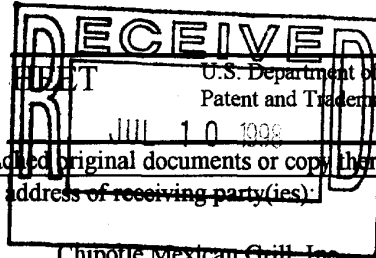


07-14-1998

REC



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To the Honorable Commissioner of Patents and Trademarks, 1 rue de la Harpe, Paris, France, or to the Honorable Commissioner of Patents and Trademarks, U.S. Department of Commerce, Patent and Trademark Office, Washington, D.C. 20231, for the recording of original documents or copy thereof:

1. Name and address of conveying party(ies):

Name: World Foods, Inc.
d/b/a Chipotle Mexican Grill
Address: 2546 15th Street
Denver, Colorado 80211

Individual Association
 General Partnership Limited Partnership
 Corporation, State of Colorado
Other: _____

Additional name(s) of conveying party(ies) attached?
 Yes No

2. Name and address of receiving party(ies):

Name: Chipotle Mexican Grill, Inc.
Address: 2546 15th Street
Denver, Colorado 80211

Individual(s) citizenship: _____
Association: _____
General Partnership: _____
Limited Partnership: _____
 Corporation, State of Delaware
Other: _____

If assignee is not domiciled in the United States, a domestic representative designation is attached: Yes No
(Designation must be a separate document from Assignment)
Additional name(s) of receiving party(ies) attached?
 Yes No

3. Nature of Conveyance:
 Assignment Merger
 Security Agreement Change of Name
 Other: _____

Execution Date: March 2, 1998

4. Application Number(s) or Registration Number(s):

A. Trademark Application Number(s): _____

Additional numbers attached? Yes No

B. Registration Number(s):
1,934,470

Additional numbers attached? Yes No

5. Name and address of party to whom correspondence concerning this document should be mailed:

Name: Beth M. Goldman
Address: Heller Ehrman White & McAuliffe
525 University Avenue
Palo Alto, California 94301

6. Total Applications and registrations involved: 5

7. Total fee (37 CFR 3.41)(\$40.00 per assignment):\$ 40.00
 Enclosed
 Authorized to be charged to Deposit Account
 The Commissioner is authorized to charge underpayment of any fees or credit any overpayment to deposit account number 08-1645.

8. Deposit Account Number 08-1645.

Statement and Signature: To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Beth M. Goldman
Typed Name

Beth M. Goldman
Signature

7/6/98
Date

DO NOT USE THIS SPACE

Mail documents to be recorded with required cover information to: Commissioner of Patents and Trademarks
Box Assignments
Washington, D.C. 20231


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State of Delaware
Office of the Secretary of State PAGE 1

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF MERGER, WHICH MERGES:

"WORLD FOODS, INC.", A COLORADO CORPORATION,
WITH AND INTO "CHIPOTLE MEXICAN GRILL, INC." UNDER THE NAME OF "CHIPOTLE MEXICAN GRILL, INC.", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE TWENTY-SEVENTH DAY OF FEBRUARY, A.D. 1998, AT 9:30 O'CLOCK A.M.





Edward J. Freel, Secretary of State

2853698 8100M

981197736

AUTHENTICATION: 9097626

DATE: 05-22-98
TRADEMARK

REEL: 1752 FRAME: 0548

CERTIFICATE OF MERGER

OF

**WORLD FOODS, INC.,
a Colorado corporation**

INTO

**CHIPOTLE MEXICAN GRILL, INC.,
a Delaware corporation**

**(UNDER SECTION 252 OF THE GENERAL
CORPORATION LAW OF THE STATE OF DELAWARE)**

Chipotle Mexican Grill, Inc., a Delaware corporation, hereby certifies that:

(1) The name and state of incorporation of each of the constituent corporations are:

(a) Chipotle Mexican Grill, Inc., a Delaware corporation ("Chipotle");
and

(b) World Foods, Inc., a Colorado corporation ("World Foods").

(2) An Agreement of Merger has been approved, adopted, certified, executed and acknowledged by Chipotle and by World Foods in accordance with the provisions of subsection (c) of Section 252 of the General Corporation Law of the State of Delaware.

(3) The name of the surviving corporation is Chipotle Mexican Grill, Inc. which will continue its existence as the surviving corporation under its present name upon the effective date of the merger.

(4) The certificate of incorporation of Chipotle shall be amended to read in its entirety as set forth on Exhibit A hereto.

(5) The executed Agreement of Merger is on file at the principal place of business of the surviving corporation, 2546 15th Street, Denver, Colorado 80211.

(6) A copy of the Agreement of Merger will be furnished by Chipotle, on request and without cost, to any stockholder of Chipotle or World Foods.

(7) The authorized capital stock of World Foods is 25,000,000 shares of Common Stock and 7,900,000 shares of Preferred Stock.

(8) This Certificate of Merger and the Merger provided herein shall become effective at 9:00 am Eastern Standard Time on March 2, 1998.

IN WITNESS WHEREOF, Chipotle has caused this Certificate of Merger to be signed by ITS CHIEF EXECUTIVE OFFICER, M. Steven Ellis.

Chipotle Mexican Grill, Inc.,
a Delaware corporation

By: _____

M. Steven Ellis
M. Steven Ellis

CHIEF EXECUTIVE OFFICER

**CERTIFICATE OF INCORPORATION
OF
CHIPOTLE MEXICAN GRILL, INC.**

ARTICLE I

The name of the corporation is Chipotle Mexican Grill, Inc. (the "Corporation").

ARTICLE II

The address of the Corporation's registered office in the State of Delaware is 1013 Centre Road, Wilmington, Delaware 19805. The name of the Corporation's registered agent at such address is The Prentice-Hall Corporation System, Inc. New Castle County.

ARTICLE III

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.

ARTICLE IV

A. **Authorized Capital Stock.** The aggregate number of shares of all classes of stock which the Corporation shall have authority to issue is 35,000,000, which are divided into two classes as follows:

(a) 20,000,000 shares of Common Stock, par value \$0.01 per share, with the rights and preferences designated in Part B below (the "Common Stock"); and

(b) 15,000,000 shares of Preferred Stock, par value \$0.01 per share (the "Preferred Stock"). The Preferred Stock shall be divided into series. The first series shall consist of 8,034,009 shares and is designated Series B Convertible Preferred Stock with the rights and preferences designated in Part C below (the "Series B Preferred"; shares of Series B Preferred are sometimes referred to herein as the "Series B Preferred Shares"). The remaining shares of Preferred Stock may be issued from time to time in one or more series. The Board of Directors of the Corporation is expressly authorized to provide for the issue of all or any of the remaining shares of the Preferred Stock in one or more series, and to fix the number of shares and to determine or alter for each such series, such voting powers, full or limited, or no voting powers, and such designations, preferences, and relative, participating, optional, or other rights and such qualifications, limitations, or

restrictions thereof, as shall be stated and expressed in the resolution or resolutions adopted by the Board of Directors providing for the issue of such shares and as may be permitted by the General Corporation Law of the State of Delaware.

In addition to the capitalized terms defined elsewhere herein, certain other capitalized terms used herein are defined in Part E below.

B. Provisions Relating to Common Stock.

1. **Liquidation.** In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation and after the payment of any preferential amounts to be distributed to the holders of Series B Preferred, the remaining assets available for distribution to the stockholders shall be distributed to the holders of Common Stock, ratably in proportion to the number of shares of Common Stock that each such holder holds.

2. **Dividends.** The Board of Directors may declare a dividend or distribution upon the Common Stock. Subject to the right of the holders of the Series B Preferred to participate in such dividend or distribution, dividends or distributions so declared by the Board of Directors shall be paid to the holders of Common Stock ratably in proportion to the number of shares of Common Stock held by each such holder on the date as of which the holders of Common Stock of record entitled to receive such dividends or distribution were determined.

3. **Voting Rights.** The Common Stock shall have those voting rights set forth for the Common Stock in Part D below.

C. Provisions Relating to Series B Preferred

1. **Liquidation.** Upon any voluntary or involuntary liquidation, dissolution or winding up of the Corporation, each holder of the Series B Preferred shall be entitled to receive an amount, in cash out of the assets of the Corporation available for distribution to stockholders, before any distribution or payment is made upon any Common Stock, equal to the Series B Liquidation Value plus all accrued and unpaid dividends to which such holders shall be entitled pursuant to Section 2 hereof. The merger or consolidation of the Corporation or the sale of all or substantially all of the Corporation's assets shall not be deemed to be a liquidation, dissolution or winding up of the Corporation. After the payment to the holders of the Series B Preferred of the full preferential amounts provided for in this Section 1, the holders of the Series B Preferred as such shall have no right or claim to any of the remaining assets of the Corporation. If upon any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the assets to be distributed to the holders of Series B Preferred shall be insufficient to permit the payment to such stockholders of the full preferential amount aforesaid, then all of the assets of the Corporation available for distribution to the holders of Series B Preferred shall be distributed ratably in proportion to the number of Series B Preferred Shares held

by each such holder on the date of liquidation, dissolution or winding up of the Corporation.

2. Dividends. If at any time the Corporation pays any dividends or makes any other distributions with respect to the Common Stock, the Corporation shall pay at such time to each holder of Series B Preferred the dividends or other distributions which such holder would have been entitled to receive had such holder converted all of its Series B Preferred Shares into Common Stock on the date as of which the holders of Common Stock of record entitled to such dividends or other distributions were determined.

3. Voting Rights. The Series B Preferred shall have those voting rights set forth for the Series B Preferred in Part D below.

4. Conversion.

4.1 Conversion Procedure.

(a) At any time and from time to time, any holder of Series B Preferred may convert all or any portion of the Series B Preferred Shares (including any fraction of a share) held by such holder into the number of shares of Common Stock computed by (i) multiplying the number of Series B Preferred Shares to be converted by \$2.01 and (ii) dividing the resulting product by the Conversion Price then in effect.

(b) Each conversion of Series B Preferred Shares shall be deemed to have been effected as of the close of business on the date on which the certificate or certificates representing the Series B Preferred Shares to be converted have been surrendered at the principal office of the Corporation. At such time as such conversion has been effected, the rights of the holder of such Series B Preferred Shares as such holder shall cease and the Person or Persons in whose name or names any certificate or certificates for shares of Common Stock are to be issued upon such conversion shall be deemed to have become the holder or holders of record of the shares of Common Stock represented thereby.

(c) As soon as possible after a conversion has been effected (but in any event within three business days in the case of Section 4.1(c)(i) and (iii) below), the Corporation shall deliver to the converting holder:

(i) a certificate or certificates representing the number of shares of Common Stock issuable by reason of such conversion in such name or names and such denomination or denominations as the converting holder has specified;

(ii) payment in an amount equal to all dividends, if any, owing with respect to each share converted which have not been paid prior thereto, plus the amount payable under Section 4.1(f) below with respect to such conversion; and

(iii) a certificate representing any Series B Preferred Shares which were represented by the certificate or certificates delivered to the Corporation in connection with such conversion but which were not converted.

(d) The issuance of certificates for shares of Common Stock upon conversion of Series B Preferred Shares shall be made without charge to the holders of such Series B Preferred Shares for any issuance tax in respect thereof or other cost incurred by the Corporation in connection with such conversion and the related issuance of shares of Common Stock. Upon conversion of each Series B Preferred Share, the Corporation shall take all such actions as are necessary in order to insure that the Common Stock issuable with respect to such conversion shall be validly issued, fully paid and nonassessable.

(e) The Corporation shall not close its books against the transfer of Series B Preferred Shares or shares of Common Stock issued or issuable upon conversion of Series B Preferred Shares in any manner which interferes with the timely conversion of Series B Preferred Shares.

(f) If any fractional interest in a share of Common Stock would, except for the provisions of this Section 4.1(f), be deliverable upon any conversion of the Series B Preferred Shares, the Corporation, in lieu of delivering the fractional share therefor, may pay an amount to the holder thereof equal to the fair market value (as reasonably determined in good faith by the Board of Directors) of such fractional interest as of the date of conversion.

4.2 Conversion Price.

(a) Initial Conversion Price. The initial Conversion Price shall be \$2.01. In order to prevent dilution of the conversion rights granted to holders of Series B Preferred Shares hereunder, the Conversion Price shall be subject to adjustment from time to time pursuant to this Section 4.2 and Section 4.4.

(b) Adjustment of Conversion Price upon Issuance of Common Stock. If at any time after the date hereof the Corporation shall issue or sell any shares of Common Stock (other than shares of Common Stock issued upon conversion of the Series B Preferred) for a consideration per

share less than the Conversion Price in effect immediately prior to the time of such issue or sale, then, forthwith upon such issue or sale, the Conversion Price shall be reduced to equal the Effective Price (as hereinafter defined) of the shares of Common Stock so issued or sold. The "Effective Price" of shares of Common Stock issued or sold shall mean the dollar amount determined by dividing the total number of shares of Common Stock issued or sold by the Corporation in such issue (or deemed to have been issued or sold) by the aggregate consideration received by the Corporation (or deemed to have been received) for such issue.

(c) Other Adjustment Events and Provisions. For the purposes of this Section 4.2, the following clauses shall also be applicable:

(i) Issuance of Rights, Warrants or Options. If at any time the Corporation shall grant, issue or sell (whether directly or by assumption in a merger or otherwise) any rights or warrants to subscribe for or to purchase, or any options for the purchase of, Common Stock or any stock or securities convertible into or exchangeable for Common Stock (such convertible or exchangeable stock or securities being herein called "Convertible Securities"), whether or not such rights, warrants or options or the right to convert or exchange any such Convertible Securities are immediately exercisable, and the price per share for which Common Stock is issuable upon the exercise of such rights, warrants or options or upon conversion or exchange of such Convertible Securities (determined as provided below) shall be less than the Conversion Price in effect immediately prior to the time of the granting of such rights, warrants or options, then the total maximum number of shares of Common Stock issuable upon the exercise of such rights, warrants or options or upon conversion or exchange of the total maximum amount of such Convertible Securities issuable upon the exercise of such rights, warrants or options shall be deemed to be outstanding as of the date of granting of such rights, warrants or options and to have been issued for such price per share and the Conversion Price shall be adjusted (as of the date of the granting of such rights, warrants or options) as set forth in Section 4.2(b) above. Except as provided in clause (iii) below, no further adjustments of any Conversion Price shall be made upon the actual issue of such Common Stock or of such Convertible Securities upon exercise of such rights, warrants or options or upon the actual issue of such Common Stock upon conversion or exchange of such Convertible Securities. For purposes of this clause (i), the price per share for which Common Stock is issuable upon the exercise of any such rights, warrants or options or upon conversion or exchange of any such Convertible Securities shall be

determined by dividing (A) the total amount, if any, received or receivable by the Corporation as consideration for the granting of such rights, warrants or options, plus the minimum aggregate amount of additional consideration payable to the Corporation upon the exercise of all such rights, warrants or options, plus, in the case of such rights, warrants or options that relate to Convertible Securities, the minimum aggregate amount of additional consideration, if any, payable upon the issue or sale of such Convertible Securities and upon the conversion or exchange thereof, by (B) the total maximum number of shares of Common Stock issuable upon the exercise of such rights, warrants or options or upon the conversion or exchange of all such Convertible Securities issuable upon the exercise of such rights, warrants or options.

(ii) Issuance of Convertible Securities. If the Corporation shall issue (whether directly or by assumption in a merger or otherwise) or sell any Convertible Securities (other than the Series B Preferred), whether or not the rights to exchange or convert thereunder are immediately exercisable, and the price per share for which Common Stock is issuable upon conversion or exchange of such Convertible Securities (determined as provided below) shall be less than the Conversion Price in effect immediately prior to the time of such issue or sale, then the total maximum number of shares of Common Stock issuable upon conversion or exchange of all such Convertible Securities shall be deemed to be outstanding as of the date of the issue or sale of such Convertible Securities and to have been issued for such price per share and the Conversion Price shall be adjusted (as of the date of the issue or sale of such Convertible Securities) as set forth in Section 4.2(b) above; provided that (A) except as provided in clause (iii) below, no further adjustments of any Conversion Price shall be made upon the actual issue of such Common Stock upon conversion or exchange of such Convertible Securities and (B) if any such issue or sale of such Convertible Securities is made upon exercise of any rights or warrants to subscribe for or to purchase or any option to purchase any such Convertible Securities for which adjustments of any Conversion Price have been or are to be made pursuant to other provisions of this Section 4.2(c), no further adjustment of any Conversion Price shall be made by reason of such issue or sale. For purposes of this clause (ii), the price per share for which Common Stock is issuable upon conversion or exchange of Convertible Securities shall be determined by dividing (1) the total amount received or receivable by the Corporation as consideration for the issue or sale of such Convertible Securities, plus the minimum

aggregate amount of additional consideration, if any, payable to the Corporation upon the conversion or exchange thereof, by (2) the total maximum number of shares of Common Stock issuable upon the conversion or exchange of all such Convertible Securities.

(iii) Change in Option Price or Conversion Rate. If the purchase price provided for in any rights, warrants or options referred to in clause (i) above, or the additional consideration, if any, payable upon the conversion or exchange of Convertible Securities referred to in clause (i) or (ii) above, or the rate at which any Convertible Securities referred to in clause (i) or (ii) above are convertible into or exchangeable for Common Stock, shall change (other than under or by reason of provisions designed to protect against dilution), then the Conversion Price in effect at the time of such event shall forthwith be readjusted to the Conversion Price that would have been in effect at such time had such rights, warrants, options or Convertible Securities still outstanding provided for such changed purchase price, additional consideration or conversion rate, as the case may be, at the time initially granted, issued or sold.

(iv) Stock Dividends. In case the Corporation shall declare a dividend or make any other distribution upon any stock of the Corporation payable in Common Stock (which is not paid to the Series B Preferred), then and in such event, the Conversion Price then in effect shall be decreased by multiplying the Conversion Price then in effect by a fraction:

(i) the numerator of which shall be the total number for shares of Common Stock issued and outstanding immediately prior to the time of such issuance; and

(ii) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance plus the number of shares of Common Stock issuable in payment of such dividend or distribution.

(v) Consideration for Stock. In case any shares of Common Stock or Convertible Securities or any rights, warrants or options to purchase any such Common Stock or Convertible Securities shall be issued or sold:

(A) for cash, the consideration received therefor shall be deemed to be the amount received by the

Corporation therefor, without deduction therefrom of any expenses incurred or any underwriting commissions or concessions paid or allowed by the Corporation in connection therewith;

(B) for a consideration other than cash, the amount of the consideration other than cash received by the Corporation shall be deemed to be the fair value of such consideration as determined, in good faith and in the exercise of reasonable business judgment, by the Board of Directors; or

(C) in connection with any merger or consolidation in which the Corporation is the surviving corporation (other than any consolidation or merger in which the previously outstanding shares of Common Stock of the Corporation shall be changed into or exchanged for the stock or other securities of another corporation), the amount of consideration therefor shall be deemed to be the fair value as determined, in good faith and in the exercise of reasonable business judgment, by the Board of Directors of such portion of the assets and business of the non-surviving corporation as such Board of Directors may determine to be attributable to such shares of Common Stock, Convertible Securities, rights, warrants or options, as the case may be.

(vi) Record Date. In case the Corporation shall take a record of the holders of its Common Stock for the purpose of entitling them (A) to receive a dividend or other distribution payable in Common Stock or in Convertible Securities or (B) to subscribe for or purchase Common Stock or Convertible Securities, then such record date shall be deemed to be the date of the actual issue or sale of the shares of Common Stock deemed to have been issued or sold upon the declaration of such dividend or the actual making of such other distribution or the date of the actual granting of such right of subscription or purchase, as the case may be.

(vii) Treasury Shares. The number of shares of Common Stock outstanding at any given time shall not include shares directly or indirectly owned or held by or for the account of the Corporation or any of its subsidiaries, and the disposition of any such shares (other than by retirement and/or cancellation) shall be considered an issue or sale of Common Stock for the purposes of this Section 4.2(c):

(d) Certain Dividends and Distributions. If the Corporation shall declare a dividend or make any other distribution (other than a distribution referred to in Section 4.2(c)) upon the Common Stock (other than cash dividends payable out of retained earnings), then in each case the Conversion Price in effect immediately prior to the declaration of such dividend or making of such distribution shall be adjusted so that the same shall equal the price determined by multiplying the Conversion Price in effect immediately prior to the close of business on the date fixed for the determination of stockholders entitled to receive such dividend or distribution by a fraction the numerator of which shall be the Market Price on the date prior to the date fixed for such determination, less, in the case of a dividend or distribution in cash, the amount per share of Common Stock so declared or, in the case of any other dividend or distribution, the then fair value (as determined, in good faith and in the exercise of reasonable business judgment, by the Board of Directors) of the portion of the property or assets so distributed applicable to one share of Common Stock, and the denominator of which shall be such Market Price, such adjustment to become effective immediately prior to the opening of business on the day following the date fixed for the determination of stockholders entitled to receive such distribution.

(e) Subdivision or Combination of Stock. In case the Corporation shall at any time subdivide the outstanding shares of Common Stock into a greater number of shares, the Conversion Price in effect immediately prior to such subdivision shall be proportionately reduced and, conversely, in case the outstanding shares of Common Stock shall be combined into a smaller number of shares, the Conversion Price in effect immediately prior to such combination shall be proportionately increased.

(f) Adjustments for Consolidation, Merger, Sale of Assets, Reorganization. In case the Corporation (i) consolidates with or merges into any other Person and is not the continuing or surviving Person of such consolidation or merger, (ii) permits any other Person to consolidate with or merge into the Corporation and the Corporation is the continuing or surviving Person but, in connection with such consolidation or merger, the Common Stock is changed into or exchanged for stock or other securities of any other Person or cash or any other assets, or (iii) transfers all or substantially all of its property and assets to any other Person, or (iv) effects a capital reorganization or reclassification of the capital stock of the Corporation in such a way that holders of Common Stock shall be entitled to receive stock, securities, cash or assets with respect to or in exchange for Common Stock, then, and in each such case, proper provision shall be made so that, upon the basis and upon the terms and in the manner provided in this Section 4.2(f), each holder of a share of Series B Preferred, upon conversion of a share of Series B Preferred at any time after the

consummation of such consolidation, merger, transfer, reorganization or reclassification, shall be entitled to receive, in lieu of shares of Common Stock issuable upon such conversion prior to such consummation, the stock, securities, cash and assets to which such holder would have been entitled upon such consummation if such holder had so converted such share of Series B Preferred immediately prior thereto at the aggregate Conversion Price in effect immediately prior to such consummation as adjusted to the time of such transaction (subject to adjustments subsequent to such corporate action as nearly equivalent as possible to the adjustments provided for in this Section 4.2).

(g) Notice of Adjustment. Whenever the number of shares of Common Stock or other stock or property or assets issuable upon the conversion of each share of Series B Preferred or the Conversion Price is adjusted pursuant to this Section 4.2, then and in each such case the President of the Corporation shall have prepared and execute a certificate (the "Adjustment Certificate") setting forth, in reasonable detail, the event requiring the adjustment, the Conversion Price resulting from such adjustment, the method by which such adjustment was calculated (including a description of the basis on which the Board of Directors made any determination hereunder), and shall cause a copy of the Adjustment Certificate to be filed with the transfer agent for the Series B Preferred, if any, and a notice thereof mailed to the holders of record of the outstanding shares of such Series B Preferred.

(h) No Avoidance. The Corporation shall not amend its Certificate of Incorporation, or participate in any reorganization, sale or transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action for the purpose of avoiding or seeking to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but shall at all times in good faith use its best efforts, and assist in carrying out all such action as may be reasonably necessary or appropriate in order to protect the conversion rights of the holders of the Series B Preferred set forth herein.

4.3 Mandatory Conversion Upon Qualified Public Offering. If a firm commitment for an underwritten Public Offering of shares of Common Stock is effected in which (a) the aggregate price paid by the public for the shares is at least \$20,000,000 and (b) the price per share paid by the public for such shares is at least equal to \$6.03 (adjusted appropriately in the event the shares of Series B Preferred are subdivided into a greater number, whether by stock split, stock dividend or otherwise, or combined into a lesser number, whether by reverse stock split or otherwise) (a "Qualified Public Offering"), then all of the outstanding Series B Preferred Shares shall be automatically converted into shares of Common Stock upon the closing of the sale of shares pursuant to such Qualified Public

Offering, all without any further action by the holders of such Series B Preferred Shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent.

4.4 Certain Events. If any event similar to or of the type contemplated by the provisions of this Section 4, but not expressly provided for by such provisions, occurs, then the Board of Directors, including a majority of the Directors elected by holders of Common Stock, shall make an appropriate and equitable adjustment in the Conversion Price so as to protect the rights of the holders of Series B Preferred; provided that no such adjustment shall increase the Conversion Price as otherwise determined pursuant to this Section 4 or decrease the number of shares of Common Stock issuable upon conversion of each Series B Preferred Share.

5. Redemption upon an Event of Noncompliance.

(a) An Event of Noncompliance shall be deemed to have occurred if any Series B Preferred Shares are outstanding and any of the following occurs:

(i) If the Corporation materially breaches or otherwise materially fails to perform or observe any Material Covenant and such failure to perform or observe a Material Covenant is not cured within thirty days after the Corporation receives written notice of the occurrence thereof; provided, however, that if such breach is not reasonably capable of being cured within such period, the foregoing cure period shall be extended for so long as the Corporation is using reasonable efforts to effect such cure, but in no event more than thirty days after the expiration of such initial 30-day period;

(ii) If the Corporation or any Subsidiary (as such term is defined in the Preferred Stock Purchase Agreement) makes an assignment for the benefit of creditors or admits in writing its inability to pay its debts generally as they become due; or an order, judgment or decree is entered adjudicating the Corporation or any Subsidiary bankrupt or insolvent; or any order for relief with respect to the Corporation or any Subsidiary is entered under the United States Bankruptcy Code; or the Corporation or any Subsidiary petitions or applies to any tribunal for the appointment of a custodian, trustee, receiver or liquidator for the Corporation or any Subsidiary, or of any substantial part of the assets of the Corporation or any Subsidiary, or commences any proceeding relating to the Corporation or any Subsidiary under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction; or any such petition or application is filed, or any such proceeding is commenced, against the Corporation or any Subsidiary and either (x) the Corporation or any such Subsidiary by any act indicates its

approval thereof, consent thereto or acquiescence therein or (y) such petition, application or proceeding is not dismissed within sixty days;

(iii) Unless disclosed to, and approved by, the Board of Directors (including at least one of the Series B Directors) prior to the default, if the Corporation or any Subsidiary defaults in the performance of any obligation or agreement if the effect of such default is to cause an amount exceeding \$100,000 to become due prior to its stated maturity or if the Corporation or any Subsidiary defaults in the payment of an amount exceeding \$100,000 when such amount is due (whether at stated maturity, by acceleration or otherwise); or

(iv) Unless disclosed to, and approved by, the Board of Directors (including at least one of the Series B Directors) prior to the expiration of the 90-day period described below, if any money judgment, writ or warrant of attachment, or similar process involving an amount in any individual case in excess of \$25,000 is entered or filed against the Corporation or any of its Subsidiaries or any of their respective assets and remains undischarged, unvacated, unbonded or unstayed for a period of ninety days.

(b) If any Event of Noncompliance shall have occurred, the holders of a majority of the Series B Preferred Shares then outstanding may demand by written notice delivered to the Corporation immediate redemption of all or any portion of the Series B Preferred Shares then outstanding at a price per share equal to the Series B Liquidation Value plus all accrued and unpaid dividends thereon (the "Series B Redemption Price"). The Corporation shall give prompt written notice of any such election to the other holders of the Series B Preferred (but in any event within five days after the receipt of the initial demand for redemption), and each such other holder may demand immediate redemption of all or any portion of such holder's Series B Preferred Shares by giving written notice thereof to the Corporation within seven days after receipt of the Corporation's notice. If any holder or holders of the Series B Preferred demands immediate redemption of all or any portion of such holder's Series B Preferred Shares pursuant to the terms of this Section 5(b), the Corporation shall pay to such holder or holders the aggregate Series B Redemption Price of such shares requested to be redeemed by such holder or holders within sixty days after receipt of the initial demand for redemption.

6. Purchase Rights. If at any time the Corporation grants, issues or sells any equity securities or rights to purchase stock, warrants, securities or other property pro rata to the record holders of Common Stock ("Purchase Rights"), then each holder of Series B Preferred shall be entitled to such Purchase Rights, ratably in proportion to the number of shares of Common Stock each such holder would have held if each had converted all Series B Preferred Shares held by it into Common Stock on the date on which a record is

taken for the grant, issuance or sale of such Purchase Rights, or, if no such record is taken, the date as of which the record holders of Common Stock are to be determined for the grant, issuance or sale of such Purchase Rights.

7. Miscellaneous.

7.1 No Reissuance of Series B Preferred. No Series B Preferred Shares acquired by the Corporation by reason of redemption, purchase, conversion or otherwise shall be reissued, and all such shares shall be cancelled, retired and eliminated from the shares which the Corporation shall be authorized to issue.

7.2 Registration of Transfer. The Corporation shall keep at its principal office a register for the registration of Series B Preferred Shares. Upon the surrender of any certificate representing Series B Preferred Shares at such place, the Corporation shall, at the request of the record holder of such certificate, execute and deliver (at the Corporation's expense) a new certificate or certificates in exchange therefor representing in the aggregate the number of Series B Preferred Shares represented by the surrendered certificate. Each such new certificate shall be registered in such name and shall represent such number of Series B Preferred Shares as is requested by the holder of the surrendered certificate and shall be substantially identical in form to the surrendered certificate, and dividends shall accrue on the Series B Preferred Shares represented by such new certificate from the date to which dividends have been fully paid on such Series B Preferred Shares represented by the surrendered certificate.

7.3 Replacement. Upon receipt of evidence reasonably satisfactory to the Corporation (an affidavit of the registered holder will be satisfactory) of the ownership and the loss, theft, destruction or mutilation of any certificate evidencing Series B Preferred Shares, or, in the case of any such mutilation upon surrender of such certificate, the Corporation shall (at its expense) execute and deliver in lieu of such certificate a new certificate of like kind representing the number of Series B Preferred Shares represented by such lost, stolen, destroyed or mutilated certificate and dated the date of such lost, stolen, destroyed or mutilated certificate, and dividends shall accrue on the Series B Preferred Shares represented by such new certificate from the date to which dividends have been fully paid on such lost, stolen, destroyed or mutilated certificate.

7.4 Amendment and Waiver. No amendment, modification or waiver shall be binding or effective with respect to any provision of this Part C without the prior written consent of the holders of a majority of the Series B Preferred Shares outstanding at the time such action is taken; provided that no amendment shall by its terms discriminate against any holder of Series B Preferred other than as a result of a difference in the number of Series B Preferred Shares held by such holders.

7.5 Notices. Except as otherwise expressly provided, all notices referred to in this Part C shall be in writing and shall be delivered by registered or certified mail, return receipt requested, postage prepaid and shall be deemed to have been given

when so mailed (a) to the Corporation, at its principal executive offices and (b) to any stockholder, at such holder's address as it appears in the stock records of the Corporation (unless otherwise indicated by notice in writing by such holder).

D. Voting Rights: Directors.

1. In General. Except as otherwise provided by the General Corporation Law of the State of Delaware or by this Certificate of Incorporation, as amended, on all matters submitted to a vote of the stockholders of the Corporation, the Common Stock and Series B Preferred shall vote together as a single class. Each holder of Series B Preferred shall have the number of votes equal to the number of shares of Common Stock which such holder would have been entitled to receive had such holder converted all of its Series B Preferred Shares into Common Stock on the date as of which the holders of Common Stock of record entitled to vote were determined (assuming for this purpose only that Series B Preferred Shares are convertible into fractional shares) and each holder of Common Stock shall have one vote per share of Common Stock held by such holder on the date as of which the holders of Common Stock of record entitled to vote were determined.

2. Board of Directors.

2.1 The Board of Directors of the Corporation shall consist of nine members. The holders of Series B Preferred, voting as a separate class, shall be entitled to elect five members of the Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors. The holders of the Common Stock, voting as a separate class, shall be entitled to elect four members of the Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors. Each Committee of the Board of Directors shall have as a member at least one Series B Director at all times. An increase in the number of members constituting the Board of Directors must be approved by a vote of six of the nine members of the Board of Directors.

2.2 Vacancies and Removal.

(a) In the event of a vacancy or vacancies on the Board of Directors of the Corporation caused by the death, resignation or removal of one or more directors elected by the holders of the Series B Preferred, such vacancy may be filled only by the directors (or the remaining director, if only one) elected by the holders of the Series B Preferred or by a majority vote of the holders of the Series B Preferred then outstanding. Any person elected as a director by the holders of the Series B Preferred, or by the directors elected by them, may be removed by a majority vote of the holders of the Series B Preferred outstanding with or without cause at any time.

(b) In the event of a vacancy or vacancies on the Board of Directors of the Corporation caused by the death, resignation or removal of one or more directors elected by the holders of the Common Stock, such vacancy may be filled only by the directors (or the remaining director, if only one) elected by the holders of the Common Stock or by a majority vote of the Common Stock then outstanding. Any person elected as a director by the holders of the Common Stock, or by the directors elected by them, may be removed by a majority vote of the holders of the Common Stock outstanding with or without cause at any time.

3. Majority Vote Required. The vote of a majority of the outstanding shares of Series B Preferred shall be required as to all matters upon which the Series B Preferred is entitled to vote as a separate class except as otherwise provided under the General Corporation Law of the State of Delaware.

E. Definitions.

"Closing Date" has the meaning set forth in the Preferred Stock Purchase Agreement.

"Market Price" of any security means the average of the closing prices with respect to sales of such security on all securities exchanges on which such security may at the time be listed, or, if there has been no sales on any such exchange on any day, the average of the highest bid and lowest asked prices on the primary exchange on which such security is listed at the end of such day, or, if on any day such security is not so listed, the average of the representative bid and asked prices quoted in the NASDAQ System as of 4:00 P.M., New York time, or, if on any day such security is not quoted in the NASDAQ System, the average of the highest bid and lowest asked prices on such day in the domestic over-the-counter market as reported by the National Quotation Bureau, Incorporated, or any similar successor organization, in each such case averaged over a period of twenty-one days consisting of the day as of which "Market Price" is being determined and the twenty consecutive business days prior to such day. If at any other time such security is not listed on any securities exchange or quoted in the NASDAQ System or the over-the-counter market, the "Market Price" shall be the fair value thereof determined by the Board of Directors in good faith.

"Material Covenant" means (i) the covenants of the Corporation in Article VII and Article VIII of the Preferred Stock Purchase Agreement and (ii) the covenants of the Corporation in the Registration Rights Agreement which if not performed would have a material adverse effect on the exercise by any Person of the registration rights provided for therein.

"Person" means an individual, a partnership, a corporation, a limited liability company, an association, a joint stock company, a trust, a joint venture, an unincorporated organization and a governmental entity or any department, agency or political subdivision thereof.

"Preferred Stock Purchase Agreement" means the Preferred Stock Purchase Agreement, dated as of February 6, 1998, by and among the Corporation and the Investors and individuals named therein.

"Public Offering" means any offering by the Corporation of its equity securities to the public pursuant to an effective registration statement under the Securities Act of 1933, as then in effect, or any comparable statement under any successor federal statute then in force other than a registration statement on Form S-8.

"Registration Rights Agreement" means the Registration Rights Agreement, dated as of March 2, 1998, by and among the Corporation and holders of Series B Preferred Shares, as such agreement may be amended from time to time in accordance with its terms.

"Series B Director" means any member of the Board of Directors selected by the holder or holders of a majority of the Series B Preferred Shares.

"Series B Liquidation Value" of any share of Series B Preferred as of any particular date will be equal to \$2.01 plus 8% per annum from the Closing Date (adjusted appropriately in the event the shares of Series B Preferred are subdivided into a greater number, whether by stock split, stock dividend or otherwise, or combined into a lesser number, whether by reverse stock split or otherwise).

ARTICLE V

A. The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors, and the directors need not be elected by ballot unless required by the By-Laws of the Corporation.

B. Except as otherwise provided by law, action by the Board of Directors shall require the affirmative vote of a majority of the entire Board of Directors.

ARTICLE VI

In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware, the Board of Directors is expressly authorized, subject to the vote required in Article V, to adopt, amend and repeal the By-Laws of the Corporation; and the stockholders may so adopt, amend or repeal the By-Laws of the Corporation, subject to the voting requirements set forth in Part D of Article IV of this Certificate of Incorporation.

ARTICLE VII

A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the General Corporation Law of the State of Delaware, or (iv) for any transaction from which the director derived an improper personal benefit. If the General Corporation Law of the State of Delaware is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law of the State of Delaware, as so amended. Any repeal or modification of this Article shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

ARTICLE VIII

Each person who is or was a director or officer of the Corporation and each person who serves or served at the request of the Corporation as a director, officer or partner of another enterprise shall be indemnified by the Corporation in accordance with, and to the fullest extent authorized by, the General Corporation Law of the State of Delaware, as the same now exists or may be hereafter amended. Any repeal or modification of this Article shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

ARTICLE IX

The Corporation reserves the right to amend, alter or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon the stockholders herein are granted subject to this reservation. This Certificate of Incorporation shall not be amended, altered or repealed in any manner which would adversely alter or change the powers, preferences or special rights of the Series B Preferred Shares without the affirmative vote or consent of the holders of a majority of the outstanding Series B Preferred Shares, voting as a separate class.

ARTICLE X

The incorporator of this Corporation is Kyle Guse, whose address is 525 University Avenue, Palo Alto, California 94301.