

03-22-2002

Form PTO-1594 (Rev. 03/01) OMB No. 0651 (exp. 5/31/200)

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

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

1. Name of conveying party(ies): Allconnect.com, Inc. 3-8-02
Individual(s) Association
General Partnership Limited Partnership
X Corporation-State
Other
Additional name(s) of conveying party(ies) attached? Yes X No

2. Name and address of receiving party(ies)
Name: Allconnect, Inc.
Internal Address:
Street Address: 6255 Barfield Road, Suite 200
City: Atlanta State: GA Zip: 30328
Individual(s) citizenship
Association
General Partnership
Limited Partnership
X Corporation-State Delaware
Other
If assignee is not domiciled in the United States, a domestic representative designated is attached: Yes X No
(Designations must be a separate document from assignment)
Additional name(s) & address(es) attached? Yes X No

3. Nature of conveyance:
Assignment Merger
Security Agreement X Change of Name
Other
Execution Date: June 1, 2001

4. Application number(s) or registration number(s):
A. Trademark Application No.(s)
76/084,900
76/085,359
Additional number(s) attached Yes X No

B. Trademark Registration No.(s)
2,220,770
2,311,828
Additional number(s) attached Yes X No

5. Name and address of party to whom correspondence concerning document should be mailed:
Name: Wendy L. Robertson
Internal Address: Alston & Bird LLP
Street Address: 1201 W. Peachtree Street
City: Atlanta State: GA Zip: 30309-3424

6. Total number of applications and registrations involved: 4
7. Total fee (37 CFR 3.41) \$ 115.00
X Enclosed
Authorized to be charged to deposit account
8. Deposit account number:
(Attached duplicate copy of this page if paying by deposit account)

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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.
Wendy Robertson Wendy Robertson 3/4/02
Name of Person Signing Signature Date

Total number of pages including cover sheet, attachments, and document: 32

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

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02 FC:482 75.00 DP

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FINANCE SECTION

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REEL: 002467 FRAME: 0227

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

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PAGE 1

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "ALLCONNECT.COM, INC.", CHANGING ITS NAME FROM "ALLCONNECT.COM, INC." TO "ALLCONNECT, INC.", FILED IN THIS OFFICE ON THE FIRST DAY OF JUNE, A.D. 2001, AT 3 O'CLOCK P.M.

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



*Harriet Smith Windsor*  
Harriet Smith Windsor, Secretary of State

3152519 8100

AUTHENTICATION: 1166851

010264273

DATE: 06-01-01

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REEL: 002467 FRAME: 0228

**AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
ALLCONNECT.COM, INC.**

AllConnect.com, Inc., a corporation organized and existing under the laws of the State of Delaware, hereby certifies as follows:

**FIRST:** The name of the corporation is AllConnect.com, Inc. The original Certificate of Incorporation of AllConnect, Inc. was filed with the office of the Secretary of State of the State of Delaware on December 29, 1999. AllConnect, Inc. filed a Certificate of Amendment of Certificate of Incorporation of AllConnect, Inc. with the office of the Secretary of State of the State of Delaware on February 14, 2000, which, among other things, changed the name of AllConnect, Inc. to AllConnect.com, Inc. AllConnect.com, Inc. filed (i) a Certificate of Designation, Preferences and Rights of the Series A Preferred Stock of AllConnect.com, Inc. with the office of the Secretary of State of the State of Delaware on February 14, 2000, (ii) a Certificate of Amendment of Certificate of Incorporation for AllConnect.com, Inc. with the office of the Secretary of State of the State of Delaware on May 26, 2000, (iii) a Certificate of Correction to the Certificate of Incorporation with the office of the Secretary of State of the State of Delaware on May 30, 2000, (iv) a Certificate of Designation, Preferences and Relative, Participating, Optional and Other Special Rights of Series B Convertible Participating Preferred Stock and Qualifications, Limitations and Restrictions Thereof with the office of the Secretary of State of the State of Delaware on June 8, 2000 (the "Series B Certificate of Designation"), (v) a Certificate of Correction to the Series B Certificate of Designation with the office of the Secretary of State of the State of Delaware on September 20, 2000, (vi) a Certificate of Designation, Preferences and Relative, Participating, Optional and Other Special Rights of Series C Convertible Participating Preferred Stock and Qualifications, Limitations and Restrictions Thereof with the office of the Secretary of State of the State of Delaware on December 28, 2000, (vii) a Certificate of Amendment of Certificate of Incorporation for AllConnect.com, Inc. with the office of the Secretary of State of the State of Delaware on December 28, 2000, and (viii) a Certificate of Amendment to the Series B Certificate of Designation with the office of the Secretary of State of the State of Delaware on December 28, 2000.

**SECOND:** This Amended and Restated Certificate of Incorporation restates and integrates and further amends the Certificate of Incorporation of AllConnect.com, Inc., including the Certificates of Designation, and has been duly adopted and approved in accordance with Sections 242 and 245 of the General Corporation Law of the State of Delaware. Stockholder approval of this Amended and Restated Certificate of Incorporation was given by written consent of the stockholders of AllConnect.com, Inc. in accordance with Section 228 of the General Corporation Law of the State of Delaware.

**THIRD:** Approval by AllConnect.com, Inc.'s Board of Directors (the "**Board**") of this Amended and Restated Certificate of Incorporation was given by written consent

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of the members of the Board in accordance with Section 141 of the General Corporation Law of the State of Delaware.

FOURTH: The text of the Certificate of Incorporation is hereby amended and restated in its entirety as follows:

**ARTICLE 1  
NAME**

The name of this corporation is Allconnect, Inc. (the "*Corporation*").

**ARTICLE 2  
REGISTERED OFFICE AND AGENT**

The registered office of the Corporation in the State of Delaware shall be located at Corporation Trust Center, 1209 Orange Street, City of Wilmington, County of New Castle, State of Delaware 19801. The registered agent of the Corporation at such address shall be The Corporation Trust Company.

**ARTICLE 3  
DURATION**

The Corporation is to have perpetual existence.

**ARTICLE 4  
PURPOSE AND POWERS**

The purpose of this Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware (the "*Delaware General Corporation Law*"). The Corporation shall have all powers that may now or hereafter be lawful for a corporation to exercise under the Delaware General Corporation Law.

**ARTICLE 5  
CAPITAL STOCK**

The total number of shares of capital stock of all classes which the Corporation shall have the authority to issue is Two Hundred Forty Million (240,000,000) shares of which (a) Ninety Million (90,000,000) shares shall be preferred stock, \$0.001 par value per share ("*Preferred Stock*") of which (i) Five Hundred Thousand (500,000) shares shall be designated as Series A Preferred Stock (the "*Series A Preferred Stock*") (ii) Nineteen Million One Hundred Forty Thousand One Hundred Seventy Five (19,140,175) shares shall be designated as Series B Preferred Stock (the "*Series B Preferred Stock*"), and (iii) Seventy Million (70,000,000) shares shall be designated as Series C Preferred Stock (the "*Series C Preferred Stock*") and (b) One Hundred Fifty Million (150,000,000) shares shall be common stock, \$0.001 par value per share ("*Common Stock*"). Shares of

the Preferred Stock and the Common Stock purchased by the Corporation shall be cancelled and shall revert to authorized but unissued share of the same type. The Board may decrease (but not increase) the number of shares in any series subsequent to the date of original issuance of shares in such series, but not below the number of shares of such shares then outstanding or as required to be reserved.

**(A) COMMON STOCK** Each share of Common Stock shall have the same relative rights as and be identical in all respects to all other shares of Common Stock.

1. **DIVIDENDS.** Subject to the prior rights, if any, of holders of all classes of stock at the time outstanding having prior rights as to dividends, dividends may be paid on Common Stock out of any assets legally available for the payment of dividends thereon, but only when, as and if declared by the Board.

2. **DISSOLUTION, LIQUIDATION, OR WINDING UP.** In the event of any voluntary or involuntary dissolution, liquidation or winding up of the Corporation, the assets of the Corporation shall be distributed as provided in Section (B)2 of this Article 5.

3. **VOTING RIGHTS.** The holders of Common Stock shall be entitled to vote on each matter on which the stockholders of the Corporation shall be entitled to vote (including, without limitation, the election of one or more directors), and each such holder shall be entitled to one vote for each share of Common Stock held by such holder.

**(B) PREFERRED STOCK.**

1. **DIVIDENDS.**

(a) Holders of the following capital stock of the Corporation are entitled to dividends in the following order of preference, with the stock described in (i) being the highest priority stock and the stock described in (v) being the lowest priority capital stock:

- (i) Series C Preferred Stock,
- (ii) Series B Preferred Stock,
- (iii) Series A Preferred Stock,
- (iv) Common Stock; and
- (v) any other capital stock.

(b) The holders of shares of Preferred Stock shall be entitled to receive dividends, out of any assets legally available therefor, pro rata with the holders of shares of Common Stock of the Corporation and, at the rate per share declared by the Board on each outstanding share of Common Stock, when, as and if declared by the Board. Dividends shall not be cumulative. Declared and unpaid dividends on the Preferred Stock shall be payable upon the liquidation, dissolution or winding up of the Corporation

to the stockholders of the Corporation in the priority set forth above. No dividend or distribution shall be paid to holders of a lower priority stock unless an equal or greater dividend or distribution is paid to holders of shares of all classes or series of capital stock with a higher priority stock.

(c) In all cases hereunder, dividends shall be calculated and paid on the shares of Preferred Stock on an as-converted-to Common Stock basis.

## 2. LIQUIDATION.

(a) The "*Series A Original Purchase Price*" shall be equal to \$2.00 per share of Series A Preferred Stock adjusted for any stock dividends, combinations, recapitalizations or the like. The "*Series B Original Purchase Price*" shall be equal to \$0.92 per share of Series B Preferred Stock adjusted for any stock dividends, combinations, recapitalizations, or the like. The "*Series C Original Purchase Price*" shall be equal to \$0.2122 per share of Series C Preferred Stock adjusted for any stock, dividends, combinations, recapitalizations or the like.

(b) **Preference.** In the event of any actual liquidation, dissolution or winding up of the Corporation, or any event deemed to be a liquidation, dissolution or winding up pursuant to Paragraph (c) of this Section (B)2, either voluntary or involuntary (collectively, a "*Liquidating Event*"):

(i) The holders of the Series B Preferred Stock and Series C Preferred Stock, *pari passu* with respect to each other, shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation to the holders of the Series A Preferred Stock and Common Stock or any other capital stock by reason of their ownership thereof, the Series B Original Purchase Price or the Series C Original Purchase Price, as the case may be by reason of their ownership thereof, plus an amount equal to declared and unpaid dividends on such shares, if any. The sum of the Series B Original Purchase Price and such declared but unpaid dividends is hereinafter referred to as the "*Series B Liquidation Preference*." The sum of the Series C Original Purchase Price and such declared but unpaid dividends is hereinafter referred to as the "*Series C Liquidation Preference*." The Series A Liquidation Preference (defined below), Series B Liquidation Preference and the Series C Liquidation Preference may be referred to collectively as the "*Liquidation Preferences*" or individually as each "*Liquidation Preference*." If upon the occurrence of any Liquidating Event the assets of the Corporation are insufficient to pay both the full Series B Liquidation Preference of the Series B Preferred Stock and the full Series C Liquidation Preference of the Series C Preferred Stock, then all of the assets of the Corporation available to pay both the Series B Liquidation Preference and the Series C Liquidation Preference shall be distributed ratably among both the holders of the Series B Preferred Stock and Series C Preferred Stock in proportion to the full amounts to which they would otherwise be respectively entitled.

(ii) Upon the completion of the full distribution required by Section (B)2(b)(i) above, the holders of the Series A Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation to the

holders of Common Stock by reason of their ownership thereof, the Series A Original Purchase Price plus an amount equal to declared and unpaid dividends on such shares, if any. The sum of the Series A Original Purchase Price and such declared but unpaid dividends is hereinafter referred to as the "**Series A Liquidation Preference.**" If upon the occurrence of any Liquidating Event and upon the completion of the full distribution required by Section (B)2(b)(i) above, the assets of the Corporation are insufficient to pay the full Series A Liquidation Preference of the Series A Preferred Stock, then all the assets of the Corporation available to pay the Series A Liquidation Preference shall be distributed ratably among the holders of the Series A Preferred Stock in proportion to the number of shares of Series A Preferred Stock held by such holders.

(iii) Upon the completion of the full distributions required by Section (B)2(b)(i) and (ii) above, the remaining assets of the Corporation available for distribution to stockholders shall be distributed with respect to the outstanding shares of Series B Preferred Stock, Series C Preferred Stock, and Common Stock (each share of Series B Preferred Stock and Series C Preferred Stock shall be treated for purposes of this distribution as the number of shares of Common Stock into which such share of Preferred Stock could then be converted) pro rata without regard to class.

(iv) Notwithstanding the foregoing, (A) if the per share amount payable upon conversion (in accordance with Section (B)7 below) to the holders of Series B Preferred Stock would be greater than two times the Series B Liquidation Preference, then the Series B Preferred Stock shall convert automatically into Common Stock immediately prior to the Liquidating Event (which automatic conversion shall be conditioned upon the effectiveness or closing of the Liquidating Event), and (B) if the per share amount payable upon conversion (in accordance with Section (B)7 below) to the holders of Series C Preferred Stock would be greater than two times the Series C Liquidation Preference, then the Series C Preferred Stock shall convert automatically into Common Stock immediately prior to the Liquidating Event (which automatic conversion shall be conditioned upon the effectiveness or closing of the Liquidating Event).

(c) **Deemed Liquidations.** Any (i) consolidation or merger of the Corporation with or into any other corporation or other entity or person, or any other corporate reorganization or similar transaction, in which the stockholders of the Corporation immediately prior to such consolidation, merger or reorganization or similar transaction, shall, immediately thereafter, own less than 50% (calculated on an as converted, fully diluted basis) of the surviving entity's voting or equity securities immediately after such consolidation, merger or reorganization, or any transaction or series of related transactions in which in excess of fifty percent (50%) of the Corporation's voting or equity securities are transferred (an "**Acquisition**"), or (ii) sale, conveyance, transfer, exclusive license, lease or other disposition of all or substantially all of the assets of the Corporation (an "**Asset Transfer**"), shall be deemed to be a Liquidating Event, unless the holders of a majority of the Series B Preferred Stock and the Series C Preferred Stock (voting together as a single class with each holder of Series B Preferred Stock or Series C Preferred Stock entitled to cast a number of votes equal to the number of shares of Common Stock into which the shares of Series B Preferred Stock or Series C Preferred

Stock held are then convertible) elect that such Acquisition or Asset Transfer shall not be deemed a Liquidating Event.

(d) **Distributions of Property.** In the event of a Liquidating Event under this Section (B)2, if the consideration received by the Corporation is other than cash, its value will be its fair market value (as determined below). Any securities shall be valued as follows:

(i) Securities not subject to investment letter or other similar restrictions on free marketability covered by Section (B)2(d)(ii) below:

(A) If traded on a securities exchange or the Nasdaq Stock Market, the value shall be deemed to be the average of the closing prices of the securities on such exchange or quotation system over the thirty (30) day period ending three (3) trading days prior to the closing of the transaction;

(B) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid prices over the thirty (30) day period ending three (3) trading days prior to the closing of the transaction; and

(C) If there is no active public market, the value shall be the fair market value thereof, as determined by the Board and approved by the holders of a majority of the then outstanding shares of Preferred Stock, voting together as a single class. If such approval is not obtained within ten (10) business days after the Board first notifies such holders, in writing, of the valuation proposed by the Board, then, within five (5) business days after the expiration of the preceding ten (10) business day period, the Board and the holders of a majority of the then outstanding shares of Preferred Stock, voting together as a single class, shall mutually appoint a nationally recognized "Big Five" accounting firm or reputable valuation firm with experience in the appraisal of the types of assets owned by the Corporation to appraise the fair market value of the securities. If the Board and the holders of a majority of the then outstanding shares of Preferred Stock, voting together as a single class, are unable, within such five (5) business day period, to agree upon a nationally recognized "Big Five" accounting firm or reputable valuation firm to perform the appraisal, then, within an additional five (5) business days thereafter, each of (i) the Board, and (ii) the holders of a majority of the then outstanding Preferred Stock, shall appoint one "Big Five" accounting firm or reputable valuation firm, and each of those firm(s) shall appoint another "Big Five" accounting firm or reputable valuation firm, which third firm shall perform the appraisal. If the final appraisal is within 10% of the value proposed by the Board, then the cost of such appraisal will be borne proportionally by the holders of the then outstanding shares of Preferred Stock, based upon the value of their respective holdings. If the final appraisal varies by more than 10% from the value proposed by the Board, then the Corporation shall bear the cost of the appraisal.

(ii) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall be to make an appropriate



discount from the market value determined as above in Section (B)2(d)(i) to reflect the approximate fair market value thereof, as determined by the Board.

(c) **Spin-offs.** In the event of a spin-off or similar event, the Corporation shall establish a similar capital structure for the newly formed entity as then in effect for the Corporation in order to protect the rights, preferences and privileges of the Preferred Stock.

3. **VOTING RIGHTS.** Except as otherwise expressly provided herein, including but not limited to Article 6, or by law, the holder of each share of Preferred Stock shall have the right to one vote for each share of Common Stock into which such Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any stockholders' meeting in accordance with the bylaws of the Corporation, and shall be entitled to vote, together with holders of the Common Stock, with respect to any question upon which holders of Common Stock have the right to vote. Fractional votes shall not, however, be permitted and any fractional voting rights available on an as-converted basis (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

#### 4. **PROTECTIVE PROVISIONS.**

(a) **Series C Preferred Stockholder Protective Provisions.** So long as any shares of Series C Preferred Stock are outstanding, the Corporation shall not without first obtaining the approval (by vote or written consent, as provided by law) of the holders of a majority of the then outstanding shares of Series C Preferred Stock, voting separately as a single class:

(i) alter or change the rights, preferences or privileges of the shares of Series C Preferred Stock or any other securities of the Corporation so as to affect adversely the shares of Series C Preferred Stock;

(ii) amend, alter or repeal the Corporation's Certificate of Incorporation or Bylaws so as to affect adversely the shares of Series C Preferred Stock; or

(iii) authorize the declaration or payment of a dividend on or the purchase, redemption or other acquisition of any security issued by the Corporation and junior to or *pari passu* with the Series C Preferred Stock (except for (A) acquisitions of Common Stock by the Corporation pursuant to agreements which permit the Corporation to repurchase such shares at or below cost upon termination of services to the Corporation or in exercise of the Corporation's right of first refusal upon a proposed transfer, in all cases as approved by the Board or (B) a redemption under Section (B)8 hereof).

(b) **Series B Preferred Stockholder Protective Provisions.** So long as any shares of Series B Preferred Stock are outstanding, the Corporation shall not without first obtaining the approval (by vote or written consent, as provided by law) of the holders of a

majority of the then outstanding shares of Series B Preferred Stock, voting separately as a single class:

(i) alter or change the rights, preferences or privileges of the shares of Series B Preferred Stock or any other securities of the Corporation so as to affect adversely the shares of Series B Preferred Stock;

(ii) amend, alter or repeal the Corporation's Certificate of Incorporation or Bylaws so as to affect adversely the shares of Series B Preferred Stock; or

(iii) authorize the declaration or payment of a dividend on or the purchase, redemption or other acquisition of any security issued by the Corporation and junior to or *pari passu* with the Series B Preferred Stock (except for (A) acquisitions of Common Stock by the Corporation pursuant to agreements which permit the Corporation to repurchase such shares at or below cost upon termination of services to the Corporation or in exercise of the Corporation's right of first refusal upon a proposed transfer, in all cases as approved by the Board or (B) a redemption under Section (B)8 hereof).

**(c) Series B and Series C Preferred Stockholder Protective Provisions.** So long as any shares of Series B Preferred Stock and/or Series C Preferred Stock are outstanding, the Corporation shall not without first obtaining the approval (by vote or written consent, as provided by law) of the holders of a majority of the then outstanding Series B Preferred Stock and Series C Preferred Stock, voting together as a single class:

(i) authorize or commence any liquidation, dissolution or winding up of the Corporation;

(ii) authorize the issuance of any security by the Corporation with relative rights or preferences on parity with or senior to the Series C Preferred Stock;

(iii) increase (other than by conversion) or decrease in the total number of authorized shares of Series C Preferred Stock, Series B Preferred Stock, Series A Preferred Stock, Common Stock or any other series or class of the Corporation's capital stock;

(iv) authorize or commence any Acquisition or Asset Transfer, or any reclassification or other change of any stock, or any recapitalization of the Corporation (including, but not limited to, a recapitalization in connection with a spin-off of a portion of the Corporation's assets);

(v) increase the number of shares reserved under the terms of the Corporation's 2000 Long Term Incentive Plan and 2000 Non-Employee Director and Consultant Plan or any other equity incentive plan, unless approved by the Board including at least one Series B Director (defined in Article 6 below) and at least one Series C Director (defined in Article 6 below); or

(vi) increase or decrease the size of the Board.

(d) All protective provisions shall terminate upon the closing of the Corporation's initial public offering registered under the 1933 Act prior to or in connection with which all outstanding shares of Preferred Stock will be automatically converted to Common Stock.

5. **STATUS OF CONVERTED STOCK.** In the event any shares of Preferred Stock shall be converted pursuant to Section (B)7 hereof, the shares so converted shall be cancelled and shall not be issuable by the Corporation. The Certificate of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

6. **PRE-EMPTIVE RIGHTS OF PREFERRED STOCK. PRO-RATA RIGHT.**

(a) **Pro-Rata Right.** Each holder of Series B Preferred Stock and each holder of Series C Preferred Stock (each, an "*Investor*") shall also have the right to purchase its Pro-Rata Portion (defined below), of all (or any part) of New Securities (defined below) that the Corporation may, from time to time hereafter, sell and issue. For this purpose, an Investor's "*Pro Rata Portion*" shall mean (A) the number of New Securities to be issued and sold by the Corporation multiplied by (B) the quotient of (x) the Common Stock or other capital stock, including the number of shares of Common Stock or other capital stock issuable upon conversion of the Preferred Stock or other convertible security of Corporation, then held by the Investor, divided by (y) the sum of the total number of then outstanding shares of Common Stock or other capital stock and the total number of shares of Common Stock or other capital stock issuable upon exercise of any outstanding options and warrants and upon conversion of all then-outstanding shares of convertible securities of the Corporation. "*New Securities*" shall mean any options, warrants, convertible debt, shares of capital stock or other securities or rights convertible or exchangeable for capital stock of the Corporation; provided, however, that New Securities does not include any of the following issuances:

(i) Shares of Common Stock issued or issuable upon conversion of the Series A Preferred Stock, Series B Preferred Stock, or Series C Preferred Stock;

(ii) Shares of Series C Preferred Stock issuable upon conversion of the convertible notes issued under the Convertible Note Purchase Agreement dated on or about December 29, 2000; and

(iii) Shares of Common Stock issued upon the exercise or conversion of any options, warrants or convertible debt outstanding as of the date hereof;

(iv) Shares of Common Stock issued or issuable in an initial public offering registered under the 1933 Act prior to or in connection with which all outstanding shares of Preferred Stock will be automatically converted to Common Stock;

(v) Shares issued in connection with any share split, combination or recapitalization of the Corporation or as a dividend or distribution in respect of the Common Stock, the Series A Preferred Stock, the Series B Preferred Stock, or Series C Preferred Stock;

(vi) Shares of Common Stock of the Corporation issuable or issued to employees, officers, consultants or directors of the Corporation pursuant to the terms of the Corporation's 2000 Long Term Incentive Plan and 2000 Non-Employee Director and Consultant Plan or any other equity incentive plan approved by the Board including at least one Series B Director and at least one Series C Director;

(vii) Options, warrants, convertible debt, shares of capital stock or other securities or rights convertible or exchangeable for capital stock of the Corporation issued pursuant to the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets or other reorganization whereby the Corporation owns more than 50% of the voting power of such corporation, provided that any such issuance is or has been duly approved by the Board, including the approval of at least one Series B Director and at least one Series C Director;

(viii) Options, warrants, convertible debt, shares of capital stock or other securities or rights convertible or exchangeable for capital stock of the Corporation issued in connection with any equipment leases or borrowings, direct or indirect, from financial or other institutions regularly engaged in such business, provided that any such issuance is or has been duly approved by the Board, including the approval of at least one Series B Director and at least one Series C Director;

(ix) Up to 48,913 shares of Series C Preferred Stock issued pursuant to the warrant issued by the Corporation to Imperial Bank in connection with the Forbearance Agreement and Amendment dated December 29, 2000, or other securities or rights convertible or exchangeable for such shares of Series C Preferred Stock; and

(x) Up to 282,752 shares of Series C Preferred Stock issued pursuant to the warrant issued by the Corporation to Imperial Bank in connection with the Forbearance Agreement and Amendment No. 2 dated on or about June 4, 2001, or other securities or rights convertible or exchangeable for such shares of Series C Preferred Stock.

(b) **Procedure.** If the Corporation proposes to undertake an issuance of New Securities, it shall promptly give each Investor written notice of its intention, describing the type of New Securities, the price and the general terms and conditions upon which the Corporation proposes to issue the same. Each Investor shall have twenty-five (25) days from the receipt of such notice to agree to purchase up to its Pro Rata Portion of New Securities for the price and upon the terms and conditions specified in the notice by giving written notice to the Corporation and stating therein the quantity of New Securities to be purchased. The Corporation shall give each Investor written notice (the "**Subsequent Notice**") on the date immediately following such twenty-five (25) day period as to any New Securities with respect to which Investors have not exercised their right. Each such Investor shall have a right of over allotment such that if any Investor having a right under this Section (B)6 fails to exercise its right to purchase its Pro Rata Portion of the New Securities, the other Investors may purchase the non-purchasing Investor's portion on a pro rata basis, by agreeing in writing to purchase such New Securities within fifteen (15) days after receipt of the Subsequent Notice.

(c) **Lapse.** If any of the Investors fail to exercise their right under this Section (B)6 to purchase their Pro-Rata Portion of the New Securities (including any over-allotment) by (i) the expiration of the twenty-five (25) day period contemplated by Section (B)6(b) if all Investors fail to exercise their preemptive rights, or (ii) the expiration of the fifteen (15) day period contemplated by Section (B)6(b) for all Investors who exercise their preemptive rights in accordance with this Section (B)6, the Corporation shall have a period of ninety (90) days thereafter to sell any of the New Securities (including any over allotment) in respect of which such Investors' rights were not exercised, at a price and upon terms and conditions no more favorable to the purchasers thereof than specified in the Corporation's notice to the Investors pursuant to this Section (B)6. If the Corporation has not sold such New Securities within such ninety (90) days, the Corporation shall not thereafter issue or sell any such New Securities, without again first offering such securities to all Investors in the manner provided in this Section (B)6.

(d) **Termination of Pre-Emptive Rights.** The pre-emptive rights set forth above shall expire upon and not include the Corporation's initial public offering registered under the 1933 Act prior to or in connection with which all outstanding shares of Preferred Stock will be automatically converted to Common Stock; *provided, however,* that nothing in this Section (B)6 shall be deemed to waive any contractual rights of the holders of Series B Preferred Stock or Series C Preferred Stock to participate in the Corporation's initial public offering.

(e) **Transfer of Pre-Emptive Rights.** The pre-emptive rights granted to each Investor under this Section (B)6 shall be non-transferable, except that such rights may be transferred or assigned (but only with all related obligations) by an Investor to a Qualified Transferee (as defined below); *provided* that the Company is given written notice at the time of or within a reasonable time after said transfer or assignment, stating the name and address of the transferee or assignee and identifying the securities with respect to which such rights are being transferred or assigned. For purposes of this Section (B)6, a "*Qualified Transferee*" shall mean any person (A) who is an Investor, (B) who is an affiliate (as such term is defined in Rule 405 promulgated under the 1933 Act) of such Investor, or (C) who is a partner, shareholder or member of an Investor, or a grantor or beneficiary of an Investor that is a trust.

7. **CONVERSION.** The holders of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall have the following rights with respect to the conversion of the Preferred Stock into shares of Common Stock (the "*Conversion Rights*"):

(a) **Right to Convert.** Subject to and in compliance with the provisions of this Section (B)7, each share of Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Series A Original Purchase Price by the Series A Conversion Price (as defined below) in effect on the date the certificate is surrendered. The Series A Conversion Price shall initially be

equal to the Series A Original Purchase Price and shall be subject to adjustment for stock dividends, combinations, splits or recapitalizations (the "*Series A Conversion Price*"). Subject to and in compliance with the provisions of this Section (B)7, each share of Series B Preferred Stock 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 Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Series B Original Purchase Price by the Series B Conversion Price (as defined below) applicable to such share, determined as hereafter provided, in effect on the date the certificate is surrendered for conversion. The Series B Conversion Price per share of Series B Preferred Stock initially shall be equal to the Series B Original Purchase Price and shall be subject to adjustment as set forth in Section (B)7(c) below (the "*Series B Conversion Price*"). Subject to and in compliance with the provisions of this Section (B)7, each share of Series C Preferred Stock 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 Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Series C Original Purchase Price by the Series C Conversion Price (as defined below) applicable to such share, determined as hereafter provided, in effect on the date the certificate is surrendered for conversion. The Series C Conversion Price per share of Series C Preferred Stock initially shall be equal to the Series C Original Purchase Price and shall be subject to adjustment as set forth in Section (B)7(e) below (the "*Series C Conversion Price*").

(b) **Automatic Conversion.** Each share of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall automatically be converted into shares of Common Stock at the then effective applicable Conversion Price immediately upon the earlier to occur of (i) the closing of a firm commitment underwritten public offering pursuant to an effective registration statement under the 1933 Act, covering the offer and sale of securities for the account of the Corporation to the public at a price per share of Common Stock of not less than ten (10) times (after adjusting for stock dividends, combinations, splits or recapitalizations) the Series C Original Purchase Price with aggregate cash proceeds to the Corporation of at least \$40,000,000 (a "*Qualified Public Offering*"), or (ii) the date specified by affirmative election of the holders of a majority of the outstanding shares of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock, voting together as a single class, to convert such shares into Common Stock.

(c) **Mechanics of Conversion.**

(i) **Optional Conversion.** Before any holder of the Series A Preferred Stock, Series B Preferred Stock or Series C Preferred Stock shall be entitled to convert shares of the Series A Preferred Stock, Series B Preferred Stock or Series C Preferred Stock 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 Corporation or of any transfer agent for such shares and shall give written notice to the Corporation at its principal corporate office, of the election to convert the same and shall state therein the name or names in which the certificate or certificates for shares of

Common Stock are to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Preferred Stock, or to the nominee or nominees of such holder, 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 (i) a conversion into fractional shares of Common Stock in accordance with Section (B)7(e)(vii)(A) and (ii) any declared but unpaid dividends on the shares of Series A Preferred Stock, Series B Preferred Stock or Series C Preferred Stock being converted. 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 Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date. If the conversion is in connection with an underwritten offering of securities registered pursuant to the 1933 Act, the conversion may, at the option of any holder tendering Series A Preferred Stock, Series B Preferred Stock or Series C Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive Common Stock upon 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.

(ii) **Automatic Conversion.** Upon the occurrence of either of the events specified in Section (B)7(b) above, the outstanding shares of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock which are automatically converting pursuant to Section (B)7(b) above, 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 Corporation or its transfer agent; *provided, however,* that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such conversion unless the certificates evidencing such shares of Preferred Stock are either delivered to the Corporation or its transfer agent as provided below, or the holder notifies the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement reasonably satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. Upon the occurrence of such automatic conversion of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock, the holders of such shares of Preferred Stock shall surrender the certificates representing such shares (or such reasonable agreement in the case of lost, stolen or destroyed certificates) at the office of the Corporation or any transfer agent for the Corporation. Thereupon, there shall be issued and delivered to such holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common Stock into which the shares of Preferred Stock surrendered were convertible on the date on which such automatic conversion occurred, and any declared but unpaid dividends and the value of any fractional shares shall be paid in accordance with the provisions of Section (B)(7)(c)(i) above.

(d) **Reservation of Stock Issuable upon Conversion.** The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock solely for the purpose of effecting the conversion of the shares of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series A Preferred Stock, Preferred Stock and Series C Preferred Stock, in addition to such other remedies as shall be available to the holder of such shares of the Series A Preferred Stock, Preferred Stock and Series C Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes.

(e) **Series B Conversion Price and Series C Conversion Price Adjustments for Certain Dilutive Issuances, Splits and Combinations.** The Series A Conversion Price shall not be subject to adjustment pursuant to this Section (B)7(e). The Series B Conversion Price and Series C Conversion Price shall be subject to adjustment from time to time as follows:

(i) **Sale of Shares Below Conversion Prices.**

(A)(1) **Sale of Shares Below Series B Conversion Price.** If the Corporation shall issue, after the date upon which any shares of Series B Preferred Stock were first issued (the "*Series B Purchase Date*"), any Additional Stock (as defined below) without consideration or for a consideration per share less than the Series B Conversion Price in effect immediately prior to the issuance of such Additional Stock, the Series B Conversion Price in effect immediately prior to each such issuance shall automatically (except as otherwise provided in this Section (B)7(e)(i)) be adjusted to a price determined by multiplying such Series B Conversion Price by a fraction, the numerator of which shall be sum of (1) the number of shares of Common Stock into which the then outstanding shares of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock would be converted if fully converted immediately prior to such sale or issuance of Additional Stock (but not taking into account any anti-dilution provisions triggered by such sale or issuance of Additional Stock), plus (2) the number of shares of Common Stock that the aggregate consideration received by the Corporation (calculated pursuant to Section (B)7(e)(i)(C) and (D) below) for such issuance of Additional Stock would purchase at such Series B Conversion Price then in effect immediately prior to the deemed issuance of such Additional Stock, plus (3) 11,500,000 shares of Common Stock (as adjusted for any stock dividends, combinations, recapitalizations or the like); and the denominator of which shall be the sum of (1) the number of shares of Common Stock into which the then outstanding shares of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock would be converted if fully converted immediately prior to such sale or issuance of Additional Stock (but not taking into account any anti-dilution provisions triggered by such sale or issuance of Additional Stock), plus (2) 11,500,000 shares of Common Stock (as adjusted



for any stock dividends, combinations, recapitalizations or the like), plus (3) the number of shares of such Additional Stock issued or deemed issued pursuant to Section (B)7(c)(i)(E).

(2) **Sale of Shares Below Series C Conversion Price.** If the Corporation shall issue, after the date upon which any shares of Series C Preferred Stock were first issued (the "*Series C Purchase Date*"), any Additional Stock without consideration or for a consideration per share less than the Series C Conversion Price in effect immediately prior to the issuance of such Additional Stock, the Series C Conversion Price in effect immediately prior to each such issuance shall automatically (except as otherwise provided in this Section (B)7(e)(i)) be adjusted to a price determined by multiplying such Series C Conversion Price by a fraction, the numerator of which shall be the sum of (1) the number of shares of Common Stock into which the then outstanding shares of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock would be converted if fully converted immediately prior to such sale or issuance of Additional Stock (but not taking into account any anti-dilution provisions triggered by such sale or issuance of Additional Stock), plus (2) the number of shares of Common Stock that the aggregate consideration received by the Corporation (calculated pursuant to Section (B)7(c)(i)(C) and (D) below) for such issuance of Additional Stock would purchase at such Series C Conversion Price then in effect immediately prior to the deemed issuance of such Additional Stock; and the denominator of which shall be the sum of (1) the number of shares of Common Stock into which the then outstanding shares of Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock would be converted if fully converted immediately prior to such sale or issuance of Additional Stock (but not taking into account any anti-dilution provisions triggered by such sale or issuance of Additional Stock), plus (2) the number of shares of such Additional Stock issued or deemed issued pursuant to Section (B)7(e)(i)(E).

(B) No adjustment of the Series B Conversion Price or Series C Conversion Price, as applicable, shall be made in an amount less than one cent per share, provided that any adjustments which are not required to be made by reason of this sentence shall be carried forward and shall be either taken into account in any subsequent adjustment made prior to three years from the date of the event giving rise to the adjustment being carried forward, or shall be made at the end of three years from the date of the event giving rise to the adjustment being carried forward. Except to the limited extent provided for in Sections (B)7(e)(i)(E)(3) and (4) below, no adjustment of such Series B Conversion Price and/or Series C Conversion Price, as applicable, pursuant to this Section (B)7(e)(i)(B) shall have the effect of either (i) increasing the Series B Conversion Price or Series C Conversion Price above the Series B Conversion Price or Series C Conversion Price, respectively, in effect immediately prior to such adjustment.

(C) In the case of the issuance of Additional Stock for cash, the consideration shall be deemed to be the amount of cash received by the Corporation after deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with the issuance and sale thereof.

(D) In the case of the issuance of the Additional Stock for a consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined in good faith by the Board irrespective of any accounting treatment. If, however, the holders of a majority of the then-outstanding shares of Series B Preferred Stock and Series C Preferred Stock, voting together as a single class, disagree, through written notice of such disagreement sent to the Board within ten (10) business days after the Board notifies them of its determination of fair value, with the fair value determination placed on non-cash consideration by the Board, then the holders of a majority of the then-outstanding shares of Series B Preferred Stock and Series C Preferred Stock, voting together as a single class, may cause the fair value of such non-cash consideration to be determined in accordance with the procedures set forth in Section B2(d).

(E) In the case of the issuance (whether before, on or after the applicable Series B Purchase Date or Series C Purchase Date) of options to purchase or rights to subscribe for Additional Stock, securities by their terms convertible into or exchangeable for Additional Stock or options to purchase or rights to subscribe for such convertible or exchangeable securities, except as otherwise specifically provided, the following provisions shall apply for all purposes of this Section (B)7(e):

(1) The aggregate maximum number of shares of Additional Stock deliverable upon exercise of such options to purchase or rights to subscribe for Additional Stock shall be deemed to have been issued at the time such options or rights were issued and for a consideration equal to the consideration (determined in the manner provided in Sections (B)7(e)(i)(C) and (D)), if any, received by the Corporation upon the issuance of such options or rights plus the minimum exercise price provided in such options or rights (without taking into account potential antidilution adjustments) for the Additional Stock covered thereby.

(2) The aggregate maximum number of shares of Additional Stock deliverable upon conversion of or in exchange for any such convertible or exchangeable securities or upon the exercise of options to purchase or rights to subscribe for such convertible or exchangeable securities and subsequent conversion or exchange thereof shall be deemed to have been issued at the time such securities were issued or such options or rights were issued and for a consideration equal to the consideration, if any, received by the Corporation for any such securities and related options or rights (excluding any cash received on account of accrued interest or accrued dividends), plus the minimum additional consideration, if any, to be received by the Corporation (without taking into account potential antidilution adjustments) upon the conversion or exchange of such securities or the exercise of any related options or rights (the consideration in each case to be determined in the manner provided in Sections (B)7(e)(i)(C) and (D)).

(3) In the event of any change in the number of shares of Additional Stock deliverable or in the consideration payable to the Corporation upon exercise of such options or rights or upon conversion of or in exchange for such convertible or exchangeable securities, including, but not limited to, a change resulting from the antidilution provisions thereof, the Series B Conversion Price and the Series C

Conversion Price, to the extent in any way affected by or computed using such options, rights or securities, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Additional Stock or any payment of such consideration upon the exercise of any such options or rights or the conversion or exchange of such securities.

(4) Upon the expiration of any such options or rights, the termination of any such rights to convert or exchange or the expiration of any options or rights related to such convertible or exchangeable securities, the Series B Conversion Price and the Series C Conversion Price, to the extent in any way affected by or computed using such options, rights or securities or options or rights related to such securities, shall be recomputed to reflect the issuance of only the number of shares of Additional Stock (and convertible or exchangeable securities which remain in effect) actually issued upon the exercise of such options or rights, upon the conversion or exchange of such securities or upon the exercise of the options or rights related to such securities.

(5) The number of shares of Additional Stock deemed issued and the consideration deemed paid therefor pursuant to Sections (B)7(e)(i)(E)(1) and (2) shall be appropriately adjusted to reflect any change, termination or expiration of the type described in either (B)7(e)(i)(E)(3) or (4). Notwithstanding anything herein to the contrary, any such adjustments relating to such options or convertible or exchangeable securities shall not, in the aggregate, increase the Series B Conversion Price or Series C Conversion Price above the Series B Conversion Price or Series C Conversion Price, respectively, had no adjustments ever been made for such options or convertible or exchangeable securities.

(F) "**Additional Stock**" shall mean any securities issued (or deemed to have been issued pursuant to Section (B)7(e)(i)(E)) by the Corporation after the Series B Purchase Date or Series C Purchase Date, as applicable) other than:

(1) Common Stock issued pursuant to a transaction described in Section (B)7(e)(ii) hereof;

(2) Shares of Common Stock of the Corporation issuable or issued to employees, officers, consultants or directors of the Corporation pursuant to the terms of the Corporation's 2000 Long Term Incentive Plan and 2000 Non-Employee Director and Consultant Plan or any other equity incentive plan approved by the Board including at least one Series B Director and at least one Series C Director;

(3) Shares of Series C Preferred Stock or other equity securities of the Corporation issuable upon conversion of the convertible notes issued under the Convertible Note Purchase Agreement dated on or about December 29, 2000;

(4) Shares of Common Stock issued or issuable in an initial public offering registered under the 1933 Act prior to or in connection with which all outstanding shares of Preferred Stock will be automatically converted to Common Stock;

(D) In the case of the issuance of the Additional Stock for a consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined in good faith by the Board irrespective of any accounting treatment. If, however, the holders of a majority of the then-outstanding shares of Series B Preferred Stock and Series C Preferred Stock, voting together as a single class, disagree, through written notice of such disagreement sent to the Board within ten (10) business days after the Board notifies them of its determination of fair value, with the fair value determination placed on non-cash consideration by the Board, then the holders of a majority of the then-outstanding shares of Series B Preferred Stock and Series C Preferred Stock, voting together as a single class, may cause the fair value of such non-cash consideration to be determined in accordance with the procedures set forth in Section B2(d).

(E) In the case of the issuance (whether before, on or after the applicable Series B Purchase Date or Series C Purchase Date) of options to purchase or rights to subscribe for Additional Stock, securities by their terms convertible into or exchangeable for Additional Stock or options to purchase or rights to subscribe for such convertible or exchangeable securities, except as otherwise specifically provided, the following provisions shall apply for all purposes of this Section (B)7(e):

(1) The aggregate maximum number of shares of Additional Stock deliverable upon exercise of such options to purchase or rights to subscribe for Additional Stock shall be deemed to have been issued at the time such options or rights were issued and for a consideration equal to the consideration (determined in the manner provided in Sections (B)7(e)(i)(C) and (D)), if any, received by the Corporation upon the issuance of such options or rights plus the minimum exercise price provided in such options or rights (without taking into account potential antidilution adjustments) for the Additional Stock covered thereby.

(2) The aggregate maximum number of shares of Additional Stock deliverable upon conversion of or in exchange for any such convertible or exchangeable securities or upon the exercise of options to purchase or rights to subscribe for such convertible or exchangeable securities and subsequent conversion or exchange thereof shall be deemed to have been issued at the time such securities were issued or such options or rights were issued and for a consideration equal to the consideration, if any, received by the Corporation for any such securities and related options or rights (excluding any cash received on account of accrued interest or accrued dividends), plus the minimum additional consideration, if any, to be received by the Corporation (without taking into account potential antidilution adjustments) upon the conversion or exchange of such securities or the exercise of any related options or rights (the consideration in each case to be determined in the manner provided in Sections (B)7(e)(i)(C) and (D)).

(3) In the event of any change in the number of shares of Additional Stock deliverable or in the consideration payable to the Corporation upon exercise of such options or rights or upon conversion of or in exchange for such convertible or exchangeable securities, including, but not limited to, a change resulting from the antidilution provisions thereof, the Series B Conversion Price and the Series C

Conversion Price, to the extent in any way affected by or computed using such options, rights or securities, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Additional Stock or any payment of such consideration upon the exercise of any such options or rights or the conversion or exchange of such securities.

(4) Upon the expiration of any such options or rights, the termination of any such rights to convert or exchange or the expiration of any options or rights related to such convertible or exchangeable securities, the Series B Conversion Price and the Series C Conversion Price, to the extent in any way affected by or computed using such options, rights or securities or options or rights related to such securities, shall be recomputed to reflect the issuance of only the number of shares of Additional Stock (and convertible or exchangeable securities which remain in effect) actually issued upon the exercise of such options or rights, upon the conversion or exchange of such securities or upon the exercise of the options or rights related to such securities.

(5) The number of shares of Additional Stock deemed issued and the consideration deemed paid therefor pursuant to Sections (B)7(e)(i)(E)(1) and (2) shall be appropriately adjusted to reflect any change, termination or expiration of the type described in either (B)7(e)(i)(E)(3) or (4). Notwithstanding anything herein to the contrary, any such adjustments relating to such options or convertible or exchangeable securities shall not, in the aggregate, increase the Series B Conversion Price or Series C Conversion Price above the Series B Conversion Price or Series C Conversion Price, respectively, had no adjustments ever been made for such options or convertible or exchangeable securities.

(F) "*Additional Stock*" shall mean any securities issued (or deemed to have been issued pursuant to Section (B)7(e)(i)(E)) by the Corporation after the Series B Purchase Date or Series C Purchase Date, as applicable) other than:

(1) Common Stock issued pursuant to a transaction described in Section (B)7(e)(ii) hereof;

(2) Shares of Common Stock of the Corporation issuable or issued to employees, officers, consultants or directors of the Corporation pursuant to the terms of the Corporation's 2000 Long Term Incentive Plan and 2000 Non-Employee Director and Consultant Plan or any other equity incentive plan approved by the Board including at least one Series B Director and at least one Series C Director;

(3) Shares of Series C Preferred Stock or other equity securities of the Corporation issuable upon conversion of the convertible notes issued under the Convertible Note Purchase Agreement dated on or about December 29, 2000;

(4) Shares of Common Stock issued or issuable in an initial public offering registered under the 1933 Act prior to or in connection with which all outstanding shares of Preferred Stock will be automatically converted to Common Stock;

(5) Shares of Common Stock issued or issuable upon conversion of the Series A Preferred Stock, Series B Preferred Stock or Series C Preferred Stock;

(6) Shares of Common Stock issued or issuable upon exercise of warrants and options outstanding as of the date of the Series B Purchase Date (for the Series B Preferred Stock) and the Series C Purchase Date (for the Series C Preferred Stock);

(7) Shares of Common Stock, or other securities, or warrants, rights, options or other convertible securities issued pursuant to any equipment leasing arrangement, commercial credit arrangement or debt financing from a bank or similar financial institution, and approved by the Board, including at least one Series B Director and at least one Series C Director;

(8) Shares of Common Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or other rights issued for consideration other than cash pursuant to a merger, consolidation, acquisition or similar business combination, and approved by the Board, including at least one Series B Director and at least one Series C Director;

(9) Up to 48,913 shares of Series C Preferred Stock issued pursuant to the warrant issued by the Corporation to Imperial Bank in connection with the Forbearance Agreement and Amendment dated December 29, 2000, or other securities or rights convertible or exchangeable for such shares of Series C Preferred Stock; or

(10) Up to 282,752 shares of Series C Preferred Stock issued pursuant to the warrant issued by the Corporation to Imperial Bank in connection with the Forbearance Agreement and Amendment No. 2 dated on or about June 4, 2001, or other securities or rights convertible or exchangeable for such shares of Series C Preferred Stock.

(G) In the event that the Series B Preferred Stock and Series C Preferred Stock is converted into Common Stock pursuant to Section (B)7(b)(ii) in connection with a public offering at a price per share to the public (the "IPO Price") of less than ten (10) times (after adjusting to reflect any stock splits, dividends, recapitalizations and other similar events) the Series C Original Purchase Price, then (i) the Series B Conversion Price in effect at the time of such conversion shall be reduced (but not increased in any event) immediately prior to such conversion to an amount equal to the quotient of (X) the IPO Price, divided by (Y) 2.3076, and (ii) the Series C Conversion Price in effect at the time of such conversion shall be reduced (but not increased in any event) immediately prior to such conversion to an amount equal to the quotient of (X) the IPO Price, divided by (Y) 10.

(ii) Adjustment for Common Stock Dividends and Distributions. If the Corporation should at any time or from time to time after the Series B Purchase Date or Series C Purchase Date, as applicable, fix a record date for the effectuation of a split or

subdivision of the outstanding shares of Common Stock or the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock (hereinafter referred to as "*Common Stock Equivalents*") without payment of any consideration by such holder for the additional shares of Common Stock or the Common Stock Equivalents (including the additional shares of Common Stock issuable upon conversion or exercise thereof), then, as of such record date (or the date of such dividend distribution, split or subdivision if no record date is fixed), the Series B Conversion Price and Series C Conversion Price shall be appropriately decreased so that the number of shares of Common Stock issuable on conversion of each share of Series B Preferred Stock and Series C Preferred Stock shall be increased in proportion to such increase of the aggregate of shares of Common Stock outstanding and those issuable with respect to such Common Stock Equivalents with the number of shares issuable with respect to Common Stock Equivalents determined from time to time in the manner provided for deemed issuances in Section (B)7(e)(i)(E).

(iii) Adjustment for Subdivisions and Combinations. If the number of shares of Common Stock outstanding at any time after the Series B Purchase Date is decreased by a combination of the outstanding shares of Common Stock, then, following the record date of such combination, the Series B Conversion Price and Series C Conversion Price shall be appropriately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in outstanding shares.

(iv) Other Distributions. If the Corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by the Corporation or other persons, assets (excluding cash dividends) or options or rights not referred to in Section (B)7(e)(i), then, in each such case for the purpose of this Section (B)7(e)(iv), the holders of Series B Preferred Stock and Series C Preferred Stock shall be entitled to a proportionate share of any such distribution as though they were the holders of the number of shares of Common Stock of the Corporation into which their shares of Series B Preferred Stock and/or Series C Preferred Stock, as applicable, are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

(v) Recapitalizations. If at any time or from time to time there shall be a recapitalization of the Common Stock (other than a subdivision, combination or merger or sale of assets transaction provided for elsewhere in this Section (B)7 or Section (B)2, provision shall be made so that the holders of the Series B Preferred Stock and Series C Preferred Stock shall thereafter be entitled to receive upon conversion of the Series B Preferred Stock and Series C Preferred Stock the number of shares of stock or other securities or property of the Corporation or otherwise, to which a holder of Common Stock deliverable upon conversion would have been entitled on such recapitalization. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section (B)7 with respect to the rights of the holders of the Series B Preferred Stock and Series C Preferred Stock after the recapitalization to the end that the provisions

of this Section (B)7 (including adjustment of the Series B Conversion Price and Series C Conversion Price then in effect and the number of shares issuable upon conversion of the Series B Preferred Stock and Series C Preferred Stock) shall be applicable after that event and be as nearly equivalent as practicable.

(vi) No Impairment. The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section (B)7 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 Series B Preferred Stock and Series C Preferred Stock against impairment.

(vii) No Fractional Shares and Certificate as to Adjustments.

(A) No fractional shares shall be issued upon the conversion of any share or shares of the Series B Preferred Stock and Series C Preferred Stock. Whether or not fractional shares are issuable upon such conversion shall be determined on the basis of the total number of shares of Series B Preferred Stock and/or Series C Preferred Stock the holder is converting into Common Stock and the number of shares of Common Stock issuable upon such aggregate conversion. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Corporation shall, in lieu of issuing any fractional share, pay the holder otherwise entitled to such fraction cash equal to the product of such fraction multiplied by the Common Stock's fair market value (as determined by the Board) on the date of conversion.

(B) Upon the occurrence of each adjustment or readjustment of the Series B Conversion Price or Series C Conversion Price pursuant to this Section (B)7, the Corporation, at its expense, shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of Series B Preferred Stock and Series C 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 Corporation shall, upon the written request at any time of any holder of Series B Preferred Stock or Series C Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Series B Conversion Price and Series C Conversion Price at the time in effect immediately prior to and after such adjustment or readjustment, and (C) 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 a share of the Series B Preferred Stock or Series C Preferred Stock.

(viii) Notices of Record Date. In the event of (i) any taking by the Corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise



acquire any shares of stock of any class or any other securities or property, or to receive any other right, or (ii) any Acquisition or Asset Transfer, or any voluntary or involuntary dissolution, liquidation or winding up of the Corporation; the Corporation shall deliver to each holder of Preferred Stock, at least 20 days prior to the date specified therein, a notice specifying (A) the date on which any such record is to be taken for the purpose of such dividend, distribution or right, and the amount and character of such dividend, distribution or right, (B) the date on which any such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up is expected to become effective, and (C) the date, if any, that is to be fixed as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up.

(ix) Reservation of Stock Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series B Preferred Stock and Series C 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 Series B Preferred Stock and Series C 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 Series B Preferred Stock and Series C Preferred Stock, in addition to such other remedies as shall be available to the holder of such Series B Preferred Stock and Series C Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to the Certificate of Incorporation of the Corporation.

8. **REDEMPTION.** The Corporation shall not be obligated to redeem the Series A Preferred Stock. The Corporation shall be obligated to redeem the outstanding shares of Series B Preferred Stock and Series C Preferred Stock as follows:

(a) If the Corporation has not consummated its initial public offering by June 4, 2006, and any shares of Series B Preferred Stock or Series C Preferred Stock remain outstanding, then, upon notice (the "**Election Notice**") provided by holders of (A) with respect to the Series B Preferred Stock, a majority of the then outstanding Series B Preferred Stock or (C) with respect to the Series C Preferred Stock, a majority of the then outstanding Series C Preferred Stock (in any such case, the "**Initiating Holders**"), and received by the Company no earlier than June 4, 2006, the Corporation shall redeem (the "**Mandatory Redemption**") (i) the shares of Series B Preferred Stock and/or Series C Preferred Stock held by the Initiating Holders and requested to be redeemed by the Initiating Holders and (ii) the shares of Series B Preferred Stock and/or Series C Preferred Stock held by holders that provide notice to the Company during the Redemption Period (defined below) (collectively with the Initiating Holders, the

**"Redeeming Holders").** Within ten (10) days of the Corporation's receipt of the Election Notice, the Corporation shall give written notice (the **"Initial Redemption Notice"**) to all other holders of Series B Preferred Stock and Series C Preferred Stock of the election to redeem, and each such holder shall have the right, exercisable upon written notice to the Company within twenty (20) days of receipt of the Initial Redemption Notice (the **"Redemption Period"**), to participate in such redemption. Upon receipt of such notices, the Corporation shall redeem, to the extent of lawfully available funds therefor, commencing on the ninetieth (90<sup>th</sup>) day after the Election Notice is made (such date being referred to herein as the **"Post-Election Date"**), and also then on each of the first two (2) anniversaries of the Post-Election Date, according to the percentages below:

<u>Date of Redemption</u>	<u>% of Shares of Preferred Stock then Outstanding to be Redeemed</u>
Post-Election Date Preferred Stock	33 1/3% of all shares of Series B and/or Series C Preferred Stock requested to be redeemed and outstanding on such date
First Anniversary of Post-Election Date	50% of all shares of Series B Preferred Stock and/or Series C Preferred Stock requested to be redeemed and outstanding on such date
Second Anniversary of Post-Election Date	all shares of Series B Preferred Stock and/or Series C Preferred Stock requested to be redeemed and outstanding on such date

The dates upon which redemption occurs shall be referred to herein as the **"Redemption Dates,"** and each a **"Redemption Date"**. If any Redemption Date is a Saturday, Sunday or legal holiday, then such redemption shall occur on the first business day thereafter.

(b) The Corporation shall effect such redemptions on the applicable Redemption Date by paying in cash in exchange for the shares of Series B Preferred Stock and/or Series C Preferred Stock to be redeemed a sum equal to the greater of (i) two (2) times the sum of the applicable Original Issue Price per share of Series B Preferred Stock and/or Series C Preferred Stock plus all declared and unpaid dividends with respect to such shares, computed to such Redemption Date or (ii) the Appraised Value, as provided in Section (B)(8)(h) (such amount being hereinafter referred to as the **"Redemption Price"**).

(c) Not less than 30 days nor more than 45 days after the expiration of the Redemption Period, the Corporation shall give written notice (the **"Second Redemption Notice"**) to each holder of record (at the close of business on the business day next preceding the day on which the Second Redemption Notice is given) of the Series B Preferred Stock and Series C Preferred Stock to be redeemed, at the address of such

holder last shown on the records of the Corporation, notifying such holder of the redemption to be effected, specifying the number of shares of Series B Preferred Stock and/or Series C Preferred Stock to be redeemed from such holder on each Redemption Date (computed with respect to any redemption pursuant to Section (B)(8)(a) above on a pro rata basis in accordance with the number of such shares held by all holders thereof), the Redemption Price(s) (including the Appraised Value of the shares of Series B Preferred Stock and/or Series C Preferred Stock to be redeemed), the Redemption Dates, the and the method of payment (check or wire transfer) of the Redemption Price(s) upon surrender of their share certificates. Except as provided in Section (B)(8)(d), on or after each Redemption Date, each holder of Series B Preferred Stock and Series C Preferred Stock to be redeemed shall surrender to the Corporation the certificate or certificates representing such shares, in the manner and at the place designated in the Second Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be canceled. If fewer than the total number of shares of Series B Preferred Stock and Series C Preferred Stock represented by any certificate are redeemed, a new certificate representing the number of unredeemed shares of Series B Preferred Stock or Series C Preferred Stock, as applicable, will be issued to the holder thereof without cost to such holder within three business days after surrender of the certificate representing the redeemed shares.

(d) If the funds of the Corporation legally available for redemption of Series B Preferred Stock and Series C Preferred Stock on any Redemption Date are insufficient to redeem the total number of shares of Series B Preferred Stock and Series C Preferred Stock to be redeemed on such Redemption Date, then those funds that are legally available will be used to redeem: (i) first, the maximum possible number of shares of Series C Preferred Stock from holders thereof who have requested redemption pro rata based on the aggregate Redemption Price of such shares held by each such holder; and (ii) second, if funds remain legally available after redemption of all the shares of Series C Preferred Stock then due to be redeemed, the maximum possible number of shares of Series B Preferred Stock from holders thereof who have requested redemption pro rata based on the aggregate Redemption Price of such shares held by each such holder. Any unpaid amounts due hereunder shall accrue interest at the lower of (i) the highest nonusurious rate allowed by applicable law and (ii) the rate of fifteen percent (15%) per annum, payable quarterly in arrears. At any time and from time to time thereafter when additional funds of the Corporation are legally available for redemption of shares of Series B Preferred Stock and Series C Preferred Stock, such funds immediately will be used to redeem the balance of the shares of Series B Preferred Stock and Series C Preferred Stock which the Corporation has become obligated to redeem on any Redemption Date but which it has not redeemed according to the priority set forth above, and such funds will not be used for any other purpose, including the redemption of any shares of Series B Preferred Stock and Series C Preferred Stock that the Corporation is obligated to redeem on any subsequent Redemption Date.

(e) From and after such Redemption Date, unless there shall have been a default in payment of the Redemption Price or the Corporation is unable to pay the Redemption Price due to not having sufficient legally available funds, all rights of the holders of such

shares as holders of Series B Preferred Stock and Series C Preferred Stock (except the right to receive the Redemption Price without interest upon surrender of their certificates), shall cease and terminate with respect to such shares, *provided* that in the event that shares of Series B Preferred Stock and Series C Preferred Stock are not redeemed due to a default in payment by the Corporation or because the Corporation does not have sufficient legally available funds, such shares of Series B Preferred Stock and Series C Preferred Stock shall remain outstanding and shall be entitled to all of the rights and preferences provided herein.

(f) Any shares of Series B Preferred Stock or Series C Preferred Stock which are redeemed or otherwise acquired by the Corporation will be cancelled and will not be reissued, sold or transferred.

(g) All redemption rights shall terminate upon the closing of the Corporation's initial public offering registered under the 1933 Act prior to or in connection with which all outstanding shares of Preferred Stock will be automatically converted to Common Stock.

(h) The "*Appraised Value*" of any shares of Series B Preferred Stock and/or Series C Preferred Stock to be redeemed hereunder shall be the fair market value of such shares, respectively, as established by the Board in good faith immediately following and as of the date of receipt of the Second Redemption Notice, plus any declared but unpaid dividends on such shares (which fair market value shall not include a discount for minority ownership interest or illiquidity). The Corporation shall include the value that has been placed upon the Series B Preferred Stock and Series C Preferred Stock by the Board with respect to such redemption in the Second Redemption Notice. If the holders of (i) with respect to the Series B Preferred Stock, a majority of the then outstanding Series B Preferred Stock or (ii) with respect to the Series C Preferred Stock, a majority of the then outstanding Series C Preferred Stock (hereinafter, in any such case, the "*Objecting Holders*"), shall give the Corporation written notice prior to the first Redemption Date that they disagree with the Appraised Value for any shares of Series B Preferred Stock and/or Series C Preferred Stock as determined by the Board, then the Objecting Holders and the Board shall attempt to agree upon the Appraised Value. Should the Objecting Holders and the Board be unable to agree during the twenty (20)-day period immediately following the giving of the written notice of such disagreement as to the Appraised Value without the employment of appraisers, then the Appraised Value shall be determined by appraisal. If the Objecting Holders and the Corporation agree upon one appraiser within fifteen (15) days after failing to agree to the Appraised Value, the appraisal shall be conducted by such appraiser. If the Objecting Holders and the Corporation are unable to agree upon one appraiser within such 15-day period, then they shall each select an appraiser experienced in the business of evaluating or appraising the market value of stock. The two (2) appraisers so selected (the "*Initial Appraisers*") shall mutually select a third appraiser experienced in the business of appraising the market value of stock (the "*Additional Appraiser*"). The Additional Appraiser shall then, on or prior to the scheduled Redemption Date, appraise such shares to be redeemed. The Additional Appraiser shall forthwith give written notice of his determination to the Corporation and the Objecting Holders, and such value determination shall be the

**Appraised Value.** The appraisers shall not discount the shares of Preferred Stock for minority ownership interest or illiquidity. If the Initial Appraisers fail to select such Additional Appraiser as provided above, then either the Objecting Holders or the Corporation may after written notice to the other, file a declaratory judgment action in any Court of Chancery in the State of Delaware and each shall cooperate in such motion seeking the appointment of such Additional Appraiser. The Objecting Holders shall pay the expenses and fees of the appraiser selected by the Objecting Holders, proportionally based upon the applicable Redemption Price of their respective shares. The Company shall pay the expenses and fees of the appraiser selected by the Company and the expenses and fees of the Additional Appraiser.

9. **NOTICES.** Any notice required by the provisions of this Article 5 to be given to the holders of shares of Preferred Stock shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified; (ii) when sent by confirmed facsimile or electronic transmission if received during normal business hours of the recipient on a business day, or if not, then on the next business day; or (iii) one (1) business day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt (or, in the case of non-U.S. residents, two (2) business days after deposit with an internationally recognized overnight courier, specifying international priority delivery, with written verification of receipt). All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Corporation.

## **ARTICLE 6 BOARD OF DIRECTORS**

### **6.1 Directors; Number; Election**

The Board shall consist of seven (7) members. At any annual or special meeting, or pursuant to any consent or any other action taken, for the purpose of electing directors to the Board, (i) the holders of a majority of the then outstanding shares of Series B Preferred Stock shall be entitled to elect two (2) members of the Board (the "**Series B Directors**"), and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors; (ii) the holders of a majority of the then outstanding shares of Series C Preferred Stock shall be entitled to elect two (2) members of the Board (the "**Series C Directors**"), and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors; (iii) the holders of a majority of the then outstanding shares of Series A Preferred Stock and Common Stock, voting as a single class shall be entitled to elect two (2) members of the Board (the "**Series A and Common Stock Directors**"), and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors; and (iv) the one (1) remaining director shall be an outside industry expert nominated by and acceptable to a majority of the other six (6) directors (the "**Mutual Director**") and elected by the holders of a majority of the then outstanding shares of Common Stock, Series A Preferred Stock, Series B Preferred Stock, and Series C Preferred Stock, voting together as a single class (on an as-converted basis). Upon the

recommendation or nomination of a majority of the other six (6) directors, the holders of a majority of the then outstanding shares of Common Stock, Series A Preferred Stock, Series B Preferred Stock, and Series C Preferred Stock, voting together as a single class (on an as-converted basis), shall be entitled to remove from office the Mutual Director and to fill any vacancy caused by the resignation, death or removal of such Mutual Director.

So long as any shares of Series B Preferred Stock and/or Series C Preferred Stock whose rights include redemption rights as set forth in Section (B)7 (the "*Redeemable Preferred Stock*") remain outstanding, in the event of a failure of the Corporation to redeem shares of the Redeemable Preferred Stock as required pursuant to this Certificate of Incorporation, which failure continues unremedied for a period of greater than ninety (90) days after the Corporation's receipt of written notice of such failure from holders of Redeemable Preferred Stock (an "*Event of Default*"), then the holders of the Redeemable Preferred Stock shall (immediately upon the giving of written notice to the Corporation by the holders of a majority of the then outstanding shares of Redeemable Preferred Stock), voting together as a single class, be entitled to elect the smallest number of directors that shall constitute a majority of the authorized number of directors of the Corporation, and the holders of the remaining capital stock without redemption rights (the "*Non-Redeemable Stock*") voting as a single class shall be entitled to elect the remaining members of the Board. Upon the election by the holders of the Redeemable Preferred Stock, voting together as a single class, of the directors they are entitled to elect as provided in the preceding sentence, the terms of office of all persons who were theretofore directors of the Corporation shall forthwith terminate, whether or not the holders of the Non-Redeemable Stock shall then have elected the remaining directors of the Corporation. If, after the election of a new Board pursuant to this Article 6, the Event of Default is cured, then the holders of the Redeemable Preferred Stock shall be divested of the special voting rights specified in this Article 6. However, the special voting rights of this Article 6 shall again accrue to the holders of the shares of the Redeemable Preferred Stock in case of any later occurrence of an Event of Default. Upon the termination of any such special voting rights as hereinabove provided, the Board shall promptly call a special meeting of the stockholders at which all directors will be elected in accordance with the provisions of this Article 6, and the terms of office of all persons who are then directors of the Corporation shall terminate immediately upon the election of their successors. In any event, the special voting rights of this Article 6 shall expire immediately upon the closing of the Corporation's initial public offering registered under the 1933 Act prior to or in connection with which all outstanding shares of Preferred Stock will be automatically converted to Common Stock.

The number of directors of the Corporation shall be such number as from time to time shall be fixed by, or in the manner provided in, the bylaws of the Corporation. Unless and except to the extent that the bylaws of the Corporation shall otherwise require, the election of directors of the Corporation need not be by written ballot. Except as otherwise provided in this Certificate of Incorporation, each director of the Corporation shall be entitled to one vote per director on all matters voted or acted upon by the Board.

## 6.2 Management of Business and Affairs of the Corporation

The business and affairs of the Corporation shall be managed by or under the direction of the Board.

## 6.3 Limitation of Liability

No director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that this provision shall not eliminate or limit the liability of a director (a) for any breach of the director's duty of loyalty to the Corporation or its stockholders; (b) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (c) under Section 174 of the Delaware General Corporation Law; or (d) for any transaction from which the director derived an improper personal benefit. If the Delaware General Corporation Law hereafter is amended to authorize the further elimination or limitation of the personal liability of directors, then the liability of a director of the Corporation, in addition to the elimination and limitation of personal liability provided herein, shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law as so amended. Any repeal or modification of this Article 6.3 shall be prospective only and shall not adversely affect any right or protection of, or any limitation on the liability of, a director of the Corporation existing at, or arising out of the facts or incidents occurring prior to, the effective date of such repeal or modification. For purposes of this Article 6.3, "fiduciary duty as a director" also shall include any fiduciary duty arising out of serving at the Corporation's request as a director of another corporation, partnership, limited liability company, joint venture or other enterprise, and "liable to the Corporation or its stockholders" also shall include any liability to such other corporation, partnership, limited liability company, joint venture, trust or other enterprise, and any liability to the Corporation in its capacity as a security holder, joint venturer, partner, member, beneficiary, creditor or investor of or in any such other corporation, partnership, limited liability company, joint venture, trust or other enterprise.

## ARTICLE 7 COMPROMISE OR ARRANGEMENT

Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation 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 this corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this corporation under § 291 of Title 8 of the Delaware General Corporation Law or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under § 279 of Title 8 of the Delaware General Corporation Law order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, 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 this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as a 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 this corporation, as the case may be, and also on this corporation.

### **ARTICLE 8 INDEMNIFICATION**

Each person who is or was or had agreed to become a director or officer of the Corporation, or each such person who is or was serving or who had agreed to serve at the request of the Board as a director, officer, employee or agent of another corporation, limited liability company, partnership, joint venture, trust or other enterprise or nonprofit entity, including service with respect to employee benefit plans (including the heirs, executors, administrators or estate of such person), shall be indemnified by the Corporation to the fullest extent permitted by the Delaware General Corporation Law or any other applicable laws as presently or hereafter in effect. Without limiting the generality or the effect of the foregoing, the Corporation may enter into one or more agreements with any person which provide for indemnification greater or different than that provided in this Article 8. Any repeal or modification of this Article 8 shall not adversely affect any right or protection existing hereunder immediately prior to such repeal or modification.

### **ARTICLE 9 AMENDMENT OF BYLAWS**

In furtherance and not in limitation of the powers conferred by the Delaware General Corporation Law, the Board is expressly authorized and empowered to adopt, alter, amend and repeal the bylaws of the Corporation.

### **ARTICLE 10 RESERVATION OF RIGHT TO AMEND CERTIFICATE OF INCORPORATION**

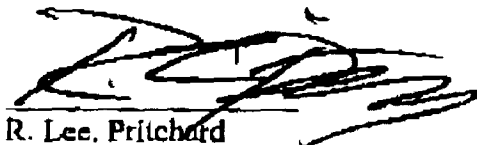
The Corporation reserves the right at any time, and from time to time, to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, and other provisions authorized by the laws of the State of Delaware at the time in force may be added or inserted, in the manner now or hereafter prescribed by law; and all rights, preferences and privileges of any nature conferred upon stockholders, directors, or any other persons by and pursuant to this Certificate of Incorporation in its present form or as hereafter amended are granted subject to the rights reserved in this Article 10.



**ARTICLE 11  
SEVERABILITY**

In the event that any provision of this Certificate of Incorporation (including any provision within a single article, paragraph or sentence) is held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining provisions are severable and shall remain enforceable to the full extent permitted by law.

IN WITNESS WHEREOF, the Corporation has caused this Amended and Restated Certificate of Incorporation to be signed by its Chief Executive Officer on ~~May~~ <sup>June</sup> 1, 2001.



R. Lee Pritchard  
Chief Executive Officer

P. 005

TEL: 404 881 7777

ALSTON & BIRD LLP 448

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RECORDED: 03/08/2002

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