregoing, each Stockholder shall have the right to exercise any voting rights appertaining to the Escrow Shares.

(b) Pursuant to the Merger Agreement, Sprout Capital IX, L.P. has irrevocably been appointed as the Stockholders Representative to act as the true and lawful agent of the Stockholders and attorney-in-fact with respect to all matters arising in connection with this Agreement, including but not limited to the power and authority on behalf of each Stockholder (other than in his or her own right and excluding holders of Dissenting Shares) to do any one or all of the following:

(i) Receive all notices or documents given or to be given to any of the Stockholders by CIENA pursuant hereto or to the Merger Agreement or in connection herewith or therewith and to receive and accept service of legal process in connection with any suit or proceeding arising under this Agreement or the Merger Agreement;

(ii) Deliver to CIENA at the Closing all certificates and documents to be delivered to CIENA by any of the Stockholders pursuant to the Merger Agreement, together with any other certificates and documents executed by any of the Stockholders and deposited with the Stockholders Representative for such purpose;

(iii) Engage counsel, and such accountants and other advisors for any of the Stockholders and incur such other expenses on behalf of any of the Stockholders in connection with this Agreement or the Merger Agreement and the transactions contemplated hereby or thereby as the Stockholders Representative may in its sole discretion deem appropriate; and

(iv) Take such action on behalf of any of the Stockholders as the Stockholders Representative may in its sole discretion deem appropriate in respect of:

(A) waiving any inaccuracies in the representations or warranties of CIENA contained in this Agreement or in any document delivered by CIENA pursuant hereto;

(B) waiving the fulfillment of any of the conditions precedent to the Company's obligations hereunder or pursuant to the Merger Agreement;

(C) taking such other action as the Stockholders Representative or any of the Stockholders is authorized to take under this Agreement or the Merger Agreement;

(D) receiving all documents or certificates and making all determinations, on behalf of any of the Stockholders, required under this Agreement or the Merger Agreement;

(E) all such other matters as the Stockholders Representative may in its sole discretion deem necessary or appropriate to consummate this Agreement or the Merger Agreement and the transactions contemplated hereby and thereby; and

(F) all such action as may be necessary after the Closing Date to carry out any of the transactions contemplated by this Agreement, and the Merger Agreement, including, without

limitation, the defense and/or settlement of any claims for which indemnification is sought pursuant to Article VI of the Merger Agreement and any waiver of any obligation of CIENA.

All actions, decisions and instructions of the Stockholders Representative shall be conclusive and binding upon all of the Stockholders and no Stockholder nor any other Person shall have any claim or cause of action against the Stockholders Representative, and the Stockholders Representative shall have no liability to any Stockholder or any other Person, for any action taken, decision made or instruction given by the Stockholders Representative in connection with the Merger Agreement or this Agreement, except in the case of its own gross negligence or willful misconduct.

**5.2 Indemnification of Stockholders Representative.** The Stockholders Representative shall incur no liability to the Stockholders or the Escrow Agent or any other person with respect to any action taken or suffered by it in reliance upon any note, direction, instruction, consent, statement or other documents reasonably believed by the Stockholders Representative to be genuinely and duly authorized by holders of not less than a 61% interest in the Escrow Fund, nor for other action or inaction taken or omitted in good faith in connection herewith or with the Merger Agreement, in any case except for liability to the Stockholders for its own gross negligence or willful misconduct. The Stockholders Representative shall be indemnified for and shall be held harmless against any loss, liability or expense incurred by the Stockholders Representative or any of its Affiliates and any of their respective partners, directors, officers, employees, agents, stockholders, consultants, attorneys, accountants, advisors, brokers, representatives or controlling persons, in each case relating to the Stockholders Representative's conduct as Stockholders Representative, other than such losses, liabilities or expenses resulting from the Stockholders Representative's gross negligence or willful misconduct in connection with its performance under this Agreement and the Merger Agreement. This indemnification shall survive the termination of this Agreement. The costs of such indemnification (including the costs and expenses of enforcing this right of indemnification) shall be paid from the principal portion of the Reimbursement Fund (or, to the extent the Reimbursement Fund is insufficient to satisfy such costs and expenses, from the Escrow Fund). For all purposes hereunder, a majority in interest of the Stockholders shall be determined on the basis of each Stockholder's ownership of Company Common Stock outstanding immediately prior to the Effective Time (assuming the exercise or conversion of all Company Preferred Stock and Company Warrants outstanding immediately prior to the Effective Time). The Stockholders Representative may, in all questions arising under this Agreement, rely on the advice of counsel, independent public accountants and other experts selected by it, and for anything done, omitted or suffered in good faith by the Stockholders Representative in accordance with such advice, the Stockholders Representative shall not be liable to the Stockholders or the Escrow Agent or any other person. In no event shall the Stockholders Representative be liable hereunder or in connection herewith for (i) any indirect, punitive, special or consequential damages, or (ii) any amounts other than those that are satisfied out of the Reimbursement Fund or, to the extent provided for herein, the Escrow Fund. The Escrow Agent shall from time to time sell such amount of the Escrow Shares as necessary to pay such Stockholders Representative's costs and expenses, to the extent required by this Section 5.2 and to the extent that the Reimbursement Fund is insufficient for such purpose.

**5.3 Access to Information.** The Stockholders Representative shall have reasonable access to information of and concerning any Indemnity Claim and which is in the possession, custody or control of CIENA and the reasonable assistance of CIENA's officers and employees for purposes of performing the Stockholders Representative's duties under this Agreement or the Merger Agreement and exercising its rights under this Agreement and the Merger Agreement, including for the purpose of evaluating any Indemnity Claim against the Escrow Shares by CIENA; provided that the Stockholders Representative shall treat confidentially and not, except in connection with enforcing its rights or the rights of the Stockholders under this Agreement and the Merger Agreement, disclose any nonpublic information from or concerning any Indemnity Claim to anyone (except to the Stockholders Representative's attorneys, accountants and other advisers, to Stockholders, and on a need-to-know basis to other individuals who agree to keep such information confidential).

**5.4 Reasonable Reliance.** In the performance of its duties hereunder, the Stockholders Representative shall be entitled to rely upon any document or instrument reasonably believed by it to be genuine, accurate as to content and signed by any Stockholder or CIENA. The Stockholders Representative may assume that any person purporting to give any notice in accordance with the provisions hereof has been duly authorized to do so.

**5.5 Attorney-in-Fact.**

(a) The Stockholders Representative is hereby appointed and constituted the true and lawful attorney-in-fact of each Stockholder (other than a holder of Dissenting Shares), with full power in his, her or its name and on his, her or its behalf to act according to the terms of this Agreement and the Merger Agreement in the absolute discretion of the Stockholders Representative; and in general to do all things and to perform all acts including, without limitation, executing and delivering this Agreement and any other agreements, certificates, receipts, instructions, notices or instruments contemplated by or deemed advisable in connection with this Agreement.

(b) This power of attorney and all authority hereby conferred is granted and shall be irrevocable and shall not be terminated by any act of any Stockholder, by operation of law, whether by such Stockholder's death, disability protective supervision or any other event. Without limitation to the foregoing, this power of attorney is to ensure the performance of a special obligation and, accordingly, each Stockholder hereby renounces its, his or her right to renounce this power of attorney unilaterally any time before the end of the Escrow Period.

(c) Each Stockholder hereby waives any and all defenses which may be available to contest, negate or disaffirm the action of the Stockholders Representative taken in good faith under this Agreement.

(d) Notwithstanding the power of attorney granted in this Article V, no agreement, instrument, acknowledgement or other act or document shall be ineffective by reason only of the Stockholders having signed or given such directly instead of the Stockholders Representative.

**5.6 Liability.** If the Stockholders Representative is required by the terms of this Agreement to determine the occurrence of any event or contingency, the Stockholders Representative shall, in making such determination, be liable to the Stockholders only for its proven gross negligence or willful misconduct as determined in light of all the circumstances, including the time and facilities available to it in the ordinary conduct of business. In determining the occurrence of any such event or contingency, the Stockholders Representative may request from any of the Stockholders or any other person such reasonable additional evidence as the Stockholders Representative in its sole discretion may deem necessary to determine any fact relating to the occurrence of such event or contingency, and may at any time inquire of and consult with others, including any of the Stockholders, and the Stockholders Representative shall not be liable to any Stockholder for any damages resulting from its delay in acting hereunder pending its receipt and examination of additional evidence requested by it.

**5.7 Orders.** The Stockholders Representative is authorized, in its sole discretion, to comply with final, nonappealable orders or decisions issued or process entered by any court of competent jurisdiction with respect to the Escrow Shares or the Reimbursement Fund. If any portion of the Escrow Shares or the Reimbursement Fund is disbursed to the Stockholders Representative and is at any time attached, garnished or levied upon under any court order, or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such property or any part thereof, then and in any such event, the Stockholders Representative is authorized, in its sole discretion, but in good faith, to rely upon and comply with any such order, writ, judgment or decree which it is advised by legal counsel selected by it is binding upon it without the need for appeal or other action; and if the Stockholders Representative complies with any such order, writ, judgment or decree, it shall not be liable to any Stockholder or to any other Person by reason of such compliance even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

**5.8 Removal of Stockholders Representative; Authority of Successor Stockholders Representative.** Stockholders (or the successors and assigns thereto) who in the aggregate hold not less than a 61% interest in the Escrow Fund shall have the right at any time during the term of the Escrow Agreement to remove the then-acting Stockholders Representative and to appoint a successor Stockholders Representative; provided, however, that neither such removal of the then acting Stockholders Representative nor such appointment of a successor Stockholders Representative shall be effective until the delivery to the Escrow Agent of executed counterparts of a writing signed by each such Stockholder with respect to such removal and appointment, together with an acknowledgment signed by the successor Stockholders Representative appointed in such writing that he or she accepts the responsibility of successor Stockholders Representative and agrees to perform and be bound by all of the provisions of this Agreement and the Merger Agreement applicable to the Stockholders Representative. Each successor Stockholders Representative shall have all of the power, authority, rights and privileges conferred by this Agreement upon the original Stockholders Representative, and the term **Stockholders Representative** as used herein and in the Merger Agreement shall be deemed to include any interim or successor Stockholders Representative.

**5.9 Reimbursement Fund.**

(a) **Deposit of Reimbursement Shares.** In accordance with Section 6.2 of the Merger Agreement, upon execution of this Agreement, CIENA has issued and delivered, or caused to be delivered, on behalf of the Company Stockholders to the Escrow Agent one or more stock certificates (the **Reimbursement Certificates**) representing the Reimbursement Shares and having an aggregate number of shares of CIENA common stock equal to Forty Thousand Eight Hundred Three (40,803) shares, each of which is registered in the name of the Escrow Agent, as escrow agent hereunder, evidencing the Reimbursement Amount (as defined in the Merger Agreement). The Escrow Agent shall hold and distribute the Reimbursement Certificates and Reimbursement Shares in accordance with the terms hereof.

(b) **Sale of Reimbursement Shares.** Upon receiving instruction from the Stockholders Representative, the Escrow Agent shall sell on the open market any or all of the Reimbursement Shares and hold the proceeds from such sale (the **Reimbursement Proceeds**) in the Reimbursement Fund (as defined below). For purposes of this Agreement, the term **Reimbursement Fund** shall mean the Reimbursement Shares until sold in accordance with this Section 5.9(b) and thereafter the Reimbursement Proceeds, together with any interest or other income earned thereon or distributions received in respect thereof.

(c) **Reimbursement Fund.** Pursuant to Section 6.4 of the Merger Agreement and this Article V, the Stockholders Representative is entitled to full reimbursement for out-of-pocket fees and expenses and other obligations of or incurred by the Stockholders Representative in connection with the Merger Agreement and this Agreement. The Reimbursement Fund shall be used to reimburse the Stockholders Representative for out-of-pocket fees and expenses and to pay other obligations to or of the Stockholders Representative, or shall (to the extent not previously distributed to the Stockholders Representative as provided for above or subject to a claim by the Stockholders Representative) be distributed to the Stockholders at such time as the Escrow Fund is fully and finally distributed in accordance with the terms of this Agreement. In the event the Reimbursement Fund is unavailable or insufficient to satisfy in full the out-of-pocket fees and expenses of and other obligations to or of the Stockholders Representative, then the Stockholders Representative shall be entitled to reimbursement for such out-of-pocket fees and expenses and other obligations to or of the Stockholders Representative out of the Escrow Fund.

(d) **Treatment of the Reimbursement Fund.** The Escrow Agent shall hold and safeguard the Reimbursement Fund during the Escrow Period, shall treat the Reimbursement Fund as a trust fund for the benefit of the Stockholders and the Stockholders Representative in accordance with the terms of this Agreement and not as the property of CIENA, and shall hold and dispose of the Reimbursement Fund only in accordance with the terms hereof.

(e) **Investment of Reimbursement Fund.** The Escrow Agent shall invest the Reimbursement Proceeds in the Escrow Agent's **MMIS Business Insured Savings Account**. Earnings received from the investment of the Reimbursement Proceeds shall be held in the Reimbursement Fund in accordance with

the terms of this Agreement. The Escrow Agent shall have no liability for any investment losses, including without limitation any market loss on any investment liquidated prior to maturity in order to make a payment required hereunder.

(f) **Disbursement of the Reimbursement Fund.** The Escrow Agent shall disburse the Reimbursement Fund only in accordance with a written instrument delivered to the Escrow Agent that is executed by the Stockholders Representative and that instructs the Escrow Agent as to the disbursement of some or all of the Reimbursement Fund. Upon receipt by the Escrow Agent of a written instrument that is executed by the Stockholders Representative and that instructs the Escrow Agent as to the disbursement of some or all of the Reimbursement Fund, the Escrow Agent shall within five (5) business days of such instruction disburse to the Stockholders Representative the amount so instructed in such written instrument whereupon the then current Reimbursement Fund balance shall be reduced by such amount. In the event the Reimbursement Fund is unavailable or insufficient to satisfy in full the out-of-pocket fees and expenses of and other obligations to or of the Stockholders Representative, then upon receipt by the Escrow Agent of a written instrument that is executed by the Stockholders Representative and that instructs the Escrow Agent as to the disbursement of some or all of the Escrow Fund in satisfaction of the out-of-pocket fees and expenses of and other obligations to or of the Stockholders Representative, the Escrow Agent shall within two (2) business days of such instruction disburse to the Stockholders Representative the amount so instructed in such written instrument whereupon the then current Escrow Fund balance shall be reduced by such amount.

(g) **Distribution of Earnings: Tax Reporting.** Any interest or income earned on the Reimbursement Proceeds (or any cash dividends or taxable stock dividends paid with respect to the Reimbursement Shares) shall be paid to the Stockholders at least annually in accordance with their respective proportionate interests in the Reimbursement Fund. For tax reporting purposes, all interest or other income earned from the investment of the Reimbursement Proceeds (and all cash dividends or taxable stock dividends earned in respect of the Reimbursement Shares) in any tax year shall, to the extent such interest or other income is distributed by the Escrow Agent to any person or entity pursuant to the terms of this Agreement during such tax year, be reported as allocated to such person or entity.

## **ARTICLE VI**

### **MISCELLANEOUS**

**6.1 Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of Stockholders (by and through the Stockholders Representative), CIENA and the Escrow Agent, and their respective successors and assigns, whether so expressed or not.

**6.2 Waiver of Consent.** No failure or delay on the part of any party hereto 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 parties hereunder are cumulative and not exclusive of any rights or remedies which they would otherwise have. No modification or waiver of any provision of this Agreement, nor consent to any departure by any party therefrom, shall in any event be effective unless the same shall be in writing, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No notice to or demand on any party in any case shall entitle such party to any other or further notice or demand in similar or other circumstances.

**6.3 Captions.** The Article and Section captions used herein are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

**6.4 Notices.** Any notice or other communication required or permitted hereunder shall be sufficiently given if delivered in person or sent by telecopy or by registered or certified mail or by recognized overnight courier, postage prepaid, addressed as follows:

*If to CIENA, to:*

CIENA Corporation  
1201 Winterson Road  
Linthicum, Maryland 21090  
Attention: General Counsel  
Telecopy: (410) 865-8931

*with a copy to its counsel:*

Hogan & Hartson L.L.P.  
111 South Calvert Street, 16th Floor  
Baltimore, Maryland 21202  
Attention: Michael J. Silver  
Telecopy: (410) 659-2741

*if to the Escrow Agent, to:*

U.S. Bank Trust National Association  
100 Wall Street, Suite 1600  
New York, New York 10005  
Attention: Jean Clarke  
Telecopy: (212) 361-6173

*if to the Stockholders Representative, to:*

Sprout Capital IX, L.P.  
Eleven Madison Avenue, 26th Floor  
New York, New York 10010  
Attention: Wayne Nemeth  
Telecopy: (212) 538-8245

*with a copy to its counsel:*

Sonnenschein Nath & Rosenthal LLP  
1221 Avenue of the Americas  
New York, New York 10020  
Attention: Michael R. Flynn  
Telecopy: (212) 768-6800

Such notice or communication shall be deemed to have been given as of the date so delivered, sent by telecopy or mailed.

**6.5 Counterparts.** This Agreement may be executed in two or more counterparts, all of which shall be considered one and the same agreement and each of which shall be deemed an original.

**6.6 Governing Law.** The interpretation and construction of this Agreement, and all matters relating thereto, shall be governed by the laws of the State of Delaware, without regard to the choice of law provisions thereof. The non-prevailing party in any dispute arising hereunder shall bear and pay the costs and expenses (including without limitation reasonable attorneys' fees and expenses) incurred by the prevailing party or parties in connection with resolving such dispute.

**6.7 Severability.** If any term, provision, covenant or restriction of this Agreement is held by a court of competent jurisdiction or other authority to be invalid, void, unenforceable or against its regulatory policy, the remainder of the terms, provisions, covenants and restrictions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

**6.8 Amendments and Waivers.** The provisions of this Agreement, including the provisions of this sentence, may not be amended, modified or supplemented, and waivers or consents to departures from the provisions hereof may not be given without the written consent of CIENA, the Stockholders Representative and the Escrow Agent, and any amendment or waiver hereunder shall be effective and binding upon all Stockholders if signed by the Stockholders Representative.

*[Remainder of Page Intentionally Left Blank]*

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**IN WITNESS WHEREOF**, CIENA and the Escrow Agent have caused their corporate names to be hereunto subscribed by their respective officers thereunto duly authorized, and the Stockholders Representative has executed this Agreement, all as of the day and year first above written.

**CIENA CORPORATION**

By:

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Name:

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Title:

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**STOCKHOLDERS REPRESENTATIVE:**

**SPROUT CAPITAL IX, L.P.**

By: DLJ Capital Corporation,  
its managing general partner

By:

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Name:

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Title:

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**U.S. BANK TRUST NATIONAL ASSOCIATION**

By:

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Authorized Officer

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**PART II**

**INFORMATION NOT REQUIRED IN PROSPECTUS**

**Item 20. Indemnification of Directors and Officers**

Under Section 145 of the DGCL, a corporation may indemnify its directors, officers, employees and agents and its former directors, officers, employees and agents and those who serve, at the corporation's request, in such capacities with another enterprise, against expenses (including attorneys' fees), as well as judgments, fines and settlements in nonderivative lawsuits, actually and reasonably incurred in connection with the defense of any action, suit or proceeding in which they or any of them were or are made parties or are threatened to be made parties by reason of their serving or having served in such capacity. The DGCL provides, however, that such person must have acted in good faith and in a manner such person reasonably believed to be in (or not opposed to) the best interests of the corporation and, in the case of a criminal action, such person must have had no reasonable cause to believe his or her conduct was unlawful. In addition, the DGCL does not permit indemnification in an action or suit by or in the right of the corporation, where such person has been adjudged liable to the corporation, unless, and only to the extent that, a court determines that such person fairly and reasonably is entitled to indemnity for costs the court deems proper in light of liability adjudication. Indemnity is mandatory to the extent a claim, issue or matter has been successfully defended.

The Third Restated Certificate of Incorporation of CIENA (the "CIENA Certificate") contains provisions that provide that no director of CIENA shall be liable for breach of fiduciary duty as a director, except for: (1) any breach of the directors' duty of loyalty to CIENA or its stockholders; (2) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law; (3) liability under Section 174 of the DGCL; or (4) any transaction from which the director derived an improper personal benefit. The CIENA Certificate contains provisions that further provide for the indemnification of directors and officers to the fullest extent permitted by the DGCL. Under the bylaws of CIENA, CIENA is required to advance expenses incurred by an officer or director in defending any such action if the director or officer undertakes to repay such amount if it is determined that the director or officer is not entitled to indemnification. In addition, CIENA has entered into indemnity agreements with each of its directors pursuant to which CIENA has agreed to indemnify the directors as permitted by the DGCL. CIENA has obtained directors and officers liability insurance against certain liabilities, including liabilities under the Securities Act.

**Item 21. Exhibits and Financial Statement Schedules**

**(a) Exhibits**

**INDEX TO EXHIBITS**

2.1	Agreement and Plan of Merger dated as of February 18, 2004 by and among CIENA Corporation, Internet Photonics, Inc., Gregory W. Koss and Steven M. Waszak (filed herewith in Annex A to the information statement/prospectus)
2.2	First Amendment to Agreement and Plan of Merger, dated March 17, 2004 (filed herewith in Annex A to the information statement/prospectus).
5.1	Hogan & Hartson L.L.P. Opinion
8.1	Hogan & Hartson L.L.P. Tax Opinion
8.2	Sonnenschein Nath & Rosenthal LLP Tax Opinion
23.1	Consent of PricewaterhouseCoopers LLP
23.2	Consent of Hogan & Hartson L.L.P. (included as part of Exhibits 5.1 and 8.1)
23.3	Consent of Sonnenschein Nath & Rosenthal LLP (included as part of Exhibit 8.2)
24.1	Power of Attorney*
99.1	Form of Escrow Agreement by and between CIENA Corporation, U.S. Bank Trust, N.A. and Sprout Capital IX, L.P., as stockholders representative (filed herewith as Annex D to the information statement/prospectus)

\* previously filed

**Item 22. Undertakings**

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

The undersigned registrant hereby undertakes to respond to requests for information that is incorporated by reference into the prospectus pursuant to Item 4, 10(b), 11 or 13 of this form, within one business day of receipt of such request, and to send the incorporated documents by first class mail or other equally prompt means. This includes information contained in documents filed subsequent to the effective date of this Registration Statement through the date of responding to the request.

The undersigned registrant hereby undertakes to supply by means of a post-effective amendment all information concerning a transaction, and the company being acquired involved therein, that was not the subject of and included in the registration statement when it became effective.

The undersigned registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than 20 percent change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective registration statement; and

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in this Registration Statement.

*provided, however*, that paragraphs (1)(i) and (1)(ii) do not apply if the registration statement is on Form S-3, Form S-8 or Form F-3, and the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement.

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

The undersigned registrant hereby undertakes as follows: that prior to any public reoffering of the securities registered hereunder through the use of a prospectus which is a part of this registration statement, by any person or party who is deemed to be an underwriter within the meaning of Rule 145(c), the issuer undertakes that such reoffering prospectus will contain the information called for by the applicable registration form with respect to reofferings by persons who may be deemed underwriters, in addition to the information called for by the other items of the applicable form.

The registrant undertakes that every prospectus: (i) that is filed pursuant to the immediately preceding paragraph, or (ii) that purports to meet the requirements of Section 10(a)(3) of the Act and is used in connection with an offering of securities subject to Rule 415, will be filed as a part of an amendment to the registration statement and will not be used until such amendment is effective, and that, for purposes of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.





March 25, 2004

/s/ JOHN R. DILLON\*

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John R. Dillon  
Director

March 25, 2004

/s/ LAWTON W. FITT\*

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Lawton W. Fitt  
Director

March 25, 2004

/s/ JUDITH M. O BRIEN\*

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Judith M. O Brien  
Director

March 25, 2004

/s/ GERALD H. TAYLOR\*

-----  
Gerald H. Taylor  
Director

\* pursuant to power of attorney

By: /s/ RUSSELL B. STEVENSON, JR.

\_\_\_\_\_  
Russell B. Stevenson, Jr.  
Attorney-in-Fact

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