

01-23-2002

Form PTO-1594 (Rev. 03/01) OMB No. 0651-0027 (exp. 5/31/2002) Tab settings

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U.S. DEPARTMENT OF COMMERCE U.S. Patent and Trademark Office

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

1. Name of conveying party(ies): Alexza Corporation

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

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

3. Nature of conveyance:

- Assignment Merger Security Agreement Change of Name Other

Execution Date: December 21, 2001

2. Name and address of receiving party(ies)

Name: Alexza Molecular Delivery Corporation

Internal

Address:

2375 Garcia Avenue

Street Address:

City: Mountain View State: California Zip: 94043

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 (Designations must be a separate document from assignment) Additional name(s) & address(es) attached? Yes No

01-11-2002

U.S. Patent & TMO/TM Mail Rpt Dt. #34

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

A. Trademark Application No.(s)

76/262,728 76/262,729

B. Trademark Registration No.(s)

Additional number(s) attached Yes No

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

Name: Harold J. Milstein

Internal Address: Heller Ehrman White & McAuliffe LLP

Street Address: 275 Middlefield Road

01/22/2002 TDIAZ1 00000004 76262728

01 FC: 81 40.00 OP 02 FC: 82 25.00 OP Menlo Park California 94025

6. Total number of applications and registrations involved: 2

7. Total fee (37 CFR 3.41) \$ 65.00

- Enclosed Authorized to be charged to deposit account

8. Deposit account number:

08-1645

(Attach duplicate copy of this page 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.

Harold Milstein

Name of Person Signing

Harold Mil

Signature

1/7/02

Date

Total number of pages including cover sheet, attachments, and document:

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

TRADEMARK REEL: 002428 FRAME: 0780

Delaware

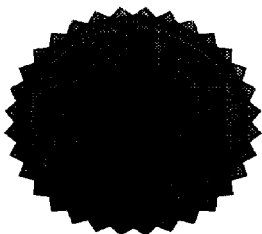
PAGE 1

The First State

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 CERTIFICATE OF MERGER, WHICH MERGES:

"MOLECULAR DELIVERY CORPORATION", A CALIFORNIA CORPORATION, WITH AND INTO "ALEXZA CORPORATION" UNDER THE NAME OF "ALEXZA MOLECULAR DELIVERY CORPORATION", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE TWENTY-FIRST DAY OF DECEMBER, A.D. 2001, AT 6:33 O'CLOCK P.M.

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



Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1524667

DATE: 12-26-01

3320635 8100M

010662987

TRADEMARK

REEL: 002428 FRAME: 0781

**CERTIFICATE OF MERGER
OF
MOLECULAR DELIVERY CORPORATION
a California corporation**

STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 06:33 PM 12/21/2001
010662987 - 3320635

INTO

**ALEXZA CORPORATION
a Delaware corporation**

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

Alexza Corporation, a Delaware corporation, hereby certifies that:

- (1) The name and state of incorporation of each of the constituent corporations are:
 - (a) Alexza Corporation, a Delaware corporation (“the Surviving Corporation”); and
 - (b) Molecular Delivery Corporation, a California corporation (“the Disappearing Corporation”).
- (2) An Agreement and Plan of Merger has been approved, adopted, certified, executed and acknowledged by the Disappearing Corporation and by the Surviving Corporation in accordance with the provisions of subsection (c) of Section 252 of the General Corporation Law of the State of Delaware.
- (3) The name of the surviving corporation is Alexza Corporation. Upon the effectiveness of this filing, Alexza Corporation will change its name to Alexza Molecular Delivery Corporation, a Delaware corporation, which will continue its existence as the surviving corporation upon the effective date of the merger.
- (4) Pursuant to the Agreement and Plan of Merger, the Restated Certificate of Incorporation of the Surviving Corporation is restated to read in its entirety as set forth in Exhibit A attached hereto.
- (5) The executed Agreement and Plan of Merger is on file at the principal place of business of the Surviving Corporation, located at 2375 Garcia Avenue, Mountain View, CA 94043.

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REEL: 002428 FRAME: 0782**

(6) A copy of the Agreement and Plan of Merger will be furnished by the Surviving Corporation, on request and without cost, to any stockholder of the Surviving Corporation or the Disappearing Corporation.

(7) The authorized capital stock of the Disappearing Corporation is 10,000,000 shares of Common Stock and 2,500,000 shares of Series A Preferred Stock as of the date of this Certificate.

(8) The effective date of this merger shall be December 21, 2001.

IN WITNESS WHEREOF, the Surviving Corporation has caused this Certificate of Merger to be signed by the Chief Executive Officer, on the 19th day of December, 2001.

ALEXZA CORPORATION,
a Delaware corporation

By: /s/ Alejandro Zaffaroni
Alejandro Zaffaroni,
Chief Executive Officer

EXHIBIT A

**AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
ALEXZA MOLECULAR DELIVERY CORPORATION**

FIRST

The name of the corporation is Alexza Molecular Delivery Corporation (the "Company").

SECOND

The address of the registered office of the Company in the State of Delaware is 615 South DuPont Highway, City of Dover, County of Kent. The name of its registered agent at such address is National Corporate Research, Ltd.

THIRD

The nature of the business or purposes to be conducted or promoted 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

The total number of shares of all classes of capital stock which the Company shall have authority to issue is 30,551,250 shares, comprised of 20,000,000 shares of Common Stock with a par value of \$0.0001 per share (the "Common Stock") and 10,551,250 shares of Preferred Stock with a par value of \$0.0001 per share (the "Preferred Stock").

The Preferred Stock will be divided into three series: 2,500,000 shares are designated "Series A Preferred Stock" (the "Series A Preferred"), 1,610,250 shares are designated "Series A-1 Preferred Stock" (the "Series A-1 Preferred"), and 6,441,000 shares are designated "Series B Preferred Stock" (the "Series B Preferred Stock").

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REEL: 002428 FRAME: 0784**

FIFTH

The relative rights, preferences, privileges, and restrictions granted to or imposed upon the respective classes of the shares of capital stock or the holders thereof are as set forth below. As used in this Article FIFTH, the term "Preferred Stock", without designation, will refer to shares of Series A Preferred, Series A-1 Preferred and Series B Preferred.

1. *Dividend Preference.*

The holders of the Preferred Stock shall be entitled to receive, out of funds legally available therefor, dividends at an annual rate equal to 8% of the Original Issue Price for such series of Preferred Stock, as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) for each outstanding share of Preferred Stock held by them, which amounts to (a) \$0.032 per share for the Series A Preferred, (b) \$0.12 for the Series A-1 Preferred and (c) \$0.08 for the Series B Preferred. This dividend will be payable when and if declared by the Board of Directors, in preference and priority to the payment of dividends on any shares of Common Stock (other than those payable solely in Common Stock or involving the repurchase of shares of Common Stock from terminated employees, officers, Directors, or consultants pursuant to contractual arrangements). In the event dividends are paid to the holders of Preferred Stock that are less than the full amounts to which such holders are entitled pursuant to this Section 1, such holders shall share ratably in the total amount of dividends paid according to the respective amounts due each such holder if such dividends were paid in full. After payment of dividends to the holders of Preferred Stock, dividends may be declared and distributed among all holders of Common Stock and Preferred Stock based on the number of shares of Common Stock into which such shares of Preferred Stock are convertible (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) on the date such dividend is declared. The dividends payable to the holders of the Preferred Stock shall not be cumulative, and no right shall accrue to the holders of the Preferred Stock by reason of the fact that dividends on the Preferred Stock are not declared or paid in any previous fiscal year of the Company, whether or not the earnings of the Company in that previous fiscal year were sufficient to pay such dividends in whole or in part. In the event that the Company shall have declared but unpaid dividends outstanding immediately prior to, and in the event of, a conversion of Preferred Stock (as provided in Section 4 hereof), the Company shall, at the option of the Company, pay in cash to the holder(s) of Preferred Stock subject to conversion the full amount of any such dividends or allow such dividends to be converted into Common Stock in accordance with, and pursuant to the terms specified in, Section 4 hereof.

2. Liquidation Preference.

a) In the event of any liquidation, dissolution, or winding up of the Company, whether voluntary or not, or the sale, lease, assignment, transfer, conveyance or disposal of all or substantially all of the assets of the Company, or the acquisition of this Company by another entity by means of consolidation, corporate reorganizations or merger, or other transaction or series of related transactions in which more than 50% of the outstanding voting power of this Company is disposed of (each a "Liquidation Event"), distributions to the shareholders of the Company shall be made in the following manner:

(i) Each holder of Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Company to the holders of Common Stock, by reason of their ownership of such stock, the amount of (a) \$0.40 (the "Original Series A Issue Price") per share for each share of Series A Preferred then held by such holder, plus an amount equal to all declared but unpaid dividends on such shares of Series A Preferred; (b) \$1.55 (the "Original Series A-1 Issue Price") per share for each share of Series A-1 Preferred then held by such holder, plus an amount equal to all declared but unpaid dividends in such shares of Series A-1 Preferred; and (c) \$1.40 (the "Original Series B Issue Price") for each share of Series B Preferred then held by such holder, plus an amount equal to all declared but unpaid dividends in such shares of Series B Preferred; in each case the Original Issue Price will be adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to the shares of the relevant series. If, upon the occurrence of a Liquidation Event, the assets and funds available to be distributed among the holders of Preferred Stock shall be insufficient to permit the payment to such holders of the full preferential amount, then the entire assets and funds of the Company legally available for distribution to the holders of Preferred Stock shall be distributed ratably based on the total preferential amount due each such holder under this Section 2(a).

(ii) After payment has been made to the holders of Preferred Stock of the full amounts to which they are entitled pursuant to paragraph (i) above, the remaining assets of the Company available for distribution to stockholders shall be distributed ratably among the holders of Common Stock and Preferred Stock (assuming conversion of all shares of Preferred Stock).

b) Each holder of Preferred Stock shall be deemed to have consented to distributions made by the Company in connection with the repurchase of shares of Common Stock issued to or held by officers, Directors, or employees of, or consultants to, the Company or its subsidiaries upon termination of their employment or services pursuant to agreements (whether now existing or hereafter entered into) providing for the right of said repurchase between the Company and such persons, provided, however, that

the amount paid to such officers, Directors, employees or consultants does not exceed the respective amounts paid by such individuals for the shares being purchased.

c) The value of securities and property paid or distributed pursuant to this Section 2 shall be computed at fair market value at the time of payment to the Company or at the time made available to shareholders, all as determined by the Board of Directors in the good faith exercise of its reasonable business judgment, provided that (i) if such securities are listed on any established stock exchange or a national market system, their fair market value shall be the closing sales price for such securities as quoted on such system or exchange (or the largest such exchange) for the date the value is to be determined (or if there are no sales for such date, then for the last preceding business day on which there were sales), as reported in the Wall Street Journal or similar publication, and (ii) if such securities are regularly quoted by a recognized securities dealer but selling prices are not reported, their fair market value shall be the mean between the high bid and low asked prices for such securities on the date the value is to be determined (or if there are no quoted prices for such date, then for the last preceding business day on which there were quoted prices).

d) Nothing hereinabove set forth shall affect in any way the right of each holder of Preferred Stock to convert such shares at any time and from time to time into Common Stock in accordance with Section 4 hereof.

3. Voting Rights.

Except as otherwise required by law or hereunder, the holder of each share of Common Stock issued and outstanding shall have one vote and the holder of each share of Series A Preferred, Series A-1 Preferred and Series B Preferred shall be entitled to the number of votes equal to the number of shares of Common Stock into which such share of Preferred Stock could be converted at the record date for determination of the shareholders entitled to vote on such matters, or, if no such record date is established, at the date such vote is taken or any written consent of shareholders is solicited, such votes to be counted together with all other shares of stock of the Company having general voting power and not separately as a class. Fractional votes by the holders of Preferred Stock shall not, however, be permitted and any fractional voting rights shall (after aggregating all shares of Common Stock into which shares of Preferred Stock held by each holder could be converted) be rounded to the nearest whole number (with one-half being rounded upward). Holders of Common Stock and Preferred Stock shall be entitled to notice of any shareholders' meeting in accordance with the Bylaws of the Company.

4. Conversion Rights.

The holders of the Preferred Stock shall have conversion rights as follows:

a) **Right to Convert.** Each share of Series A Preferred, Series A-1 Preferred and Series B Preferred shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Company or any transfer agent for such Preferred Stock, into such number of fully-paid and non-assessable shares of Common Stock as is determined by dividing the Original Issue Price for the relevant series of Preferred Stock (as adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) by the then applicable Conversion Price for such relevant series of Preferred Stock, determined as hereinafter provided, in effect at the time of conversion. The price at which shares of Common Stock shall be deliverable upon conversion of the Preferred Stock will be as follows: (a) for conversion of Series A Preferred, (the "Series A Conversion Price") it shall initially be the Original Series A Issue Price; (b) for conversion of Series A-1 Preferred (the "Series A-1 Conversion Price", it shall initially be the Original Series A-1 Conversion Price; and (c) for conversion of Series B Preferred (the "Series B Conversion Price"), it shall initially be the Original Series B Issue Price. The initial Conversion Price for all series of Preferred Stock shall be subject to adjustment as provided in accordance with Section 4(d) of this Article 4.

b) **Automatic Conversion.** Each share of Preferred Stock shall automatically be converted into shares of Common Stock at the then effective applicable Conversion Price for the relevant series of Preferred Stock upon the earlier of: (i) the closing of a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, (the "Securities Act") covering the offer and sale of Common Stock for the account of the Company to the public with aggregate proceeds to the Company in excess of \$15,000,000.00 (before deduction for underwriters commissions and expenses) and a per share price not less than \$5.00 per share (appropriately adjusted for any stock combination, stock split, stock dividend, recapitalization, or other similar transaction) or (ii) the affirmative vote or written consent of a majority of the outstanding shares of a series of Preferred Stock, which will trigger automatic conversion for shares of the relevant series of Preferred Stock only (each such event is an "Automatic Conversion"). In the event of an Automatic Conversion of the Preferred Stock upon a public offering as aforesaid, the person(s) entitled to receive the Common Stock issuable upon such conversion of such Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities.

c) **Mechanics of Conversion.** No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Company shall pay cash equal to such fraction multiplied by the then effective Conversion Price for the relevant series of Preferred Stock. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock and to receive certificates therefor, such holder

shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or of any transfer agent for the relevant series of Preferred Stock, and shall give written notice to the Company at such office that he or she elects to convert the same; provided, however, that in the event of an Automatic Conversion pursuant to Section 4(b), the outstanding shares of Preferred Stock, or of the series of Preferred Stock affected by the Automatic Conversion, shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Company or its transfer agent, and provided further that the Company shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion unless the certificates evidencing such shares of Preferred Stock are either delivered to the Company or its transfer agent as provided above, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen, or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. The Company shall, as soon as practicable after such delivery, or such agreement and indemnification in the case of a lost certificate, issue and deliver at such office to such holder of Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Preferred Stock to be converted, or in the case of Automatic Conversion, on the date of closing of the offering or the date of the affirmative vote or written consent of a majority of the then outstanding shares of Preferred Stock, as applicable, 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.

d) Adjustments to Conversion Price.

(i) Adjustments for Dividends, Splits, Subdivisions, Combinations, or Consolidation of Common Stock. In the event the outstanding shares of Common Stock shall be increased by stock dividend payable in Common Stock, stock split, subdivision, or other similar transaction occurring after the filing of these Amended and Restated Articles of Incorporation into a greater number of shares of Common Stock, the Conversion Prices then in effect shall, concurrently with the effectiveness of such event, be decreased in proportion to the percentage increase in the outstanding number of shares of Common Stock. In the event the outstanding shares of Common Stock shall be decreased by reverse stock split, combination, consolidation, or other similar transaction occurring after the filing of these Amended and Restated Articles of Incorporation into a lesser number of shares of Common Stock, the Conversion Prices then in effect shall, concurrently with the effectiveness of such event,

be increased in proportion to the percentage decrease in the outstanding number of shares of Common Stock.

(ii) **Adjustments for Other Distributions.** In the event the Company at any time or from time to time makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, any distribution payable in securities of the Company other than shares of Common Stock and other than as otherwise adjusted in this Section 4, then and in each such event provision shall be made so that the holders of Preferred Stock shall receive upon conversion thereof, in addition to the number of shares of Common Stock receivable thereupon, the amount of securities of the Company which they would have received had their Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the date of conversion, retained such securities receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this Section 4 with respect to the rights of the holders of the Preferred Stock.

(iii) **Adjustments for Reclassification, Exchange and Substitution.** If the Common Stock issuable upon conversion of the 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 above), the Conversion Prices then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted such that the 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 such Preferred Stock immediately before that change.

(iv) **Adjustments on Issuance of Additional Stock.** If the Company shall issue "Additional Stock" (as defined below) for a consideration per share less than the Series A, Series A-1 or Series B Conversion Price in effect on the date and immediately prior to such issue, then and in such event, the Series A, Series A-1 or Series B Conversion Price, as applicable, shall be reduced concurrently with such issue, to a price (calculated to three decimal places) determined by multiplying such Conversion Price by a fraction (i) the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the Company for the total number of Additional Stock so issued (or deemed to be issued) would purchase at such Conversion Price; and (ii) the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Additional Stock

so issued; provided that for purposes of this Section 4(d)(iv), all shares of Common Stock issuable upon conversion of the outstanding Preferred Stock, all shares of Common Stock issuable upon exercise of outstanding stock options, all shares of Common Stock reserved for issuance under the Company's current employee stock option plan, and all shares of Common Stock issuable upon exercise or conversion of any other outstanding security or debt instrument of the Company shall be deemed to be Common Stock outstanding. For purposes of this subsection (iv), "Additional Stock" shall mean all Common Stock issued by the Company after the date on which the first share of Series B Preferred was issued (the "Series B Original Issue Date") other than (a) upon conversion of the Series A Preferred, Series A-1 Preferred or Series B Preferred; (b) to the Company's officers, Directors, employees, consultants, and advisors under employee and consultant stock option and stock purchase plans of the Company, and under other written agreements for employees of or consultants or advisors to the Company that are approved by the affirmative vote of at least a majority of the total number of then-authorized Directors; (c) shares issued in connection with any stock split, stock dividend or recapitalization by the Company; (d) in connection with the following transactions which are primarily for other than equity financing purposes of the Company and which are approved in each case by the affirmative vote of at least a majority of the total number of then-authorized Directors: (i) strategic alliances, joint ventures, manufacturing, marketing or distribution arrangements or technology transfer or development arrangements; (ii) equipment lessors, banks or other institutions providing borrowing facilities to the Company; and (e) to the public in a public offering pursuant to an effective registration statement under the Securities Act in connection with which all outstanding shares of Preferred Stock will be converted into Common Stock.

For the purpose of making any adjustment in the Conversion Price as provided above, the consideration received by the Company for any issue or sale of Common Stock will be computed:

(1) to the extent it consists of cash, as the amount of cash received by the Company before deduction of any offering expenses payable by the Company and any underwriting or similar commissions, compensation, or concessions paid or allowed by the Company in connection with such issue or sale;

(2) to the extent it consists of property other than cash, at the fair market value of that property as determined in good faith by the Company's Board of Directors; and

(3) if Common Stock is issued or sold together with other stock or securities or other assets of the Company for a consideration which covers both, as the portion of the consideration so received that may be reasonably determined in good faith by the Board of Directors to be allocable to such Common Stock.

If the Company (1) grants any rights or options to subscribe for, purchase, or otherwise acquire shares of Common Stock, or (2) issues or sells any security convertible into shares of Common Stock, then, in each case, the price per share of Common Stock issuable on the exercise of the rights or options or the conversion of the securities will be determined by dividing the total amount, if any, received or receivable by the Company as consideration for the granting of the rights or options or the issue or sale of the convertible securities, plus the minimum aggregate amount of additional consideration payable to the Company on exercise or conversion of the securities, by the maximum number of shares of Common Stock issuable on the exercise or conversion. Such granting or issue or sale will be considered to be an issue or sale for cash of the maximum number of shares of Common Stock issuable on exercise or conversion at the price per share determined under this subsection, and the Conversion Price for all series of Preferred Stock will be adjusted as above provided to reflect (on the basis of that determination) the issue or sale. No further adjustment of such Conversion Prices will be made as a result of the actual issuance of shares of Common Stock on the exercise of any such rights or options or the conversion of any such convertible securities.

Upon the redemption or repurchase of any such securities or the expiration or termination of the right to convert into, exchange for, or exercise with respect to, Common Stock, the Conversion Price for a series of Preferred Stock will be readjusted to such price as would have been obtained had the adjustment made upon their issuance been made upon the basis of the issuance of only the number of such securities as were actually converted into, exchanged for, or exercised with respect to, Common Stock. If the purchase price or conversion or exchange rate provided for in any such security changes at any time, then, upon such change becoming effective, the Conversion Price for the applicable series of Preferred Stock then in effect will be readjusted forthwith to such price as would have been obtained had the adjustment made upon the issuance of such securities been made upon the basis of (1) the issuance of only the number of shares of Common Stock theretofore actually delivered upon the conversion, exchange or exercise of such securities, and the total consideration received therefor, and (2) the granting or issuance, at the time of such change, of any such securities then still outstanding for the consideration, if any, received by the Company therefor and to be received on the basis of such changed price or rate.

e) **No Impairment.** Except as provided in Section 6 of this Article Fourth, the Company 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 Company but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 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 Preferred Stock against impairment.

f) **Certificate as to Adjustments.** Upon the occurrence of each adjustment or readjustment of the Conversion Price of a series of Preferred Stock pursuant to this Section 4, the Company at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of the relevant series of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Company shall, upon the written request of any holder of the relevant series of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the applicable Conversion Price for the relevant 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 relevant series of Preferred Stock.

g) **Notices of Record Date.** In the event that this Company 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 its property or business, or to liquidate, dissolve, or wind up; then, in connection with each such event, this Company shall send to the holders of the Preferred Stock:

(1) at least 20 days' prior written notice of the date on which a record shall be taken for such dividend, distribution, or subscription rights (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote in respect of the matters referred to in (iii) and (iv) above; and

(2) in the case of the matters referred to in (iii) and (iv) above, at least 20 days' prior written notice of the date when the same shall take place (and specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event or the record date for the determination of such holders if such record date is earlier).

Each such written notice shall be delivered personally or given by first class mail, postage prepaid, addressed to the holders of the Preferred Stock at the address for each such holder as shown on the books of this Company.

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

i) **Reservation of Stock Issuable Upon Conversion.** The Company 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 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 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 Preferred Stock, the Company 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 shareholder approval of any necessary amendment to this Certificate of Incorporation.

j) **Status of Converted Stock.** In case any series of Preferred Stock shall be converted pursuant to this Section 4, the shares so converted shall be cancelled and shall not be issuable.

5. *Redemption Rights.*

a) At the election in writing by the holders of more than 50% of the outstanding shares of Series A Preferred, Series A-1 Preferred and Series B Preferred, acting together and without regard to series (the "Redemption Vote"), at any time beginning on the fifth anniversary of the Series B Original Issue Date, the Company shall redeem, on the terms and conditions stated herein, out of funds legally available therefor, all of the Preferred Stock in three equal annual installments, by paying in cash therefor a sum equal to the Original Issue Price of the relevant series for each share of Preferred Stock, plus all declared but unpaid dividends thereon (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) (the "Redemption Price" for each series). The first such installment and redemption shall occur within 60 days after the date of the election by the holders of Preferred Stock, with one-third of the total number of Preferred Stock outstanding at the date of such written request being redeemed at such first redemption date, and one third of such then-outstanding number being redeemed, without interest, on each of the next two

anniversaries of such first redemption date (any of these redemption date shall be referred herein as a "Redemption Date").

b) In the event that the Company is unable to redeem the full number of shares of Preferred Stock to be redeemed on any Redemption Date, the shares not redeemed shall be redeemed by this Company as provided in this Section 5 as soon as practicable after funds are legally available therefor. Any redemption effected pursuant to this paragraph (b) shall be made ratably among the holders of the Preferred Stock in proportion to the aggregate Redemption Price.

c) If the Redemption Vote is obtained, any holder(s) of Series A-1 Preferred who desire not to be redeemed may, by written notice to the holders of Series A Preferred and Series B Preferred, as well as to the Company, elect not to be redeemed, in which case the Company will not redeem any shares of Series A-1 Preferred held by stockholders having so elected.

d) If the holders of Preferred Stock have elected to have their shares of Preferred Stock that they hold redeemed as provided in paragraphs (a) and (b) above, then at least 15 but no more than 30 days prior to each Redemption Date, the Company shall give written notice by certified or registered mail, postage prepaid, to all holders of outstanding Preferred Stock whose shares are being redeemed, at the address last shown on the records of the Company for such holder, stating such Redemption Date and the applicable Redemption Price, the then applicable conversion rate (as provided in Section 4(a)) for such shares, and date of termination of the right to convert (which date shall not be earlier than 30 days after the written notice by the Company has been given) and shall call upon such holder to surrender to the Company on such Redemption Date at the place designated in the notice such holder's certificate or certificates representing the shares to be redeemed. On or after the Redemption Date stated in such notice, the holder of each share of Preferred Stock called for redemption shall surrender the certificate evidencing such shares to the Company at the place designated in such notice and shall thereupon be entitled to receive payment of the applicable Redemption Price for the shares surrendered. If less than all the shares represented by any such surrendered certificate are redeemed, a new certificate shall be issued representing the unredeemed shares. If such notice of redemption shall have been duly given, and if on such Redemption Date funds necessary for the redemption shall be available therefor, then, as to any certificates evidencing any Preferred Stock so called for redemption and not surrendered, all rights of the holders of such shares so called for redemption and not surrendered shall cease with respect to such shares, except only the right of the holders to receive the applicable Redemption Price for the Preferred Stock which they hold, without interest, upon surrender of their certificates therefor.

e) Notwithstanding anything herein to the contrary, if, on or prior to any Redemption Date (and after a redemption election has been made pursuant to this Section

5), the Company deposits, with any bank or trust company in the State of California having aggregate capital and surplus in excess of \$100,000,000.00, as a trust fund, a sum sufficient to redeem on such Redemption Date all of the shares called for redemption, with irrevocable instructions and authority to the bank or trust company to give the notice of redemption thereof (or to complete the giving of such notice if theretofore commenced) and to pay, on or after the Redemption Date or prior thereto, the applicable Redemption Price to their holders upon the surrender of their share certificates, then from and after the date of the deposit (although prior to such Redemption Date), the shares so called for redemption on such Redemption Date (but not any subsequent Redemption Date) shall be redeemed. The deposit of such sum shall constitute full payment of such shares to their holders and from and after the date of the deposit such shares shall no longer be 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 right to receive from the bank or trust company payment of the applicable Redemption Price for the Preferred Stock called for redemption on such Redemption Date without interest, upon the surrender of their certificates therefor and the right to convert said shares as provided herein at any time up to but not after the close of business on the fifth day prior to the Redemption Date of such shares (which conversion date will not be earlier than 30 days after the written notice of redemption has been given). Any monies so deposited on account of the applicable Redemption Price of the Preferred Stock converted into Common Stock subsequent to the making of such deposit shall be repaid to the Company forthwith upon the conversion of such Preferred Stock. Any interest accrued on any funds so deposited shall be the property of, and paid to, the Company. If the holders of the Preferred Stock so called for redemption shall not, at the end of two years after the applicable Redemption Date, have claimed any funds so deposited, such bank or trust company shall thereupon pay over to the Company such unclaimed funds, and such bank or trust company shall thereafter be relieved of all responsibility in respect thereof to such holders and such holders shall look only to the Company for payment of the applicable Redemption Price for the series of Preferred Stock which they hold.

6. Covenants.

In addition to any other rights provided by law, the Company shall not, without first obtaining the affirmative vote or written consent of the holders of a majority of the outstanding shares of each of the Series A Preferred, the Series A-1 Preferred and the Series B Preferred, voting separately as a class:

- a) repurchase or redeem any shares of Common Stock (except from an employee of or consultant to the Company upon termination of the employment or consultancy);
- b) increase the maximum, or decrease the minimum, number of members of the Board;

c) increase the number of authorized shares of Preferred Stock (as a class) of the Company;

d) increase, or decrease, in the number of authorized shares of Series A Preferred, Series A-1 Preferred or Series B Preferred;

e) offer, sale, or issue any security senior to or ranking equally with Series A Preferred, Series A-1 Preferred or Series B Preferred as to dividends, liquidation preferences or other statutory rights;

f) amend the Bylaws or Certificate of Incorporation of the Company if such action adversely changes the rights, preferences, or privileges of the Series A Preferred, Series A-1 Preferred or Series B Preferred;

g) pay any dividends to the holders of shares of Common Stock;

h) engage in any transaction or series of related transactions constituting a Liquidation Event; or

i) issue securities of any subsidiary of the Company.

7. *Residual Rights.*

All rights accruing to the outstanding shares of the Company not expressly provided for to the contrary herein shall be vested in the Common Stock. The Common Stock shall not be redeemable.

SIXTH

The Company is to have perpetual existence.

SEVENTH

In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware:

1. The Board of Directors of the Company is expressly authorized:

(i) To make, alter or repeal the Bylaws of the Company.

(ii) To authorize and cause to be executed mortgages and liens upon the real and personal property of the Company.

(iii) To set apart out of any of the funds of the Company available for dividends a reserve or reserves for any proper purpose and to abolish any such reserve in the manner in which it was created.

(iv) By a majority of the whole Board, to designate one or more committees, each committee to consist of one or more of the Directors of the Company. The Board may designate one or more Directors as alternate members of any committee, who may replace any absent or disqualified member of any committee. The Bylaws may provide that in the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the Board of Directors, or in the Bylaws of the Company, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Company, and may authorize the seal of the Company to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to amending the Certificate of Incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the Board of Directors as provided in Section 151(a) of the General Corporation Law of the State of Delaware, fix any of the preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the Company or the conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the Company), adopting an agreement of merger or consolidation under Sections 251 or 252 of the General Corporation Law of the State of Delaware, recommending to the stockholders the sale, lease or exchange, of all or substantially all of the Company's property and assets, recommending to the stockholders a dissolution of the Company or a revocation of a dissolution, or amending the Bylaws of the Company; and, unless the resolution or Bylaws expressly so provide, no such committee shall have the power or authority to declare a dividend, to authorize the issuance of stock, or to adopt a certificate of ownership and merger pursuant to Section 253 of the General Corporation Law of the State of Delaware.

(v) When and as authorized by the stockholders in accordance with statute, to sell, lease or exchange all or substantially all of the property and assets of the Company, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property including shares of stock in, and/or other securities of, any other corporation or corporations, as its Board of Directors shall deem expedient and for the best interests of the Company.

2. Elections of Directors need not be by written ballot unless the Bylaws of the Company shall so provide.

3. The books of the Company may be kept at such place within or without the State of Delaware as the Bylaws of the Company may provide or as may be designated from time to time by the Board of Directors of the Company.

EIGHTH

Whenever a compromise or arrangement is proposed between the Company and its creditors or any class of them and/or between the Company and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of the Company or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for the Company under the provisions of Section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for the Company under the provisions of Section 279 of Title 8 of the Delaware Code, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of the Company, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of the Company, as the case may be, agree to any compromise or arrangement and to any reorganization of the Company as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of the Company, as the case may be, and also on the Company.

NINTH

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, except for liability (i) for any breach of the director's duty of loyalty to the Company or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived any improper personal benefit. If the Delaware General Corporation Law is amended hereafter to authorize corporate action further eliminating or limiting the personal liability of Directors, then the liability of a director of the Company shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

Any repeal or modification of the foregoing paragraph by the stockholders of the Company shall not adversely affect any right or protection of a director of the Company existing at the time of such repeal or modification.

TENTH

1. Right To Indemnification

Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative ("proceeding"), by reason of the fact that he or she or a person of whom he or she is the legal representative, is or was a director or officer, employee or agent of the Company or is or was serving at the request of the Company as a director or officer, employee or agent of another corporation, or of a partnership, joint venture, trust or other enterprise, including service with respect to employee benefit plans, whether the basis of such proceeding is alleged action in an official capacity as a director, officer, employee or agent or in any other capacity while serving as a director, officer, employee or agent, shall be indemnified and held harmless by the Company to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or may hereafter be amended, (but, in the case of any such amendment, only to the extent that such amendment permits the Company to provide broader indemnification rights than said Law permitted the Company to provide prior to such amendment) against all expenses, liability and loss including attorneys' fees, judgments, fines, ERISA excise taxes or penalties and amounts paid or to be paid in settlement) reasonably incurred or suffered by such person in connection therewith and such indemnification shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of his or her heirs, executors and administrators; provided, however, that the Company shall indemnify any such person seeking indemnity in connection with an action, suit or proceeding (or part thereof) initiated by such person only if such action, suit or proceeding (or part thereof) was authorized by the Board of Directors of the Company. Such right shall be a contract right and shall include the right to be paid by the Company expenses incurred in defending any such proceeding in advance of its final disposition; provided, however, that the payment of such expenses incurred by a director or officer of the Company in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such person while a director or officer, including, without limitation, service to an employee benefit plan) in advance of the final disposition of such proceeding, shall be made only upon delivery to the Company of an undertaking, by or on behalf of such director or officer, to repay all amounts so advanced if it should be determined ultimately that such director or officer is not entitled to be indemnified under this Section or otherwise.

2. Right of Claimant to Bring Suit

If a claim under Section 1 of Article TENTH is not paid in full by the Company within ninety (90) days after a written claim has been received by the Company, the claimant may at any time thereafter bring suit against the Company to recover the unpaid amount of the claim and, if successful in whole or in part, the claimant shall be entitled to be paid also the expense of prosecuting such claim. It shall be a defense to any such action (other than an action brought to enforce a claim for expenses incurred in defending any proceeding in advance of its final disposition where the required undertaking, if any, has been tendered to this Company) that the claimant has not met the standards of conduct which make it permissible under the Delaware General Corporation Law for the Company to indemnify the claimant for the amount claimed, but the burden of proving such defense shall be on the Company. Neither the failure of the Company (including its Board of Directors, independent legal counsel, or its stockholders) to have made a determination prior to the commencement of such action that indemnification of the claimant is proper in the circumstances because he or she has met the applicable standard of conduct set forth in the Delaware General Corporation Law, nor an actual determination by the Company (including its Board of Directors, independent legal counsel, or its stockholders) that the claimant has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that claimant has not met the applicable standard of conduct.

3. Non-Exclusivity of Rights

The rights conferred on any person by Sections 1 and 2 of Article TENTH shall not be exclusive of any other right which such persons may have or hereafter acquire under any statute, provision of the Certificate of Incorporation, bylaw, agreement, vote of stockholders or disinterested Directors or otherwise.

4. Insurance

The Company may maintain insurance, at its expense, to protect itself and any such director, officer, employee or agent of the Company or another corporation, partnership, joint venture, trust or other enterprise against any such expense, liability or loss, whether or not the Company would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law.

ELEVENTH

The Company reserves the right to amend or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon a stockholder herein are granted subject to this reservation.