

02-15-2001

Substitute Form PTO-1594  
Attorney Docket No.: src\_MatterId  
Client's Ref. No.: src\_ClientRef

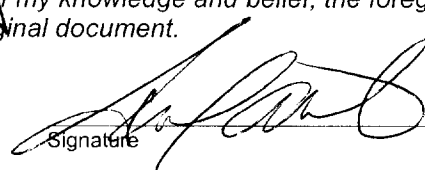
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Commissioner for Trademarks: Please record the attached copies of an original document.

<p>1. Name of conveying party(ies): OMNICON CONTACT CORPORATION</p> <p><input type="checkbox"/> Individual(s) <input type="checkbox"/> Association <input type="checkbox"/> General Partnership <input type="checkbox"/> Limited Partnership <input checked="" type="checkbox"/> Corporation—State of Delaware <input type="checkbox"/> Other _____</p> <p>Additional name(s) attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>	<p>2. Name and address of receiving party(ies): SWIFTOUCH CORPORATION 35 Crosby Drive Suite 300 Bedford, Massachusetts 01730</p> <p><input type="checkbox"/> Individual(s) Citizenship _____ <input type="checkbox"/> Association _____ <input type="checkbox"/> General Partnership _____ <input type="checkbox"/> Limited Partnership _____ <input checked="" type="checkbox"/> Corporation—State of Delaware <input type="checkbox"/> Other _____</p> <p>If the assignee is not domiciled in the United States, a domestic representative designation is attached. <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>Additional names/addresses attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>3. Nature of conveyance: <input type="checkbox"/> Assignment <input type="checkbox"/> Merger <input type="checkbox"/> Security Agreement <input checked="" type="checkbox"/> Change of Name <input type="checkbox"/> Other: _____</p> <p>Execution Date May 17, 1999</p>	<p>4. Application number(s) or trademark number(s):</p> <p>A. Trademark Application No(s): 75/692,184 75/692,253 75/692,533 75/716,040</p> <p>B: Trademark No(s):</p> <p>Additional numbers attached? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p>
<p>5. Name/address of party to whom correspondence concerning document should be mailed: DEBRA ROSE BRILLATI Fish &amp; Richardson P.C. 225 Franklin Street Boston, MA 02110-2804</p>	<p>6. Total number of applications and registrations involved: 4</p> <p>Total Fee (37 CFR 3.41): \$115.00</p> <p><input checked="" type="checkbox"/> Enclosed <input type="checkbox"/> Authorized to charge Deposit Account.</p> <p>8. Deposit Account No.: 06-1050</p> <p>Please apply any additionally charges, or any credits, to our Deposit Account No. 06-1050.</p>
<p><b>DO NOT USE THIS SPACE</b></p>	
<p>9. Statement and Signature: <i>To the best of my knowledge and belief, the foregoing information is true and correct and the attached is a true copy of the original document.</i></p> <p>Timothy A. French Name of Person Signing</p> <p> Signature</p> <p>January 31, 2001 Date</p>	
<p>Total number of pages including cover sheet, attachments, and document: 18</p>	

02/14/2001 101471 0000019 75692184

01 FC:481 40.00 DP  
02 FD:482 75.00 DP

CERTIFICATE OF MAILING BY EXPRESS MAIL

Express Mail Label No. EL69631252505

I hereby certify under 37 CFR §1.10 that this correspondence is being deposited with the United States Postal Service as Express Mail Post Office to Addressee with sufficient postage on the date indicated below and is addressed to BOX ASSIGNMENT, Commissioner of Patents, Washington, DC 20231.

February 1, 2001  
Date of Deposit

  
Signature

Samantha Bell  
Typed Name of Person Signing Certificate

*State of Delaware*  
*Office of the Secretary of State*

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PAGE 1

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "OMNICONCONTACT CORPORATION", CHANGING ITS NAME FROM "OMNICONCONTACT CORPORATION" TO "SWIFTOUCH CORPORATION", FILED IN THIS OFFICE ON THE SEVENTEENTH DAY OF MAY, A.D. 1999, AT 2:30 O'CLOCK P.M.



*Harriet Smith Windsor*

*Secretary of State*

2984637 8100

AUTHENTICATION: 0922960

010028037

DATE: 01-18-01

TRADEMARK  
REEL: 002235 FRAME: 0348

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION  
OF  
OMNICONCONTACT CORPORATION

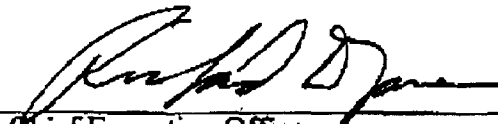
OmniContact Corporation, a corporation organized and existing under the General Corporation Law of the State of Delaware DOES HEREBY CERTIFY:

FIRST: The original Certificate of Incorporation of OmniContact Corporation was filed with the Secretary of State of Delaware on December 30, 1998.

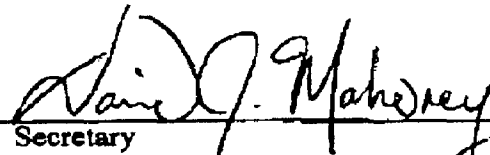
SECOND: The Restated Certificate of Incorporation of OmniContact Corporation in the form attached hereto as Exhibit A has been duly adopted in accordance with the provisions of Sections 245 and 242 of the General Corporation Law of the State of Delaware by the directors and stockholders of the Corporation.

THIRD: The Restated Certificate of Incorporation so adopted reads in full as set forth in Exhibit A attached hereto and is hereby incorporated herein by this reference.

IN WITNESS WHEREOF, OmniContact Corporation has caused this Certificate to be signed by the Chief Executive Officer and the Secretary this 17<sup>th</sup> day of May, 1999.

By   
Chief Executive Officer  
RICHARD D. LANE

ATTEST:

By   
Secretary  
DAVID J. MAHONEY

STATE OF DELAWARE  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
FILED 02:30 PM 05/17/1999  
991195294 - 2984637

**EXHIBIT A****RESTATED CERTIFICATE OF INCORPORATION  
OF  
OMNICONCONTACT CORPORATION**

**FIRST:** The name of the corporation (hereinafter called the "Corporation") is SwiftTouch Corporation.

**SECOND:** The address of the registered office of the Corporation in the State of Delaware is 1209 Orange Street, City of Wilmington, County of New Castle, Delaware 19801, and the name of the registered agent of the Corporation in the State of Delaware at such address is The Corporation Trust Company.

**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 the State of Delaware.

**FOURTH:**

A. This Corporation is authorized to issue two classes of shares to be designated respectively Preferred Stock ("Preferred Stock") and Common Stock ("Common Stock"). The total number of shares of capital stock that the Corporation is authorized to issue is Nineteen Million Shares (19,000,000). The total number of shares of Preferred Stock this Corporation shall have authority to issue is Four Million (4,000,000). The total number of shares of Common Stock this Corporation shall have authority to issue is Fifteen Million (15,000,000). The Preferred Stock shall have a par value of \$.001 per share and the Common Stock shall have a par value of \$.001 per share.

B. The Preferred Stock shall be divided into series. The first series shall consist of One Million Three Hundred Twenty Eight Thousand Six Hundred and Forty Six (1,328,646) shares and is designated "Series A Preferred Stock."

C. The powers, preferences, rights, restrictions, and other matters relating to the Series A Preferred Stock are as follows:

1. Dividends.

a. The holders of the Series A Preferred Stock shall be entitled to receive dividends at the rate of \$0.3726 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares) per annum, respectively, payable out of funds legally available therefor. Such dividends are cumulative and shall be deemed to accumulate at the rate of \$0.09315 per share per quarter whether or not declared by the Board of Directors.

b. In the event the Corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by the Corporation or other

persons, assets (excluding cash dividends) or options or rights to purchase any such securities or evidences of indebtedness, then, in each such case the holders of the Series A Preferred Stock shall be entitled to a proportionate share of any such distribution as though the holders of the Series A Preferred Stock were the holders of the number of shares of Common Stock of the Corporation into which their respective shares of Series A Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

## 2. Liquidation Preference.

a. In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the holders of the Series A Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Common Stock by reason of their ownership thereof, the amount of \$4.657 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares), respectively, plus all accrued or declared but unpaid dividends on such share for each share of Series A Preferred Stock then held by them. The Series A Preferred Stock shall rank on a parity as to the receipt of the respective preferential amounts for each such series upon the occurrence of such event. If upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series A Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive.

b. After payment to the holders of the Series A Preferred Stock of the amounts set forth in Section C.2(a) above, the entire remaining assets and funds of the Corporation legally available for distribution, if any, shall be distributed among the holders of the Common Stock and the Series A Preferred Stock in proportion to the shares of Common Stock then held by them and the shares of Common Stock which they then have the right to acquire upon conversion of the shares of Series A Preferred Stock then held by them.

c. For purposes of this Section C.2, (i) any acquisition of the Corporation by means of merger or other form of corporate reorganization in which outstanding shares of the Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the acquiring corporation or its subsidiary (other than a mere reincorporation transaction) or (ii) a sale of all or substantially all of the assets of the Corporation, shall be treated as a liquidation, dissolution or winding up of the Corporation and shall entitle the holders of Series A Preferred Stock to receive at the closing in cash, securities or other property (valued as provided in Section C.2(e) below) amounts as specified in Sections C.2(a) and C.2(b) above.

d. Whenever the distribution provided for in this Section C.2 shall be payable in securities or property other than cash, the value of such distribution shall be the fair market value of such securities or other property as determined in good faith by the Board of Directors.

### 3. Redemption.

a. Any time after December 31, 2003, upon the notice of the election of the holders of 75% or more of the Series A Preferred Stock then outstanding (the "Redemption Election"), this Corporation shall redeem, from any source of funds legally available therefor, the Series A Preferred Stock in twelve quarterly installments (each a "Series A Redemption Date") beginning no later than 60 days after the Company receives the Redemption Election. The Corporation shall effect such redemptions on the applicable Series A Redemption Dates by paying in cash in exchange for the shares of Series A Preferred Stock to be redeemed a sum equal to \$4.657 per share of Series A Preferred Stock (as adjusted for any stock dividends, combinations or splits with respect to such shares) plus all declared or accumulated but unpaid dividends on such shares (the "Series A Redemption Price"). The number of shares of Series A Preferred Stock that the Corporation shall be required under this Section C.3(a) to redeem on any one Series A Redemption Date shall be equal to the amount determined by dividing (i) the aggregate number of shares of Series A Preferred Stock outstanding immediately prior to the Series A Redemption Date by (ii) the number of remaining Series A Redemption Dates (including the Series A Redemption Date to which such calculation applies). On the day 30 days after the Redemption Election, the Company shall deliver to the holders of Series A Preferred Stock a properly executed, filed and perfected security interest in all of the intellectual property of the Company to secure the full redemption of all shares of Series A Preferred Stock.

b. As used herein and in Sections C.3(d) and C.3(e) below, the term "Redemption Date" shall refer to each of "Series A Redemption Date" and the term "Redemption Price" shall refer to each of "Series A Redemption Price." At least 15 but no more than 30 days prior to each Redemption Date written notice shall be mailed, first class postage prepaid, to each holder of record (at the close of business on the business day next preceding the day on which notice is given) of the Series A Preferred Stock to be redeemed, at the address last shown on the records of the Corporation for such holder, notifying such holder of the redemption to be effected, specifying the number of shares to be redeemed from such holder, the Redemption Date, the Redemption Price, the place at which payment may be obtained and calling upon such holder to surrender to the Corporation, in the manner and at the place designated, his certificate or certificates representing the shares to be redeemed (the "Redemption Notice"). Except as provided in Section C.3(d), on or after the Redemption Date, each holder of Series A Preferred Stock to be redeemed shall surrender to this Corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be cancelled. In the event less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares.

c. From and after the Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of shares of Series A Preferred Stock designated for redemption in the Redemption Notice as holders of Series A Preferred Stock (except the right to receive the Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for

any purpose whatsoever. If the funds of the Corporation legally available for redemption of shares of Series A Preferred Stock on any Redemption Date are insufficient to redeem the total number of shares of Series A Preferred Stock to be redeemed on such date, those funds which are legally available will be used to redeem the maximum possible number of such shares ratably among the holders of such shares to be redeemed based upon their holdings of Series A Preferred Stock. The shares of Series A Preferred Stock not redeemed shall remain outstanding and entitled to all the rights and preferences provided herein. At any time thereafter when additional funds of the Corporation are legally available for the redemption of shares of Series A Preferred Stock such funds will immediately be used to redeem the balance of the shares which the Corporation has become obliged to redeem on any Redemption Date but which it has not redeemed.

d. On or prior to each Redemption Date, the Corporation shall deposit the Redemption Price of all shares of Series A Preferred Stock designated for redemption in the Redemption Notice and not yet redeemed with a bank or trust corporation having aggregate capital and surplus in excess of \$100,000,000 as a trust fund for the benefit of the respective holders of the shares designated for redemption and not yet redeemed, with irrevocable instructions and authority to the bank or trust corporation to pay the Redemption Price for such shares to their respective holders on or after the Redemption Date upon receipt of notification from the Corporation that such holder has surrendered his share certificate to the Corporation pursuant to Section C.3(c) above. As of the date of such deposit (even if prior to the Redemption Date), the deposit shall constitute full payment of the shares to their holders, and from and after the date of the deposit the shares so called for redemption shall be redeemed and shall be deemed to be no longer outstanding, and the holders thereof shall cease to be shareholders with respect to such shares and shall have no rights with respect thereto except the rights to receive from the bank or trust corporation payment of the Redemption Price of the shares, without interest, upon surrender of their certificates therefor, and the right to convert such shares as provided in Section C.5 hereof. Such instructions shall also provide that any moneys deposited by the Corporation pursuant to this Section C.3(e) for the redemption of shares thereafter converted into shares of the Corporation's Common Stock pursuant to Section C.5 hereof prior to the Redemption Date shall be returned to the Corporation forthwith upon such conversion. The balance of any moneys deposited by the Corporation pursuant to this Section C.3(e) remaining unclaimed at the expiration of two (2) years following the Redemption Date shall thereafter be returned to the Corporation upon its request expressed in a resolution of its Board of Directors.

#### 4. Voting Rights: Directors.

a. Each holder of shares of the Series A Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Series A Preferred Stock could be converted and shall have voting rights and powers equal to the voting rights and powers of the Common Stock (except as otherwise expressly provided herein or as required by law, voting together with the Common Stock as a single class) and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Series A Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole

number (with one-half being rounded upward). Each holder of Common Stock shall be entitled to one (1) vote for each share of Common Stock held.

b. The Board of Directors shall consist of seven (7) members.

The holders of Series A Preferred Stock, voting together as a class, shall be entitled to designate three (3) members of the Board of Directors. The holders of the Common Stock, as a class, shall be entitled to designate three (3) members of the Board of Directors. The Chief Executive Officer of the Company shall be the seventh member of the Board of Directors.

c. In the case of any vacancy in the office of a director occurring among the directors elected by the holders of the Series A Preferred Stock or Common Stock pursuant to the second and third sentences of Section C.4(b) hereof, the remaining director or directors so elected by the holders of the Series A Preferred Stock or Common Stock may, by affirmative vote of a majority thereof (or the remaining director so elected if there is but one, or if there is no such director remaining, by the affirmative vote of the holders of a majority of the shares of that class) elect a successor or successors to hold the office for the unexpired term of the director or directors whose place or places shall be vacant. Any director who shall have been elected by the holders of the Series A Preferred Stock or Common Stock or any director so elected as provided in the preceding sentence hereof, may be removed during the aforesaid term of office, whether with or without cause, only by the affirmative vote of the holders of a majority of the Series A Preferred Stock or Common Stock, as the case may be.

d. So long as any shares of the Series A Preferred Stock remain outstanding, if, in the event of a failure of the Corporation to redeem shares of the Series A Preferred Stock as required pursuant to Section C.3 hereof (the "Event of Default"), then the holders of the Series A Preferred Stock, voting together as a single class, shall, immediately upon the giving of written notice to the Corporation by the holders of a majority of the then outstanding shares of Series A Preferred Stock, voting together as a single class, be entitled to elect the smallest number of directors that shall constitute a majority of the authorized number of directors of the Corporation, and the holders of the Common Stock shall be entitled to elect the remaining members of the Board of Directors. The Chief Executive Officer shall continue to serve as the seventh member of the Board of Directors. Upon the election by the holders of the Series A Preferred Stock, voting together as a single class, of the directors they are entitled to elect as hereinabove provided, the terms of office of all persons who were theretofore directors of the Corporation shall forthwith terminate whether or not the holders of the Common Stock shall then have elected the remaining directors of the Corporation. If, after the election of a new Board of Directors pursuant to Section C.4(e), the Event of Default are cured, then the holders of the Series A Preferred Stock shall be divested of the special voting rights specified in this Section. However, the special voting rights of this Section shall again accrue to the holders of the shares of the Series A Preferred Stock in case of any later occurrence of an Event of Default. Upon the termination of any such special voting rights as hereinabove provided, the Board of Directors shall promptly call a special meeting of the shareholders at which all directors will be elected, and the terms of office of all persons who are then directors of the Corporation shall terminate immediately upon the election of their successors.

e. Whenever under the provisions of Section C.4(d) hereof, the right shall have accrued to the holders of the Series A Preferred Stock to vote as a single class to



elect a majority of the Corporation's directors, the Board of Directors shall, within ten (10) days after delivery to the Corporation at its principal office of a request to such effect by the holders of a majority of the then outstanding shares of the Series A Preferred Stock, call a special meeting of shareholders for the election of directors, to be held upon not less than ten (10) nor more than twenty (20) days' notice to such holders. If such notice of meeting is not given within the ten (10) days required above, the holders of Series A Preferred Stock requesting such meeting may also call such meeting and for such purposes shall have access to the stock books and records of the Corporation. At any meeting so called or at any other meeting held while the holders of shares of Series A Preferred Stock shall have the voting power provided in Section C.4(d), the holders of a majority of the shares of Series A Preferred Stock present in person or by proxy or voting by written consent, shall be sufficient to constitute a quorum for the election of directors as herein provided. In the case of any vacancy in the office of a director occurring among the directors elected by the holders of Series A Preferred Stock pursuant to Section C.4(d), the remaining directors so elected by that class may by affirmative vote of majority thereof (or the remaining director so elected if there be but one) elect a successor or successors to hold office for the unexpired term of the director or directors whose place or places shall be vacant, provided that if there are no remaining directors so elected by that class the vacancies may be filled by the affirmative vote of the holders of a majority of the shares of Series A Preferred Stock, voting together as a single class, given either at a special meeting of such shareholders duly called for that purpose or pursuant to a written consent of shareholders. Any directors who shall have been elected by the holders of Series A Preferred Stock or by any directors so elected as provided in the next preceding sentence hereof may be removed during the aforesaid term of office, either with or without cause, by, and only by, the affirmative vote of the holders of a majority of the shares of the Series A Preferred Stock who elected such director or directors, given either at a special meeting of such shareholders duly called for that purpose or pursuant to a written consent of shareholders, and any vacancy thereby created may be filled by the holders of Series A Preferred Stock represented at such meeting or pursuant to such written consent.

5. Conversion. The holders of the Series A Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

a. Right to Convert. Each share of Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share and on or prior to the fifth day prior to the Redemption Date, if any, as may have been fixed in any Redemption Notice with respect to the Series A Preferred Stock, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$4.657 plus any accrued or declared and unpaid dividends by the Conversion Price applicable to such share, determined as hereinafter provided, in effect on the date the certificate is surrendered for conversion. The price at which shares of Common Stock shall be deliverable upon conversion of shares of the Series A Preferred Stock (the "Series A Conversion Price") shall initially be \$4.657 per share of Common Stock. Such initial Series A Conversion Price shall be adjusted as provided for in this Section 5a and shall further be adjusted as hereinafter provided.

b. Automatic Conversion. Each share of Series A Preferred Stock shall automatically be converted into shares of Common Stock at the then-effective Series A

Conversion Price, respectively, upon the earlier, as to each Series, of (i) the date specified by written consent or agreement of holders of at least seventy-five percent (75%) of the shares of such Series then outstanding, or (ii) immediately upon the closing of the sale of the Corporation's Common Stock in a firm commitment, underwritten public offering registered under the Securities Act of 1933, as amended (the "Securities Act") other than a registration relating solely to a transaction under Rule 145 under such Act (or any successor thereto) or to an employee benefit plan of the Corporation, at a public offering price (prior to underwriters' discounts and expenses) equal to or exceeding \$13.00 per share of Common Stock (as adjusted for any stock dividends, combinations or splits with respect to such shares) and the aggregate proceeds to the Corporation and/or any selling Stockholders (after deduction for underwriters' discounts and expenses relating to the issuance, including without limitation fees of the Corporation's counsel) of which exceed \$25,000,000.

c. Mechanics of Conversion.

(i) Before any holder of Series A Preferred Stock shall be entitled to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for such stock, and shall give written notice to the Corporation at such office that he elects to convert the same and shall state therein the name or names in which he wishes the certificate or certificates for shares of Common Stock to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Series A Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which he shall be entitled as aforesaid. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of surrender of the shares of Series A Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

(ii) If the conversion is in connection with an underwritten offering of securities pursuant to the Securities Act, the conversion may, at the option of any holder tendering shares of Series A Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive the Common Stock upon conversion of the Series A Preferred Stock shall not be deemed to have converted such Series A Preferred Stock until immediately prior to the closing of such sale of securities.

d. Adjustments to Series A Conversion Price for Certain Diluting

Issues.

(i) Special Definitions. For purposes of this Section C.5(d), the following definitions apply:

(1) "Options" shall mean rights, options, or warrants to subscribe for, purchase or otherwise acquire either Common Stock or Convertible Securities (defined below).

(2) "Original Issue Date" shall mean the date on which a share of Series A Preferred Stock was first issued.

(3) "Convertible Securities" shall mean any evidences of indebtedness, shares (other than Common Stock and Series A Preferred Stock) or other securities convertible into or exchangeable for Common Stock.

(4) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to Section C.5(d)(iii), deemed to be issued) by the Corporation after the Original Issue Date, other than shares of Common Stock issued or issuable:

(A) upon conversion of shares of Series A Preferred Stock;

(B) to officers, directors or employees of, or consultants to, the Corporation pursuant to stock option or stock purchase plans or agreements on terms approved by the Board of Directors, but not exceeding 750,000 shares of Common Stock (net of any repurchases of such shares), as long as (i) the strike price is at least \$2.096, and (ii) such options are not granted to Barend van den Brande, Gerald Polucci and Robert Miller without the prior unanimous written approval of the holders of the Series A Preferred Stock subject to adjustment for all subdivisions and combinations;

(C) As a dividend or distribution on Series A Preferred Stock; or

(D) for which adjustment of the Series A Conversion Price is made pursuant to Section C.5(e).

(ii) No Adjustment of Conversion Price. Any provision herein to the contrary notwithstanding, no adjustment in the Conversion Price for a series of Preferred Stock shall be made in respect of the issuance of Additional Shares of Common Stock unless the consideration per share (determined pursuant to Section C.5(d)(v) hereof) for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is less than the Conversion Price for such series of Preferred Stock in effect on the date of, and immediately prior to such issue.

(iii) Deemed Issue of Additional Shares of Common Stock. In the event the Corporation at any time or from time to time after the Original Issue Date shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities then entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein designed to protect against dilution) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date,

provided further that in any such case in which Additional Shares of Common Stock are deemed to be issued:

(1) no further adjustments in the Series A Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(2) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase in the consideration payable to the Corporation, or decrease in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof, the Series A Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities (provided, however, that no such adjustment of the Series A Conversion Price shall effect Common Stock previously issued upon conversion of the Series A Preferred Stock);

(3) no readjustment pursuant to clause (2) or (3) above shall have the effect of increasing the Series A Conversion Price to an amount which exceeds the lower of (a) the Series A Conversion Price on the original adjustment date, or (b) the Series A Conversion Price that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date.

(iv) Adjustment of Conversion Price Upon Issuance of Additional Shares of Common Stock or Preferred Stock.

(1) On May 15, 2000 the Series A Conversion Price shall be adjusted in reference to the then most recently completed Preferred Stock or Common Stock round of equity investment into the Company in excess of three million dollars (\$3,000,000) based upon the value of the Company as reflected by such investment in accordance with the following procedure: The Company shall calculate "X", which is the value of the Company as imputed from such financing, by multiplying the per share purchase price of such equity security by the total number of shares of Common Stock outstanding (counting all Preferred Stock, options and amounts for the purchase of the Company's stock on an as-converted and as-exercised basis). The Series A Conversion Price shall then be changed to the price indicated in Column Y of the table below:

If X is:

Then Y (the Conversion Price) becomes:

less than \$15,000,000 (or if there is no completed Preferred Stock or Common Stock round of financing in excess of \$3,000,000 completed before May 15, 2000)	\$1.164
less than \$20,000,000	\$1.746
less than \$25,000,000	\$2.329

less than \$30,000,000	\$2.911
less than \$35,000,000	\$3.493
less than \$40,000,000	\$4.075
equal or greater than \$40,000,000	\$4.657

(2) In the event that there is any issuance of Preferred Stock or Common Stock for a price of less than \$1.164 per share (on an as converted to Common Stock basis) before May 15, 2000, then the Conversion Price shall be reduced to the price at which such securities were issued. This clause in this Section 5d(iv)(2) shall override Section 5d(iv)(1) to the extent that there is a round of financing of Preferred Stock or Common Stock, but it is not in excess of \$3,000,000 that is completed before May 15, 2000. Therefore the Conversion Price can be reduced to below \$1.164 per share.

(3) In the event this Corporation, at any time on or after May 15, 2000 shall issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Section C.5(d)(iii)) without consideration or for a consideration per share less than the Conversion Price with respect to any series of Preferred Stock in effect on the date of and immediately prior to such issue, (as such Conversion Price was adjusted as of May 15, 2000 in accordance with Section 5(d)(iv), above, then and in such event, the Conversion Price for the Series A Preferred Stock shall be reduced, concurrently with such issue, to a price equal to the quotient obtained by dividing the total computed under clause (x) below by the total computed under clause (y) below as follows:

(x) an amount equal to the sum of

(1) the aggregate purchase price of the shares of the Series A Preferred Stock sold pursuant to the agreement pursuant to which shares of Series A Preferred Stock are first issued (the "Stock Purchase Agreement"), plus

(2) the aggregate consideration, if any, received by the corporation for all Additional Stock issued on or after the Purchase Date for such series;

(y) an amount equal to the sum of

(1) the aggregate purchase price of the shares of Series A Preferred Stock sold pursuant to the Stock Purchase Agreement divided by the Conversion price for such shares in effect at the Purchase Date for such series, plus

(2) the number of shares of Additional Stock issues since the Purchase Date for such series.

(v) Determination of Consideration. For purposes of this Section C.5(d), the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(1) Cash and Property: Such consideration shall:

(A) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation excluding amounts paid or payable for accrued interest or accrued dividends;

(B) insofar as it consists of property other than cash, be computed at the fair value thereof at the time of such issue, as determined in good faith by the Board; and

(C) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (A) and (B) above, as determined in good faith by the Board.

(2) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Section C.5(d)(iii), relating to Options and Convertible Securities shall be determined by dividing

(A) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein designed to protect against dilution) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities by

(B) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein designed to protect against the dilution) issuable upon the exercise of such Options or conversion or exchange of such Convertible Securities.

e. Adjustments to Conversion Prices for Stock Dividends and for Combinations or Subdivisions of Common Stock. In the event that this Corporation at any time or from time to time after the Original Issue Date shall declare or pay, without consideration, any dividend on the Common Stock payable in Common Stock or in any right to acquire Common Stock for no consideration, or shall effect a subdivision of the outstanding shares of Common Stock into a greater number of shares of Common Stock (by stock split, reclassification or otherwise than by payment of a dividend in Common Stock or in any right to acquire Common Stock), or in the event the outstanding shares of Common Stock shall be combined or consolidated, by reclassification or otherwise, into a lesser number of shares of Common Stock, then the Conversion Price for any series of Preferred Stock in effect immediately prior to such event shall, concurrently with the effectiveness of such event, be proportionately decreased or increased, as appropriate. In the event that this Corporation shall declare or pay, without consideration, any dividend on the Common Stock payable in any right to acquire Common Stock for no consideration then the Corporation shall be deemed to have made a dividend

payable in Common Stock in an amount of shares equal to the maximum number of shares issuable upon exercise of such rights to acquire Common Stock.

f. Adjustments for Reclassification and Reorganization. If the Common Stock issuable upon conversion of the Series A Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification or otherwise (other than a subdivision or combination of shares provided for in Section C.5(e) above or a merger or other reorganization referred to in Section C.2(c) above), the Series A Conversion Price then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted so that the Series A Preferred Stock shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of the Series A Preferred Stock immediately before that change.

g. No Impairment. The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section C.5 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of the Series A Preferred Stock against impairment.

h. Certificates as to Adjustments. Upon the occurrence of each adjustment or readjustment of any Conversion Price pursuant to this Section C.5, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of Series A Preferred Stock a certificate executed by the Corporation's Chief Executive Officer or Chief Financial Officer setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Series A Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price for such series of Preferred Stock at the time in effect, and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of the Series A Preferred Stock.

i. Notices of Record Date. In the event that the Corporation shall propose at any time: (i) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus; (ii) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of stock of any class or series or other rights; (iii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or (iv) to merge or consolidate with or into any other corporation, or sell, lease or convey all or substantially all of its assets, or to liquidate, dissolve or wind up;

j. Issue Taxes. The Corporation shall pay any and all issue and other taxes that may be payable in respect of any issue or delivery of shares of Common Stock on conversion of shares of Series A Preferred Stock pursuant hereto; provided, however, that the Corporation shall not be obligated to pay any transfer taxes resulting from any transfer requested by any holder in connection with any such conversion.

k. Reservation of Stock Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series A Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series A Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to this Certificate.

l. Fractional Shares. No fractional share shall be issued upon the conversion of any share or shares of Series A Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Series A Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of a fraction of a share of Common Stock, the Corporation shall, in lieu of issuing any fractional share, pay the holder otherwise entitled to such fraction a sum in cash equal to the fair market value of such fraction on the date of conversion (as determined in good faith by the Board of Directors).

m. Notices. Any notice required by the provisions of this Section C.5 to be given to the holders of shares of Series A Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at his address appearing on the books of the Corporation.

6. Restrictions and Limitations.

a. So long as any shares of Preferred Stock remain outstanding, the Corporation shall not, without the vote or written consent by the holders of at least 66-2/3% of the then outstanding shares of the Series A Preferred Stock, voting together as a single class:

(i) Redeem, purchase, or otherwise acquire for value (or pay into or set aside for a sinking fund for such purposes) any share or shares of Preferred Stock otherwise than by redemption in accordance with Section C.3 hereof or by conversion in accordance with Section C.5 hereof;

(ii) Redeem, purchase or otherwise acquire (or pay into or set aside for a sinking fund for such purpose), any of the Common Stock, provided, however,



that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing services for the Company or any subsidiary pursuant to agreements under which the Company has the option to repurchase such shares at cost or at cost plus interest at a rate not to exceed nine percent (9%) per annum upon the occurrence of certain events, such as the termination of employment, provided further, however, that the total amount applied to the repurchase of shares of Common Stock shall not exceed \$100,000 during any twelve (12) month period;

(iii) Authorize or issue, or obligate itself to issue, any other equity security (including any security convertible into or exercisable for any equity security) senior to or on a parity with the Preferred Stock as to dividend rights or redemption rights or liquidation preferences;

(iv) Effect any sale, lease, assignment, transfer, or other conveyance of all or substantially all of the assets of the Corporation or any of its subsidiaries, or any consolidation or merger involving the Corporation or any of its subsidiaries, or any reclassification or other change of any stock, or any recapitalization of the Corporation;

(v) Permit any subsidiary to issue or sell, or obligate itself to issue or sell, except to the Corporation or any wholly owned subsidiary, any stock of such subsidiary; or

(vi) Alter, change or amend the preferences, privileges or rights of Series A Preferred Stock, increase or decrease the authorized number of directors constituting the Board of Directors, or otherwise change or amend the Company's Certificate of Incorporation or Bylaws.

(vii) Make any substantial change to the Company's Business Plan or operate the Company other than in accordance with the Business Plan.

(viii) Merge, sell or otherwise consolidate this Company (including through a sale of substantially all of its assets) through a transaction or series of transactions in which more than 33 1/3% of the voting power of the Company is transferred or merger sell or otherwise consolidate the Company with any other entity more than 10% of which is owned, either directly or indirectly, by any stockholder of the Company.

(ix) Authorizing or issuing stock options for the aggregate purchase of more than 750,000 shares of the Company's stock or issue any stock options whose exercise price is lower than \$2.096 per share adjusted for stock splits or reorganizations.

(x) Retain any accounting firm other than KPMG Peat Marwick, Deloitte & Touche, PricewaterhouseCoopers, Arthur Anderson or Ernst & Young to perform any financial audit of the Company.

(xi) Issue more Series A Stock except upon exercise of the Warrants.

7. **No Reissuance of Series A Preferred Stock.** No share or shares of Series A Preferred Stock 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.

**FIFTH:** In furtherance and not in limitation of the powers conferred by statute, the Board of Directors shall have the power, subject to the provisions of Section C.6 of Article FOURTH, both before and after receipt of any payment for any of the Corporation's capital stock, to adopt, amend, repeal or otherwise alter the Bylaws of the Corporation without any action on the part of the stockholders; provided, however, that the grant of such power to the Board of Directors shall not divest the stockholders of nor limit their power, subject to the provisions of Section C.6 of Article FOURTH, to adopt, amend, repeal or otherwise alter the Bylaws.

**SIXTH:** Elections of directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

**SEVENTH:** The Corporation reserves the right to adopt, repeal, rescind or amend in any respect any provisions contained in this Restated Certificate of Incorporation in the manner now or hereafter prescribed by applicable law, and all rights conferred on stockholders herein are granted subject to this reservation.

**EIGHTH:** A director of the Corporation shall, to the full extent permitted by the Delaware General Corporation Law as it now exists or as it may hereafter be amended, not be liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. Neither any amendment nor repeal of this Article EIGHTH, nor the adoption of any provision of this Restated Certificate of Incorporation inconsistent with the Article EIGHTH, shall eliminate or reduce the effect of this Article EIGHTH in respect of any matter occurring, or any cause of action, suit or claim that, but for this Article EIGHTH, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.