05-23-2001

101726739

FORM PTO-1595 :T U.S. DEPARTMENT OF COMMERCE

MKD 5-21-01

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

1. Name of conveying party(ies):
PowerBar, Inc.
2150 Shattuck Avenue, Berkeley, CA 94704
☐ Individual(s) ☐ Association
☐ General Partnership ☐ Limited Partnership
☒ Corporation-State California
☐ Other
Additional name(s) of conveying party(ies) attached?
☐ Yes ☒ No

2. Name and address of receiving party(ies):
Name: PowerBar, Inc.
Internal Address:
Street Address: 2150 Shattuck Avenue
City: Berkeley State: California ZIP: 94704
☐ Individual(s) citizenship
☐ Association
☐ General Partnership
☐ Limited Partnership
☒ Corporation-State Delaware
☐ Other
If assignee is not domiciled in the United States, a domestic representative designation is attached:
☐ Yes ☐ No
Additional name(s) & Address(es) attached?
☐ Yes ☒ No

MAY 21 2001

3. Nature of conveyance:
☐ Assignment ☒ Merger
☐ Security Agreement ☐ Change of Name
☐ Other
Execution Date: March 30, 2000

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

A. Trademark Application No.(s)
75/597,282 75/609,712 75/634,949
75/597,283 75/615,270

B. Trademark No.(s)

1,447,798	2,089,431	2,129,260	2,324,968
1,447,799	2,103,868	2,247,881	2,336,752
2,060,720	2,116,159	2,251,934	2,426,171
2,089,430	2,126,109	2,263,510	2,426,172

Additional numbers attached? ☐ Yes ☒ No

5. Name and address of party to whom correspondence concerning document should be mailed:
Name: Robert H. Sanders
Internal Address: c/o Nestle USA, Inc.
Street Address: 800 North Brand Blvd. - 20th Floor
City: Glendale State: CA ZIP: 91203

6. Total number of applications and registrations involved: 21

7. Total fee (37 CFR 3.41) ..... $ 540.00
☐ Enclosed
☒ Authorized to be charged to deposit account

8. Deposit account number:
03-0775
(Attach additional copy of form if paying by deposit account.)

DO NOT USE THIS SPACE

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.

Robert H. Sanders — Name of Person Signing
Signature
May 18, 2001 — Date

Total number of pages including cover sheet: 19

OMB No. 0651-0011 (exp. 4/94)

Do not detach this portion

Mail documents to be recorded with required cover sheet information to:

Commissioner of Patents and Trademarks
Box Assignments
Washington, D.C. 20231

Public burden reporting for this sample cover sheet is estimated to average about 30 minutes per document to be recorded, including time for reviewing the document and gathering the data needed, and completing and reviewing the sample cover sheet. Send comments regarding this burden estimate to the U.S. Patent and Trademark Office, Office of Information Systems, PK2-1000C, Washington, D.C. 20231, and to the Office of Management and Budget, Paperwork Reduction Project (0651-0011), Washington, D.C. 20503.

AB/RA/6-27/AB695001

STATE OF DELAWARE
DIVISION OF CORPORATIONS
FILED 03:00 PM 03/30/2000
001162675 – 2843828

CERTIFICATE OF MERGER

OF

POWERBAR INC.
a California corporation

WITH AND INTO

POWERBAR INC.
a Delaware corporation

(Under Section 252 of the General
Corporation Law of the State of Delaware)

PowerBar Inc., organized and existing under the General Corporation Law of the State of Delaware ("PowerBar Delaware"), does hereby certify:

FIRST: That the name and state of incorporation of each of the constituent corporations to the merger is as follows:

Name	State of Incorporation
PowerBar Inc.	Delaware
PowerBar Inc.	California

SECOND: That a plan and agreement of merger between the parties to the merger has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with Section 252(c) of the General Corporation Law of the State of Delaware.

THIRD: That the name of the surviving corporation of the merger is PowerBar Inc., a Delaware corporation, (the "Surviving Corporation").

FOURTH: That the Certificate of Incorporation of PowerBar Delaware shall be amended in its entirety to read as set forth in Exhibit A, and shall be the Certificate of Incorporation of the Surviving Corporation.

FIFTH: That the executed plan and agreement of merger is on file at the principal place of business of the Surviving Corporation, located at 2150 Shattuck Avenue, Berkeley, California 94704.

SIXTH: That a copy of the plan and agreement of merger will be furnished by the Surviving Corporation, on request and without cost, to any stockholder of any constituent corporation.

SEVENTH: That PowerBar Inc., a California corporation, has authorized 25,000,000 shares of Common Stock, with a par value of $0.001 per share, and 5,000,000 shares of Preferred Stock, with a par value of $0.001 per share, of which 2,049,344 shares are designated "Series A Preferred" and 2,581,449 shares are designated "Series B Preferred."

IN WITNESS WHEREOF, PowerBar Inc., the Surviving Corporation, has caused this Certificate of Merger to be executed by its authorized officer on this 30th day of March, 2000.

POWERBAR INC.
a Delaware corporation

By: _____
Name: David B. Cooper, Jr.
Title: VP & CFO

EXHIBIT A

CERTIFICATE OF INCORPORATION
OF POWERBAR INC.

PowerBar Inc., a corporation organized and existing under the laws of the State of Delaware, hereby certifies that the text of the Certificate of Incorporation is hereby amended in its entirety to read as follows:

ARTICLE I.

The name of the corporation is PowerBar Inc. (the "Company").

ARTICLE II.

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

ARTICLE III.

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

ARTICLE IV.

1. Definitions. For purposes of this Certificate, the following terms have the following meanings:

"Indebtedness" means (i) all indebtedness for borrowed money, (ii) that portion of any obligations respecting capital leases which is properly classified as a liability on a balance sheet in conformity with GAAP, (iii) notes payable and drafts accepted representing extensions of credit, whether or not representing obligations for borrowed money, (iv) obligations owed for all or any part of the deferred purchase price of any property or services to the extent (a) due more than one year after the date of incurrence of the obligation or (b) evidenced by a note or similar written instrument, and (v) all indebtedness secured by any Lien on any property or assets even if noncourse.

"Initial Public Offering" means a public offering of shares of Common Stock, firmly underwritten by a managing underwriter or underwriters of national reputation, at a total offering price of not less than $25 million net of underwriting discounts and commissions.

"Liquidity Event" means (i) an Initial Public Offering, (ii) a merger or consolidation of the Company with any other entity (unless the stockholders of the corporation immediately before the merger or consolidation own, directly or indirectly, immediately after the merger or consolidation, all the equity securities of the corporation or whatever other entity succeeded to the business and assets of the corporation in the same percentages as they owned the corporation immediately before the merger or consolidation) or (iii) a sale of all or substantially all of the assets of the Company, whether such sale occurs as one transaction or a series of related transactions.

2. Authorized Capital. The Company is authorized to issue two classes of stock, designated "Common Stock" and "Preferred Stock," respectively. The total number of shares which the Company is authorized to issue is 5,025,000 shares, $0.001 par value per share. The number of shares of Common Stock ("Common") which the Company is authorized to issue is 25,000 shares, and the number of shares of Preferred Stock ("Preferred") which the Company is authorized to issue is 5,000,000 shares, of which 2,049,344 shares shall be designated "Series A Preferred" (each a "Series A Share" and together the "Series A Shares") and 2,581,449 shares shall be designated "Series B Preferred" (each a "Series B Share" and together the "Series B Shares"). The Series A Shares and the Series B Shares are each referred to as a "Preferred Share" and collectively as the "Preferred Shares."

3. Dividends. Except as set forth in Section 4, the Company shall pay to the holders of the Preferred Shares (each a "Preferred Stockholder" and together the "Preferred Stockholders"), out of the assets of the Company available for the payment of dividends under the laws of the State of Delaware, dividends at the same times and in the same per share amounts (in accordance with the next sentence) as dividends are paid to the holders of the Common Stock (each a "Common Stockholder" and together the "Common Stockholders"). For purposes of determining the amount of any dividend to be paid to the Preferred Stockholders, each Preferred Share shall be deemed converted into shares of Common Stock using the Conversion Ratio (as defined below) applicable to such Preferred Shares as of the record date for the dividend. Subject to this Article IV, the foregoing principles shall apply not only to cash dividends but also to all dividends and distributions of securities, assets or property by the Company with respect to its shares.

4. Liquidation. In connection with any liquidation (complete or partial), dissolution or winding up of the Company, whether voluntary or involuntary, the holders of the Series A Shares (each a "Series A Holder" and together the "Series A Holders") shall be entitled, before any distribution or payment is made upon any Series B Shares or any Common Stock, to be paid out of the assets of the Company available for distribution to its stockholders, $9.7592 for each Series A Share (the "Series A Payment"). After the Company has made the Series A Payment, the holders of the Series B Shares (each a "Series B Holder" and together the "Series B Holders") shall be entitled to

be paid out of the assets of the Company available for distribution to its stockholders, $9.7592 for each Series B Share (the "Series B Payment"). If, in connection with such liquidation, dissolution or winding up of the Company, whether voluntary or involuntary, the assets of the Company to be distributed among the Series A Holders are insufficient to permit payment to the Series A Holders of the entire Series A Payment, then the entire remaining assets of the Company shall be distributed to the Series A Holders ratably based upon the respective number of Series A Shares owned by each such holder. If, after the Company makes the entire Series A Payment, the assets of the Company to be distributed among the Series B Holders are insufficient to permit payment to the Series B Holders of the entire Series B Payment, then the entire remaining assets of the Company shall be distributed to the Series B Holders ratably based upon the respective number of shares of Series B Shares owned by each such holder. In connection with any such liquidation, dissolution or winding up of the Company, after the Series A Holders have received the entire Series A Payment and the Series B Holders have received the entire Series B Payment, the remaining assets of the Company may be distributed to the Common Stockholders until the distributions per share of Common Stock equal $9.759.20 If, and after the distributions per share of Common Stock have been so equalized with those made on the Series A Shares and the Series B Shares, the remaining assets of the Company may be distributed to the Common Stockholders and the Preferred Stockholders according to the principles set forth in Section 3. Both the merger or consolidation of the Company with another entity (unless the stockholders of the corporation immediately before the merger or consolidation own, directly or indirectly, immediately after the merger or consolidation, more than fifty percent (50%) of the voting securities of the corporation or whatever other entity succeeds to the business and assets of the corporation in the merger or consolidation) and the sale or transfer by the Company of all or substantially all of the Company's assets shall be deemed a liquidation, dissolution or winding up of the Company within the meaning of this Article IV.

5. Voting.

(a) Election of Directors. The Board of Directors of the Company shall be comprised of seven members. The Series A Holders, voting as a separate class with each Series A Share entitled to one vote, shall have the right to elect one member of the Board of Directors (the "Series A Director"). Only the Series A Holders, voting as a separate class with each Series A Share entitled to one vote, shall have the right to remove a Series A Director without cause or to fill a vacancy caused by the resignation, removal or death of a Series A Director. All members of the Board of Directors of the Company other than the Series A Directors (the "Other Directors") shall be elected by the Series B Holders and the Common Stockholders voting together as a single class, with each Common Stockholder entitled to one vote for each share held by such holder and each Series B Holder entitled to the number of votes as shall equal the number of shares of Common Stock into which its Series B Shares are convertible as of the record date for the vote. Only the Series B Holders and the Common Stockholders, voting together as a single class based on the voting principles described in the previous sentence, shall have the right to remove any Other Director without cause or to fill a vacancy caused by the resignation, removal or death of any Other Director.

(b) Other Votes. Except as provided in Subsection 5(a) or Subsection 9(b), or as

may otherwise be required by law, the Common Stockholders and Preferred Stockholders shall vote together as a single class on all matters. In voting on such matters, the Common Stockholders shall have 1,000 votes for each share of Common Stock held by them and the Preferred Stockholders shall have one vote for each share of Common Stock into which their Preferred Shares are convertible as of the record date for the vote

6. Convertibility.

(a) Conversion Ratio. Each Preferred Share shall be convertible at any time at the option of its holder into shares of Common Stock. Subject to the adjustments set forth in Section 6(c), each Preferred Share shall be convertible into .007371 shares of Common Stock (the "Conversion Ratio"). A Preferred Stockholder may convert any or all of such shares and may convert different shares at different times. To convert shares, a Preferred Stockholder must give five days' prior written notice of conversion to the Company and deliver the certificate or certificates representing the Preferred Shares to be converted to the Company by the date of the conversion (the "Conversion Date"). On the Conversion Date, the Company shall: (i) cancel the Preferred Shares that are converted and issue to their former holder a certificate or certificates representing the shares of Common Stock issued upon such conversion, (ii) issue to that holder a certificate or certificates representing any Preferred Shares represented by the certificate or certificates so surrendered that are not then being converted and (iii) make appropriate notations in the books and records of the Company to evidence the conversion of such Preferred Shares into Common Stock.

(b) Automatic Conversion The Preferred Stock shall automatically be converted into Common Stock upon the closing of an Initial Public Offering, if any, at the then-applicable Conversion Ratio.

(c) Anti-Dilution.

(i) Stock Splits and Reclassifications If the outstanding shares of Common Stock are subdivided into a greater number of shares of Common Stock or if the Common Stock is, or the rights related thereto are, reclassified, modified or altered in such a way that the number of shares of Common Stock outstanding is actually or effectively increased, the Conversion Ratio shall, simultaneously with the effectiveness of such subdivision, reclassification, modification or alteration, be proportionately increased (*i.e.*, the number of shares of Common Stock into which a Preferred Share can be converted shall be increased). Conversely, if the outstanding shares of Common Stock are combined into a smaller number of shares of Common Stock or if the Common Stock is, or the rights related thereto are, reclassified, modified or altered in such a way that the number of shares of Common Stock outstanding is actually or effectively decreased, the Conversion Ratio shall, simultaneously with the effectiveness of such combination, reclassification, modification or alteration, be proportionately decreased (*i.e.*, the number of shares of Common Stock into which a Preferred Share can be converted shall be decreased). A dividend or distribution of shares of Common Stock to holders of shares of Common Stock shall be deemed to be a subdivision of shares

of Common Stock for these purposes.

(ii) Notice of Adjustment to Holders. Upon the occurrence of each adjustment or readjustment of the Conversion Ratio, the Company shall compute such adjustment or readjustment in accordance with the terms of this Certificate. Within ten days after the occurrence of such adjustment or readjustment, the Company shall furnish each Preferred Stockholder with a certificate signed by the Company's chief financial officer setting forth in reasonable detail: (i) the Conversion Ratio after such adjustment or readjustment, (ii) the method of calculation and the facts upon which such calculation was based and (iii) the number of shares of Common Stock into which a Preferred Share can be converted after such adjustment or readjustment. If, within 15 days after receipt of such certificate, Preferred Stockholders owning in the aggregate at least sixty-seven percent (67%) of the Preferred Shares so request in writing, the Company shall at its expense cause the computation of the adjustment or readjustment to be recalculated by independent certified public accountants of recognized standing selected by the Company.

(d) No Fractional Shares. No fractional shares shall be issued upon conversion of shares of Preferred Stock and the holder thereof shall receive the amount of cash payable in respect of any fractional share of Common Stock to which he shall be entitled. Whether or not fractional shares are issuable upon such conversion shall be determined on the basis of the total number of shares of the total number of shares of Preferred Stock the holder is at the time converting into Common Stock and the number of shares of Common Stock issuable upon such aggregate conversion.

7. Preemptive Rights.

(a) In General. Each Series A Holder shall have a preemptive right to purchase its pro rata portion of any equity securities of the Company or any debt of the Company that, upon exercise or conversion, would become equity securities of the Company (collectively "New Securities") which the Company from time to time may propose to issue and sell after the effectiveness of this Certificate. However, no Series A Holder shall have such right with respect to New Securities issued with the approval of the Company's Board of Directors to: (i) employees of the Company or (ii) owners of another corporation or other enterprise as part of an acquisition of or combination with that corporation or other enterprise by or with this corporation where such acquisition or combination results in this corporation acquiring more than fifty percent (50%) of the voting securities of such other corporation or enterprise or all or substantially all of the assets of such other corporation or enterprise. Such Series A Holder's pro rata portion, for purposes of this Section 7, shall be the ratio that the number of shares of Common Stock into which such Series A Holder can convert its Series A Shares bears to the sum of all shares of the Common Stock outstanding immediately before the issuance of the New Securities plus all shares of Common Stock then issuable upon conversion of all Preferred Shares (including the Series A Holder's Series A Shares).

(b) Notice of Right. If the Company proposes to issue New Securities (other than

as provided in the second sentence of Subsection 7(a)), it shall give each Series A Holder written notice describing the type of New Securities, the price and terms upon which the Company proposes to sell the New Securities and the name and addresses of the proposed purchasers. Each Series A Holder shall have 20 days from the date of receipt of that notice during which to elect to purchase up to its pro rata portion of such New Securities for the price and upon the other terms specified in the notice by giving written notice to the Company stating the quantity of New Securities (if any) to be so purchased.

(c) Lapse and Reinstatement of Right. If any Series A Holder fails to exercise its entire preemptive right within such 20-day period, the Company shall have 60 days thereafter during which to complete the sale of the New Securities that the Series A Holders did not elect to purchase, to the proposed purchaser or purchasers specified in the Company's notice, at a price and upon other terms that are no more favorable to such purchaser or purchasers than were specified in the notice. If the Company does not issue the New Securities within that 60-day period, the Company shall not thereafter issue or sell any New Securities (except as provided in the second sentence of Subsection 7(a)) without first offering them to the Series A Holders in the manner provided in this Section 7.

(d) Termination of Right. The preemptive right granted by this Section 7 shall expire upon the closing of an Initial Public Offering.

8. Series A Holders' Right to Redeem.

(a) In General. Subject to the balance of this Section 8, if a Liquidity Event has not occurred by March 31, 2001, then, at anytime thereafter (but no more than once each calendar year including the balance of 2001, and in all events not if a Liquidity Event has otherwise first occurred), the holders of the Series A Shares shall be entitled to have those shares valued, as provided below, and also have them redeemed by the Company, as provided below. All decisions respecting the matters referred to in this Section 8 shall be made by the holders of a majority of the Series A Shares outstanding, except that each holder of Series A Shares shall be entitled, with respect to that holder's Series A Shares or any portion of those shares, to make the decision whether to have those shares redeemed or to participate in a Liquidity Event as provided in the last sentence of Subsection 8(a)(v). As a convenience to the Company, all decisions made by the holders of the Series A Shares respecting the matters referred to in this Section 8 shall be communicated to the Company by the "Series A Representative" (see Subsection 8(d)). All references in this Section 8 to elections and other decisions by the Series A Representative are simply a "shorthand" means to describe elections and other decisions that shall be made by holders of a majority of the outstanding Series A Shares. Subject to the balance of this Section 8, at any time after March 31, 2001 if a Liquidity Event has not occurred by then, the Series A Representative may require that the Series A Shares be valued. To do that, the Series A Representative shall give a written notice to that effect to the Company (a "Valuation Notice"). If the Company and the Series A Representative do not agree on the value of the Series A Shares within 30 days after the Series A Representative gives the

Valuation Notice, the Company and the Series A Representative shall submit the matter to arbitration. The arbitration shall be conducted as follows:

(i) The Company and the Series A Representative shall attempt to select an arbitrator (the "Arbitrator"). The Arbitrator shall be an investment banking firm of national reputation. If the Company and the Series A Representative do not agree on an Arbitrator within 30 days after the Series A Representative gives its Valuation Notice, they shall each select an "appointing party" by the 40th day after the Series A Representative gave its Valuation Notice, they shall each select an "appointing party" by the 40th day after the Series A Representative gave its Valuation Notice and the two appointing parties so selected shall select the Arbitrator within ten days after the second of them is appointed. If the Series A Representative or the Company fails to select an appointing party by that 40th day, the appointing party selected by the other of them shall be (or shall appoint) the Arbitrator. If the Series A Representative and the Company both timely select an appointing party but those appointing parties do not select an Arbitrator by the tenth day after the second of them has been appointed, then, by that tenth day, each appointing party shall recommend an Arbitrator and the selection of the Arbitrator shall on that day be determined by the flip of a coin.

(ii) Throughout the procedure beginning with the giving of the Valuation Notice, but not in derogation of any rights that any Series A Holder may otherwise have under law or contract, the holders of the Series A Shares and their representatives shall have full access to the books, records, business plans, budgets, properties and personnel of the Company in order to make their assessment of the value of the Series A Shares. Once selected, the Arbitrator shall have similar access.

(iii) Within ten days after the Arbitrator is selected, the Company and the Series A Representative shall each submit a value for the Series A Shares to the Arbitrator. The contents of the submissions shall not be disclosed to any party until both submissions have been disclosed to the Arbitrator. The valuations shall be the good faith determination of the party making the submission of the fair market per share value of the Series A Shares, as of the last day of the calendar month last preceding the date of the Valuation Notice, based on the standards set forth in (iv) below. The parties may also submit supporting documentation for consideration by the Arbitrator.

(iv) The Arbitrator shall select the valuation submitted by the Company or the valuation submitted by the Series A Representative as the fair market per share value of the Series A Shares. The Arbitrator shall not select any other value. The Arbitrator shall make its determination by the 10th day after it receives the last of the submissions of the Series A Representative and the Company. The Arbitrator shall make its determination by first determining the fair market value of the entire corporation as if all the Company's shares were publicly traded. The Arbitrator shall not apply any illiquidity or minority discount based on an Initial Public Offering. The Arbitrator shall then assume that all outstanding Preferred Shares are converted into shares of Common Stock at the then-applicable Conversion Ratio, shall add those shares to the number of then-outstanding shares of Common Stock and on that basis shall determine the per share value of the

Common Stock. The value of a Series A Share, for purposes of this Section 8, shall equal the per share value of the Common Stock determined as above.

(v) Within 15 days after the Company and the Series A Representative have agreed on a value for the Series A Shares or the Arbitrator has determined a value for the Series A Shares, the Series A Representative may elect to require that the Company either complete an Initial Public Offering or (based on elections submitted by each holder of Series A Shares with respect to that holder's Series A Shares) purchase some or all of the then-outstanding Series A Shares, whether owned by the Series A Representative, other Series A Holders or both (in any such case, the "Redemption Shares") at the per share price determined as set forth above (the "Redemption Price"). The Series A Representative shall make any such election by means of written notice to the Company. If the Series A Representative does make such an election, the Company shall have the option of either completing an Initial Public Offering or purchasing the Redemption Shares. However, if the Company does not, in fact, complete an Initial Public Offering by the 180th day after the Series A Representative gave its Valuation Notice, the Company shall purchase the Redemption Shares for the Redemption Price on that 180th day or, if that day is not a business day, then the next business day. The Redemption Price shall be paid to the appropriate Series A Holders in cash. However, if a Liquidity Event occurs before the redemption is complete, each Series A Holder whose Series A Shares would otherwise have been redeemed shall be entitled not to have them redeemed but instead to participate in the Liquidity Event.

(b) Delayed Payment. If the Company is required to redeem any Series A Shares but, at the time required for redemption, is prohibited from doing so by statute, it shall redeem as many of the Series A Shares required to be redeemed as soon as it is not prohibited from doing so, including in installments. Any and all payments of the Redemption Price or portion of the Redemption Price that are so delayed shall be accompanied by interest at the annual rate of ten percent (10%) from the date the redemption was originally required to close to the date or dates of payment.

(c) Expenses of Arbitration. The fees and expenses of the Arbitrator shall be paid as follows: If the Arbitrator selects the value for the Series A Shares proposed by the Company, then the Series A Holders shall pay those fees and expenses. They shall do so in proportion to the relative number of Series A Shares owned by them as of the date of the Valuation Notice, unless the Series A Holders have reached some other agreement among themselves. If, instead, the Arbitrator selects the value for the Series A Shares proposed by the Series A Representative, then the Company shall pay the Arbitrator's fees and expenses.

(d) Series A Representative. The initial Series A Representative shall be Hellman & Friedman Capital Partners III, L.P. That partnership may assign that role (as can any permitted assignee and permitted assignee of a permitted assignee, etc.) to any other Series A Holder. In connection with the matters referred to in this Section 8, the Series A Representative shall be the sole representative of the Series A Holders. Accordingly, the Company shall be entitled to ignore any and all instructions or communications from other Series A Holders regarding the matters referred to

in this Section 8.

(e) Loan and Other Agreements. For so long as the Series A Holders are entitled to redeem any Series A Shares under this Section 8, the Company shall not enter into any loan or other agreement that could prohibit any such redemption unless both the Company's Board of Directors and the holders of a majority of the outstanding Series A Shares approve the agreement.

9. Prohibited Actions.

(a) List of Actions. So long as at least a total of 69,128 shares of Series A Shares are outstanding and except as provided in Subsection 9(b) below, the Company shall not (i) amend its Certificate of Incorporation or Bylaws, (ii) change the nature of its principal business, (iii) issue any Preferred Stock (other than the specific number of Series A Shares and Series B Shares that are designated by this Certificate) or any debt securities convertible into, or any warrants or other rights exercisable for, any Preferred Stock, which in any such case have any rights, preferences or privileges that are senior to or the same as those of the Series A Shares, (iv) increase the total compensation paid to Brian Maxwell or to Jennifer Maxwell above the total compensation paid to either for them during 1995, unless that increase is approved at a duly held meeting of the Company's Board of Directors, (v) enter into any other contract, arrangement or transaction with Brian Maxwell, Jennifer Maxwell, any member of his or her family (consisting of grandparents, parents and children, including adopted children and step children), or any entity or enterprise in which any of them has any material financial interest, unless that contract, arrangement or transaction is approved at a duly-held meeting of the Company's Board of Directors, (vi) redeem any Common Stock (other than repurchases of Common Stock originally issued to employees other than Brian Maxwell, Jennifer Maxwell or Michael McColhum at a repurchase price that does not exceed the original purchase price) or any Preferred Shares (other than Series A Shares in accordance with Section 8) or (vii) cause or permit the ratio of the Company's total Indebtedness to the Company's total stockholders' equity to exceed one to one.

(b) Consent by Series A Shares. Any of the prohibitions set forth in Subsection 9(a) may be waived with respect to any specific event or action by a vote or written consent duly taken or signed by holders of more than fifty percent (50%) of the Series A Shares outstanding on the record date for that vote or consent.

ARTICLE V.

The Company is to have perpetual existence.

ARTICLE VI.

Elections of directors need not be by written ballot unless a stockholder demands election by written ballot at the meeting and before voting begins or unless the Bylaws of the Company shall so provide.

ARTICLE VII.

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, alter, amend or repeal the Bylaws of the Company.

ARTICLE VIII.

1. To the fullest extent permitted by the Delaware General Corporation Law as the same exists or as may hereafter be amended, a director of the Company shall not be personally liable to the Company or its stockholders for monetary damages for breach of fiduciary duty as a director.

2. The Company shall indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he, his testator or intestate is or was a director, officer or employee of the Company or any predecessor of the Company, or serves or served at any other enterprise as a director, officer or employee at the request of the Company or any predecessor to the Company.

3. Neither any amendment nor repeal of this Article IX, nor the adoption of any provision of the Company's Certificate of Incorporation inconsistent with this Article IX, shall eliminate or reduce the effect of this Article IX, in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this Article IX, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

ARTICLE IX.

Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws may provide. The books of the Company may be kept (subject to any provision contained in the statutes) outside of the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Company.

ARTICLE X.

Advance notice of new business and stockholder nominations for the election of directors shall be given in the manner and to the extent provided in the Bylaws of the Company.

ARTICLE XI.

Stockholders shall be entitled to cumulative voting rights in the election of directors as set forth in this Article XIII and the Bylaws of the Company. Subject to such limitation, at all elections of directors of the Company, each holder of stock or of any class or classes or of a series or series

thereof shall be entitled to as many votes as shall equal the number of votes which (except for this provision as to cumulative voting) such stockholder would be entitled to cast for the election of directors with respect to such stockholders shares of stock multiplied by the number of directors to be elected, and such stockholder may cast all of such votes for a single director or may distribute them among the number of directors to be voted for, or for any two or more of them as such stockholder may see fit.

ARTICLE XII.

The Company 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 upon stockholders herein are granted subject to this reservation.

ARTICLE XIII.

The name and mailing address of the incorporator are:

Mark Baudler
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

State of Delaware

Office of the Secretary of State

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 CORRECTION OF "POWERBAR INC.", FILED IN THIS OFFICE ON THE TWENTY-SECOND DAY OF MAY, A.D. 2000, AT 12 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.

Edward J. Freel, Secretary of State

2849828 8100

001258310

AUTHENTICATION: 0452777

DATE:

STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 12:00 PM 05/22/2000
001258310 - 2849828

CERTIFICATE OF CORRECTION

TO

CERTIFICATE OF MERGER

OF

POWERBAR INC.

a California corporation

WITH AND INTO

POWERBAR INC.

a Delaware corporation

PowerBar Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware ("PowerBar Delaware"), does hereby certify that:

1. The name of PowerBar Delaware is PowerBar Inc.

2. The Certificate of Merger (the "Certificate") providing for the merger of PowerBar Inc., a California corporation ("PowerBar California"), with and into PowerBar Delaware, with PowerBar Delaware being the surviving corporation in the merger (the "Surviving Corporation"), which was filed with the Secretary of State of the State of Delaware on March 30, 2000, requires correction as permitted by Section 103(f) of the General Corporation Law of the State of Delaware.

3. The inaccuracy to be corrected, which is set forth in Article Seventh of the Certificate, is the number of shares of Preferred Stock of PowerBar California which are designated as "Series A Preferred" and the number of shares designated as "Series B Preferred," which were incorrectly stated as 2,049,344 and 2,581,449 shares, respectively.

4. Article Seventh of the Certificate is hereby corrected to read in its entirety as follows:

> SEVENTH: That PowerBar Inc., a California corporation, has authorized 25,000,000 shares of Common Stock, with a par value of $0.001 per share, and 5,000,000 shares of Preferred Stock, with a par value of $0.001 per share, of which 278,028 shares are designated 'Series A Preferred' and 350,567 shares are designated 'Series B Preferred.'"

IN WITNESS WHEREOF, PowerBar Inc., the Surviving Corporation, has caused this Certificate of Correction to be executed by its authorized officer on this 22nd day of May, 2000.

POWERBAR INC.
a Delaware corporation

By: _____
Name: David B. Cooper, Jr.
Title: Vice President and Chief Financial Officer