

12-08-1998



R SHEET
ONLY

Docket No.:

13914.248

100917565

Tab settings

To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):

Exerhealth, Inc.

MRP
12-4-98

- Individual(s)
- General Partnership
- Corporation-State Utah
- Other

- Association
- Limited Partnership

Additional names(s) of conveying party(ies) Yes No

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

Name: HealthRider, Inc.

Internal Address: _____

Street Address: 6322 South 3000 East

City: Salt Lake City State: UT ZIP: 84121

- Individual(s) citizenship
- Association
- General Partnership
- Limited Partnership
- Corporation-State Delaware
- Other

If assignee is not domiciled in the United States, a domestic designation is Yes N
(Designations must be a separate document from Additional name(s) & address(es) Yes N

3. Nature of conveyance:

- Assignment
- Security Agreement
- Other
- Merger
- Change of Name

Execution Date: June 30, 1995

4. Application number(s) or registration numbers(s):

A. Trademark Application No.(s)

74/553,621

B. Trademark Registration No.(s)

Additional numbers Yes No

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

Name: Jonathan W. Richards

Internal Address: _____

WORKMAN, NYDEGGER & SEELEY

1000 Eagle Gate Tower

Street Address: 60 East South Temple

City: Salt Lake City State: UT ZIP: 84111

6. Total number of applications and registrations involved:.....

1

7. Total fee (37 CFR 3.41):.....\$ \$40.00

- Enclosed
- Authorized to be charged to deposit account

8. Deposit account number:

12/07/1998 BHUYEN 00000279 74553621

DO NOT USE THIS SPACE

01 FC:481

40.00 OP

9. 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.

Jonathan W. Richards

Name of Person Signing

Jonathan W. Richards

Signature

3

December 1998

Date

Total number of pages including cover sheet, attachments, and

15

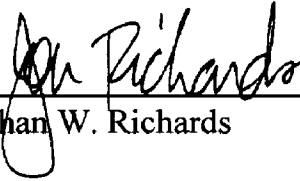
TRADEMARK

REEL: 1823 FRAME: 0345

DECLARATION

I hereby certify that the attached Certificate of Agreement of Merger, which merges Exerhealth, Inc. into HealthRider, Inc. is a true and correct copy of the original filed with the Secretary of State of Delaware on June 30, 1995.

Signed this 3RD day of December, 1998.

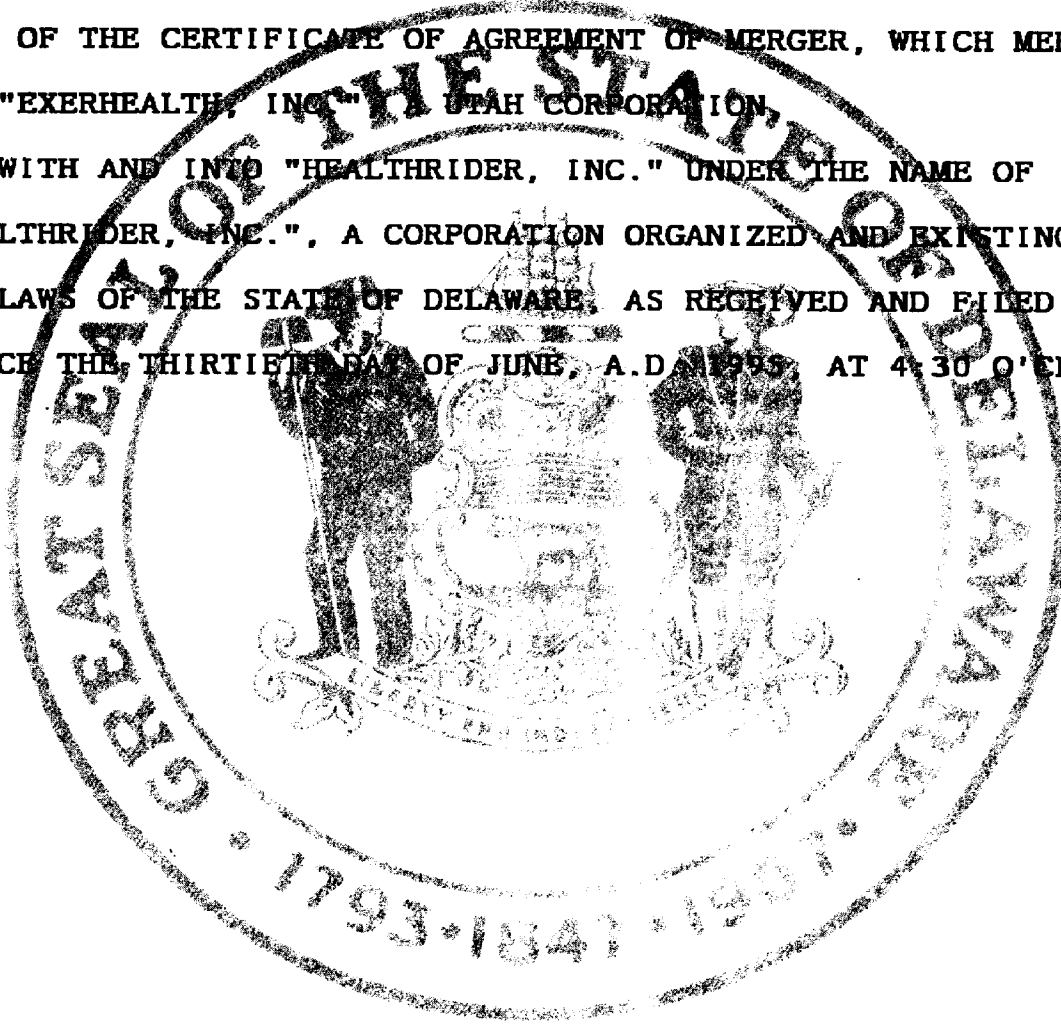


Jonathan W. Richards

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 AGREEMENT OF MERGER, WHICH MERGES: "EXERHEALTH, INC." A UTAH CORPORATION, WITH AND INTO "HEALTHRIDER, INC." UNDER THE NAME OF "HEALTHRIDER, INC.", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE THIRTIETH DAY OF JUNE, A.D. 1995, AT 4:30 O'CLOCK P.M.



Edward J. Freel

Edward J. Freel, Secretary of State

2498825 8100M

960254898

AUTHENTICATION:

DATE: 8094456

09-06-96
TRADEMARK

REEL: 1823 FRAME: 0347

**AGREEMENT AND PLAN OF MERGER
OF HEALTHRIDER, INC.,
A DELAWARE CORPORATION,
AND
EXERHEALTH, INC.,
A UTAH CORPORATION**

THIS AGREEMENT AND PLAN OF MERGER dated as of June 30, 1995 (the "Merger Agreement") is between HealthRider, Inc., a Delaware corporation ("HealthRider-Delaware"), and ExerHealth, Inc., a Utah corporation ("ExerHealth-Utah"). HealthRider-Delaware and ExerHealth-Utah are sometimes referred to herein as the "Constituent Corporations."

RECITALS

A. HealthRider-Delaware is a corporation duly organized and existing under the laws of the State of Delaware and has an authorized capital of 26,000,000 shares, 25,000,000 of which are designated Common Stock, \$.01 par value per share, and 1,000,000 of which are designated Preferred Stock, \$.01 par value per share. As of the date of this Merger Agreement, 100 shares of HealthRider-Delaware Common Stock were issued and outstanding, all of which were held by ExerHealth-Utah. No shares of HealthRider-Delaware Preferred Stock were outstanding.

B. ExerHealth-Utah is a corporation duly organized and existing under the laws of the State of Utah and has an authorized capital of 30,000,000 shares, 25,000,000 of which are designated Common Stock, no par value, and 5,000,000 of which are designated Preferred Stock, no par value. As of the date of this Merger Agreement, 10,023,751 shares of ExerHealth-Utah Common Stock and no shares of ExerHealth-Utah Preferred Stock were outstanding.

C. The Board of Directors of ExerHealth-Utah has determined that, for the purpose of effecting the reincorporation of ExerHealth-Utah in the State of Delaware, it is advisable and in the best interests of ExerHealth-Utah that ExerHealth-Utah merge with and into HealthRider-Delaware upon the terms and conditions herein provided.

E. The respective Boards of Directors of HealthRider-Delaware and ExerHealth-Utah have approved this Merger Agreement and have directed that this Merger Agreement be submitted to a vote of their respective stockholders and executed by the undersigned officers.

NOW, THEREFORE, in consideration of the mutual agreements and covenants set forth herein, HealthRider-Delaware and ExerHealth-Utah hereby agree, subject to the terms and conditions hereinafter set forth, as follows:

I. MERGER

1.1 *Merger.* In accordance with the provisions of this Merger Agreement, the Delaware General Corporation Law and the Utah Revised Business Corporation Act, ExerHealth-Utah shall be merged with and into HealthRider-Delaware (the "Merger"), the separate existence of ExerHealth-Utah shall cease and HealthRider-Delaware shall be, and is herein sometimes referred to as, the "Surviving Corporation," and the name of the Surviving Corporation shall be HealthRider, Inc.

1.2 *Filing and Effectiveness.* The Merger shall not become effective until the following actions shall be completed:

(a) This Merger Agreement and Merger shall have been adopted and approved by the stockholders of each Constituent Corporation in accordance with the requirements of the Delaware General Corporation Law and the Utah Revised Business Corporation Act;

(b) All of the conditions precedent to the consummation of the Merger specified in this Merger Agreement shall have been satisfied or duly waived by the party entitled to satisfaction thereof;

(c) An executed Certificate of Merger or an executed counterpart of this Merger Agreement meeting the requirements of the Delaware General Corporation Law shall have been filed with the Secretary of State of the State of Delaware; and

(d) An executed Articles of Merger meeting the requirements of the Utah Revised Business Corporation Act shall have been filed with the Utah Department of Commerce, Division of Corporations and Commercial Code.

The merger shall become effective as of the date and time when executed Articles of Merger meeting the requirements of the Utah Revised Business Corporation Act shall have been filed with the Utah Department of Commerce, Division of Corporations and Commercial Code. The date and time when the Merger shall become effective, as aforesaid, is herein called the "Effective Date of the Merger."

1.3 *Effect of the Merger.* Upon the Effective Date of the Merger, the separate existence of ExerHealth-Utah shall cease and HealthRider-Delaware, as the Surviving Corporation, (i) shall continue to possess all of its assets, property, rights, privileges, immunities, powers, interests, franchises and authority as constituted immediately prior to the Effective Date of the Merger, (ii) shall be subject to all actions previously taken by its and ExerHealth-Utah's Board of Directors, (iii) shall succeed, without other transfer, to all of the assets, property, rights, privileges, immunities, powers, interests, franchises and authority of ExerHealth-Utah in the manner more fully set forth in Section 16-10a-1106 of the Utah Revised Business Corporation Act and Section 259 of the Delaware General Corporation Law, (iv) shall continue to be subject to all of its debts, liabilities and obligations as constituted immediately prior to the Effective Date of the Merger, and (v) shall succeed, without other transfer, to all of the debts, liabilities and obligations of ExerHealth-Utah in the same manner as if HealthRider-Delaware had itself incurred them, all as more fully provided under the applicable provisions of the Delaware General Corporation Law and the Utah Revised Business Corporation Act.

II. CHARTER DOCUMENTS, DIRECTORS AND OFFICERS

2.1 *Certificate of Incorporation.* The Certificate of Incorporation of HealthRider-Delaware, attached hereto as Exhibit No. 1, as in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect as the Certificate of Incorporation of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

2.2 *Bylaws.* The Bylaws of HealthRider-Delaware as in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect as the Bylaws of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

2.3 *Directors and Officers.* The directors and officers of HealthRider-Delaware immediately prior to the Effective Date of the Merger shall be the directors and officers of the Surviving Corporation until their successors shall have been duly elected and qualified or until as otherwise provided

by law, the Certificate of Incorporation of the Surviving Corporation or the Bylaws of the Surviving Corporation.

III. MANNER AND BASIS OF CONVERSION OF STOCK

3.1 *ExerHealth-Utah Common Shares.* Upon the Effective Date of the Merger, each share of ExerHealth-Utah Common Stock, no par value, issued and outstanding immediately prior thereto shall by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into and exchanged for one fully paid and nonassessable share of Common Stock, \$.01 par value, of the Surviving Corporation.

3.2 *ExerHealth-Utah Options and Stock Purchase Rights.* Upon the Effective Date of the Merger, the Surviving Corporation shall assume and continue the stock option plans (including the 1995 Stock Option/Issuance Plan) and all other employee benefit plans of ExerHealth-Utah. Each outstanding and unexercised option, or other right to purchase, or security convertible into, ExerHealth-Utah Common Stock shall become an option, or right to purchase, or a security convertible into the Surviving Corporation's Common Stock on the basis of one share of the Surviving Corporation's Common Stock for each share of ExerHealth-Utah Common Stock issuable pursuant to any such option, or stock purchase right or convertible security, on the same terms and conditions and at an exercise or conversion price per share equal to the exercise or conversion price per share applicable to any such ExerHealth-Utah option, stock purchase right or other convertible security at the Effective Date of the Merger. There are no options, purchase rights for or securities convertible into Preferred Stock of ExerHealth-Utah.

A number of shares of the Surviving Corporation's Common Stock shall be reserved for issuance upon the exercise of options, stock purchase rights and convertible securities equal to the number of shares of ExerHealth-Utah Common Stock so reserved immediately prior to the Effective Date of the Merger.

3.3 *HealthRider-Delaware Common Stock.* Upon the Effective Date of the Merger, each share of HealthRider-Delaware Common Stock, \$.01 par value per share, issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by HealthRider-Delaware, the holder of such shares or any other person, be cancelled and returned to the status of authorized but unissued shares.

3.4 *Exchange of Certificates.* After the Effective Date of the Merger, each holder of an outstanding certificate representing shares of ExerHealth-Utah Common Stock may, at such shareholder's option, surrender the same for cancellation to Zions First National Bank as exchange agent (the "Exchange Agent"), and each such holder shall be entitled to receive in exchange therefor a certificate or certificates representing the number of shares of the Surviving Corporation's Common Stock into which the surrendered shares were converted as herein provided. Until so surrendered, each outstanding certificate theretofore representing shares of ExerHealth-Utah Common Stock shall be deemed for all purposes to represent the number of whole shares of the Surviving Corporation's Common Stock into which such shares of ExerHealth-Utah Common Stock were converted in the Merger.

The registered owner on the books and records of the Surviving Corporation or the Exchange Agent of any such outstanding certificate shall, until such certificate shall have been surrendered for transfer or conversion or otherwise accounted for to the Surviving Corporation or the Exchange Agent, have and be entitled to exercise any voting and other rights with respect to and to receive dividends and other distributions upon the shares of Common Stock of the Surviving Corporation represented by such outstanding certificate as provided above.

Each certificate representing Common Stock of the Surviving Corporation so issued in the Merger shall bear the same legends, if any, with respect to the restrictions on transferability as the certificates of ExerHealth-Utah so converted and given in exchange therefor, unless otherwise determined by the Board of Directors of the Surviving Corporation in compliance with applicable laws.

If any certificate for shares of HealthRider-Delaware stock is to be issued in a name other than that in which the certificate surrendered in exchange therefor is registered, it shall be a condition of issuance thereof that the certificate so surrendered shall be properly endorsed and otherwise in proper form for transfer, that such transfer otherwise be proper and that the person requesting such transfer pay to the Exchange Agent any transfer or other taxes payable by reason of issuance of such new certificate in a name other than that of the registered holder of the certificate surrendered or establish to the satisfaction of HealthRider-Delaware that such tax has been paid or is not payable.

IV. GENERAL

4.1 *Covenants of HealthRider-Delaware.* HealthRider-Delaware covenants and agrees that it will, on or before the Effective Date of the Merger:

(a) Qualify to do business as a foreign corporation in the State of Utah and in connection therewith irrevocably appoint an agent for service of process as required under the provisions of Section 16-10a-1107 of the Utah Revised Business Corporation Act;

(b) File any and all documents with the State of Utah necessary for the assumption by HealthRider-Delaware of all of the franchise tax liabilities of ExerHealth-Utah; and

(c) Take such other actions as may be required by the Utah Revised Business Corporation Act.

4.2 *Further Assurances.* From time to time, as and when required by HealthRider-Delaware or by its successors or assigns, there shall be executed and delivered on behalf of ExerHealth-Utah such deeds, acknowledgements and other instruments, and there shall be taken or caused to be taken by it such further and other actions as shall be appropriate or necessary in order to vest or perfect in or conform of record or otherwise by HealthRider-Delaware the title to and possession of all the assets, property, rights, privileges, immunities, powers, interests, franchises and authority of ExerHealth-Utah and otherwise to carry out the purposes of this Merger Agreement, and the officers and directors of HealthRider-Delaware are fully authorized in the name and on behalf of ExerHealth-Utah or otherwise to take any and all such action and to execute and deliver any and all such deeds and other instruments.

4.3 *Abandonment.* At any time before the Effective Date of the Merger, this Merger Agreement may be terminated and the Merger may be abandoned for any reason whatsoever by the Board of Directors of either ExerHealth-Utah or of HealthRider-Delaware, or of both, notwithstanding the approval of this Merger Agreement by the shareholders of ExerHealth-Utah or by the sole stockholder of HealthRider-Delaware, or by both.

4.4 *Amendment.* The Boards of Directors of the Constituent Corporations may amend this Merger Agreement at any time prior to the Effective Date of the Merger, provided that an amendment made subsequent to the adoption of this Merger Agreement by the stockholders of either Constituent Corporation shall not: (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series

thereof of such Constituent Corporation, (2) alter or change any term of the Certificate of Incorporation of the Surviving Corporation to be effected by the Merger, or (3) alter or change any of the terms and conditions of this Merger Agreement if such alteration or change would adversely affect the holders of any class or series of capital stock of either Constituent Corporation.

4.5 *Registered Office.* The registered office of the Surviving Corporation in the State of Delaware is located at 32 Loockerman Square, Suite L-100, City of Dover, County of Kent and the registered agent of the Surviving Corporation at such address is The Prentice-Hall Corporation System, Inc.

4.6 *Agreement.* Executed copies of this Merger Agreement will be on file at the principal place of business of the Surviving Corporation at 1276 South 500 West, Salt Lake City, Utah 84101, and copies thereof will be furnished to any stockholder of either Constituent Corporation, upon request and without cost.

4.7 *Governing Law.* This Merger Agreement shall in all respects be construed, interpreted and enforced in accordance with and governed by the laws of the State of Delaware and, so far as applicable, the merger provisions of the Utah Revised Business Corporation Act.


4.8 *Counterparts.* In order to facilitate the filing and recording of this Merger Agreement, the same may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, this Merger Agreement, having first been approved by the resolutions of the Boards of Directors of HealthRider-Delaware and ExerHealth-Utah, is hereby executed on behalf of each of such two corporations and attested by their respective officers thereunto duly authorized.

HealthRider, Inc.,
a Delaware corporation

By: *Michael J. Moone*
MICHAEL J. MOONE,
Chief Executive Officer and President


ATTEST:


C. REED BROWN,
Vice President, General
Counsel and Secretary

ExerHealth, Inc.,
a Utah corporation

By: *Michael J. Moone*
MICHAEL J. MOONE,
Chief Executive Officer and President

ATTEST:


C. REED BROWN,
Vice President, General
Counsel and Secretary

**CERTIFICATE OF SECRETARY
OF
HEALTHRIDER, INC.,
A DELAWARE CORPORATION**

I, Thomas A. Bevilacqua, the Assistant Secretary of HealthRider, Inc., a Delaware corporation (the "Corporation"), hereby certify that the Agreement and Plan of Merger to which this Certificate is attached was duly approved and adopted by the sole stockholder of the Corporation.

IN WITNESS WHEREOF, the undersigned has executed this Certificate on this 30th day of June, 1995.



Thomas A. Bevilacqua
Assistant Secretary

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**CERTIFICATE OF INCORPORATION
OF
HEALTHRIDER, INC.**

FIRST. The name of the corporation is HealthRider, Inc. (the "Corporation").

SECOND. The address of its registered office in the State of Delaware is 32 Lookerman Square, Suite L-100, in the City of Dover, County of Kent. The name of its registered agent at such address is The Prentice-Hall Corporation System, Inc.

THIRD. 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 Delaware.

FOURTH. (a) The Corporation is authorized to issue 26,000,000 shares of capital stock, \$0.01 par value. The shares shall be divided into two classes, designated as follows:

<u>Designation of Class</u>	<u>Number of Shares</u>	<u>Par Value</u>
Common Stock	25,000,000	\$0.01
Preferred Stock	<u>1,000,000</u>	\$0.01
TOTAL:	<u>26,000,000</u>	

(b) The Preferred Stock may be issued from time to time in one or more series. The Board of Directors is expressly authorized, in the resolution or resolutions providing for the issuance of any wholly unissued series of Preferred Stock, to fix, state and express the powers, rights, designations, preferences, qualifications, limitations and restrictions thereof, including without limitation: the rate of dividends upon which and the times at which dividends on shares of such series shall be payable and the preference, if any, which such dividends shall have relative to dividends on shares of any other class or classes or any other series of stock of the Corporation; whether such dividends shall be cumulative or noncumulative, and if cumulative, the date or dates from which dividends on shares of such series shall be cumulative; the voting rights, if any, to be provided for shares of such series; the rights, if any, which the holders of shares of such series shall have in the event of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Corporation; the rights, if any, which the holders of shares of such series shall have to convert such shares into or exchange such shares for shares of stock of the Corporation, and the terms and conditions, including price and rate of exchange of such conversion or exchange; and the redemption rights (including sinking fund provisions), if any, for shares of such series; and such other powers, rights, designations, preferences, qualifications, limitations and restrictions as the Board of Directors may desire to so fix. The Board of Directors is also expressly authorized to fix the number of shares constituting such series and to increase or decrease the number of shares of any series prior to the issuance of shares of that series and to increase or decrease the number of shares of any series subsequent to the issuance of shares of that series, but not to decrease such number below the number of shares of such series then outstanding. In case the number of shares of any series shall be so decreased, the shares constituting such decrease shall resume the status which they had prior to the adoption of the resolution originally fixing the number of shares of such series.

FIFTH. In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is authorized to make, alter or repeal any or all of the Bylaws of the Corporation; provided, however, that any

Bylaw amendment adopted by the Board of Directors increasing or reducing the authorized number of Directors shall require the affirmative vote of two-thirds of the total number of Directors which the Corporation would have if there were no vacancies. In addition, new Bylaws may be adopted or the Bylaws may be amended or repealed by the affirmative vote of at least 66-2/3% of the combined voting power of all shares of the Corporation entitled to vote generally in the election of directors, voting together as a single class. Notwithstanding anything contained in this Certificate of Incorporation to the contrary, the affirmative vote of the holders of at least 66-2/3% of the combined voting power of all shares of the Corporation entitled to vote generally in the election of directors, voting together as a single class, shall be required to alter, change, amend, repeal or adopt any provision inconsistent with, this Article FIFTH.

SIXTH. (a) Any action required or permitted to be taken by the stockholders of the Corporation must be effected at an annual or special meeting of stockholders of the Corporation and may not be effected by any consent in writing of such stockholders.

(b) Special meetings of stockholders of the Corporation may be called only by the Chairman of the Board of Directors, or by the Chairman or the Secretary at the written request of a majority of the total number of Directors which the Corporation would have if there were no vacancies upon not fewer than 10 nor more than 60 days' written notice. The request shall be sent to the Chairman and the Secretary and shall state the purposes of the proposed meeting. Special meetings of holders of the outstanding Preferred Stock may be called in the manner and for the purposes provided in the resolutions of the Board of Directors providing for the issue of such stock. Business transacted at special meetings shall be confined to the purpose or purposes stated in the notice of meeting.

(c) Notwithstanding anything contained in this Certificate of Incorporation to the contrary, the affirmative vote of the holders of at least 66-2/3% of the combined voting power of all shares of the Corporation entitled to vote generally in the election of directors, voting together as a single class, shall be required to alter, change, amend, repeal or adopt any provision inconsistent with, this Article SIXTH.

SEVENTH. (a) The number of Directors which shall constitute the whole Board of Directors of this corporation shall be as specified in the Bylaws of this corporation, subject to this Article SEVENTH.

(b) The Directors shall be classified with respect to the time for which they severally hold office into three classes designated Class I, Class II and Class III, as nearly equal in number as possible, as shall be provided in the manner specified in the Bylaws of the Corporation. Each Director shall serve for a term ending on the date of the third annual meeting of stockholders following the annual meeting at which the Director was elected; provided, however, that each initial Director in Class I shall hold office until the annual meeting of stockholders in 1998, each initial Director in Class II shall hold office until the annual meeting of stockholders in 1997, and each initial Director in Class III shall hold office until the annual meeting of stockholders in 1996. Notwithstanding the foregoing provisions of this Article, each Director shall serve until his successor is duly elected and qualified or until his death, resignation or removal.

(c) In the event of any increase or decrease in the authorized number of Directors, (i) each Director then serving as such shall nevertheless continue as a Director of the class of which he is a member until the expiration of his current term, or his early resignation, removal from office or death, and (ii) the newly created or eliminated directorship resulting from such increase or decrease shall be apportioned by the Board of Directors among the three classes of Directors so as to maintain such classes as nearly equally as possible.

(d) Any Director or the entire Board of Directors may be removed by the affirmative vote of the holders of at least 66-2/3% of the combined voting power of all shares of the Corporation entitled to vote generally in the election of directors, voting together as a single class.

(e) Notwithstanding anything contained in this Certificate of Incorporation to the contrary, the affirmative vote of the holders of at least 66-2/3% of the combined voting power of all shares of the Corporation entitled to vote generally in the election of directors, voting together as a single class, shall be required to alter, change, amend, repeal or adopt any provision inconsistent with, this Article SEVENTH.

EIGHTH. (a) 1. In addition to any affirmative vote required by law, any Business Combination (as hereinafter defined) shall require the affirmative vote of at least 66-2/3% of the combined voting power of all shares of the Corporation entitled to vote generally in the election of directors, voting together as a single class (for purposes of this Article EIGHTH, the "Voting Shares"). Such affirmative vote shall be required notwithstanding the fact that no vote may be required, or that some lesser percentage may be specified by law or in any agreement with any national securities exchange or otherwise.

2. The term "Business Combination" as used in this Article EIGHTH shall mean any transaction which is referred to in any one or more of the following clauses (A) through (E):

(A) any merger or consolidation of the Corporation or any Subsidiary (as hereinafter defined) with or into (i) any Interested Stockholder (as hereinafter defined) or (ii) any other corporation (whether or not itself an Interested Stockholder) which is, or after such merger or consolidation would be, an Affiliate (as hereinafter defined) or Associate (as hereinafter defined) of an Interested Stockholder; or

(B) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of related transactions) to or with, or proposed by or on behalf of, any Interested Stockholder or any Affiliate or Associate of any Interested Stockholder, of any assets of the Corporation or any Subsidiary constituting not less than 5% of the total assets of the Corporation, as reported in the consolidated balance sheet of the Corporation as of the end of the most recent quarter with respect to which such balance sheet has been prepared; or

(C) the issuance or transfer by the Corporation or any Subsidiary (in one transaction or a series of related transactions) of any securities of the Corporation or any Subsidiary to, or proposed by or on behalf of, any Interested Stockholder or any Affiliate or Associate of any Interested Stockholder in exchange for cash, securities or other property (or a combination thereof) constituting not less than 5% of the total assets of the Corporation, as reported in the consolidated balance sheet of the Corporation as of the end of the most recent quarter with respect to which such balance sheet has been prepared; or

(D) the adoption of any plan or proposal for the liquidation or dissolution of the Corporation, or any spin-off or split-up of any kind of the Corporation or any Subsidiary, proposed by or on behalf of an Interested Stockholder or any Affiliate or Associate of any Interested Stockholder; or

(E) any reclassification of securities (including any reverse stock split), or recapitalization of the Corporation, or any merger or consolidation of the Corporation with any of its Subsidiaries or any similar transaction (whether or not with or into or otherwise involving an Interested Stockholder) which has the effect, directly or indirectly, of increasing the percentage of the outstanding shares of (i) any class of equity securities of the Corporation or any Subsidiary or (ii) any class of securities of the Corporation or any Subsidiary convertible into equity securities of the Corporation or any Subsidiary, represented by securities of such class which are directly or indirectly owned by any Interested Stockholder or any Affiliate or Associate of any Interested Stockholder.

(b) The provisions of section (a) of this Article EIGHTH shall not be applicable to any particular Business Combination, and such Business Combination shall require only such affirmative vote

3.

as is required by law and any other provision of this Certificate of Incorporation, if such Business Combination has been approved by two-thirds of the whole Board of Directors.

(c) For the purposes of this Article EIGHTH:

1. A "person" shall mean any individual, firm, corporation or other entity.

2. "Interested Stockholder" shall mean, in respect of any Business Combination, any person (other than the Corporation or any Subsidiary) who or which, as of the record date for the determination of stockholders entitled to notice of and to vote on such Business Combination, or immediately prior to the consummation of any such transaction

(A) is or was, at any time within two years prior thereto, the beneficial owner, directly or indirectly, of 10% or more of the then outstanding Voting Shares, or

(B) is an Affiliate or Associate of the Corporation and at any time within two years prior thereto was the beneficial owner, directly or indirectly, of 10% or more of the then outstanding Voting Shares, or

(C) is an assignee of or has otherwise succeeded to any shares of capital stock of the Corporation which were at any time within two years prior thereto beneficially owned by any Interested Stockholder, if such assignment or succession shall have occurred in the course of a transaction, or series of transactions, not involving a public offering within the meaning of the Securities Act of 1933, as amended.

3. A "person" shall be the "beneficial owner" of any Voting Shares

(A) which such person or any of its Affiliates and Associates (as hereinafter defined) beneficially own, directly or indirectly, or

(B) which such person or any of its Affiliates or Associates has (i) the right to acquire (whether such right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise, or (ii) the right to vote pursuant to any agreement, arrangement or understanding, or

(C) which are beneficially owned, directly or indirectly, by any other person with which such first mentioned person or any of its Affiliates or Associates has any agreement, arrangement or understanding for the purposes of acquiring, holding, voting or disposing of any shares of capital stock of the Corporation.

4. The outstanding Voting Shares shall include shares deemed owned through application of paragraph 3 above but shall not include any other Voting Shares which may be issuable pursuant to any agreement, or upon exercise of conversion rights, warrants or options, or otherwise.

5. "Affiliate" and "Associate" shall have the respective meanings given those terms in Rule 12b-2 of the General Rules and Regulations under the Securities Exchange Act of 1934, as in effect on the date of adoption of this Certificate of Incorporation (the "Exchange Act").

6. "Subsidiary" shall mean any corporation of which a majority of any class of equity security (as defined in Rule 3a11-1 of the General Rules and Regulations under the Exchange Act) is owned, directly or indirectly, by the Corporation; provided, however, that for the purposes of the

definition of Interested Stockholder set forth in paragraph 2 of this section (c) the term "Subsidiary" shall mean only a corporation of which a majority of each class of equity security is owned, directly or indirectly, by the Corporation.

(d) A majority of the directors shall have the power and duty to determine for the purposes of this Article EIGHTH on the basis of information known to them, (1) whether a person is an Interested Stockholder, (2) the number of Voting Shares beneficially owned by any person, (3) whether a person is an Affiliate or Associate of another, (4) whether a person has an agreement, arrangement or understanding with another as to the matters referred to in paragraph 3 of section (c), or (5) whether the assets subject to any Business Combination or the consideration received for the issuance or transfer of securities by the Corporation or any Subsidiary constitutes not less than 5% of the total assets of the Corporation.

(e) Nothing contained in this Article EIGHTH shall be construed to relieve any Interested Stockholder from any fiduciary obligation imposed by law.

(f) Notwithstanding anything contained in this Certificate of Incorporation to the contrary, the affirmative vote of the holders of at least 66-2/3% of the combined voting power of all shares of the Corporation entitled to vote generally in the election of directors, voting together as a single class, shall be required to alter, change, amend, repeal or adopt any provision inconsistent with, this Article EIGHTH.

NINTH. This Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred on stockholders herein are granted subject to this reservation.

TENTH. The name and mailing address of the incorporator is Amy M. Paul, Brobeck, Phleger & Harrison, One Market Plaza, Spear Street Tower, San Francisco, California 94105.

ELEVENTH. 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 Delaware, or (iv) for any transaction from which the Director derived any improper personal benefit. If the General Corporation Law of Delaware is hereafter amended to authorize, with the approval of a corporation's stockholders, further reductions in the liability of a corporation's directors for breach of fiduciary duty, then a Director of the Corporation shall not be liable for any such breach to the fullest extent permitted by the General Corporation Law of Delaware as so amended. Any repeal or modification of the foregoing provisions of this Article ELEVENTH by the stockholders of the Corporation shall not adversely affect any right or protection of a Director of the Corporation existing at the time of such repeal or modification.

I, THE UNDERSIGNED, being the incorporator hereinbefore named, for the purpose of forming a corporation pursuant to the General Corporation Law of Delaware, do make this certificate, hereby declaring and certifying that this is my act and deed and the facts herein stated are true, and accordingly have hereunto set my hand this 10th day of May, 1995.

/s/ Amy M. Paul
Amy M. Paul, Incorporator