

07-05-2002

DEPARTMENT OF COMMERCE

OFFICE OF PATENTS AND TRADEMARKS

RECOR



102144504

Patent and Trademark Office
Docket No. 022098.2010, 2020, 2050, 2060, 2070

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

1. Name of Conveying party(ies):

Actuate Software Corporation

7-1-02

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

California

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

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

Name: Actuate Software Corporation
Street Address: 701 Gateway Boulevard
South San Francisco, California 94080

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

Additional name(s) & address(es) attached? Yes No

3. Nature of conveyance:

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

Execution Date: July 6, 1998

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

A. Trademark Application No.(s)

B. Registration No.(s)

2010533; 2056096; 2185073; 2168309 and 2179596

Additional numbers attached? Yes No

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

Carla B. Oakley
Brobeck, Phleger & Harrison LLP
Spear Street Tower
One Market
San Francisco, CA 94105

6. Total number of applications and trademark registrations involved: 5

7. Total fee (37 C.F.R. § 3.41): \$140

- Enclosed
- Authorized to be charged to deposit account, referencing Attorney Docket: 022098.2000

8. Deposit account number: 02-3950

The Commissioner is hereby authorized to charge any fees under 37 C.F.R. § 1.21 which may be required by this paper, or to credit any overpayment to Deposit Account No. 02-3950.

DO NOT USE THIS SPACE

9. Statement and Signature.

To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Name: Carla B. Oakley

Carla B. Oakley
Signature

June 26, 2002

Date

Total number of pages comprising cover sheet, attachment and document: 12

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

07/03/2002 TBIAZ1 00000117 2010533

01 FC:481
02 FC:482

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**AGREEMENT AND PLAN OF MERGER
OF ACTUATE SOFTWARE CORPORATION,
A DELAWARE CORPORATION
AND
ACTUATE SOFTWARE CORPORATION,
A CALIFORNIA CORPORATION**

THIS AGREEMENT AND PLAN OF MERGER, dated as of July 6, 1998, (the "Agreement"), is between Actuate Software Corporation, a Delaware corporation ("Actuate Software Corporation-Delaware") and Actuate Software Corporation, a California corporation ("Actuate Software Corporation-California"). Actuate Software Corporation-Delaware and Actuate Software Corporation-California are sometimes referred to herein as the "Constituent Corporations."

RECITALS

A. Actuate Software Corporation-Delaware is a corporation duly organized and existing under the laws of the State of Delaware. As of July 1, 1998, and as of the date of this Agreement, 100 shares of Common Stock are issued and outstanding, all of which are held by Actuate Software Corporation-California. No shares of Preferred Stock are issued and outstanding.

B. Actuate Software Corporation-California is a corporation duly organized and existing under the laws of the State of California and has an authorized capital stock of 30,939,464 shares, 20,000,000 of which are designated "Common Stock," and 10,939,464 of which are designated "Preferred Stock." Of such authorized shares of Preferred Stock, 2,040,000 shares are designated as Series A Preferred Stock, 2,333,224 shares are designated as Series B Preferred Stock, 2,333,334 are designated as Series B1 Preferred Stock, 1,176,471 are designated as Series C Preferred Stock, 1,176, 471 are designated as Series C1 Preferred Stock, 939,927 shares are designated Series D Preferred Stock, and 939,927 are designated as Series D1 preferred Stock. As of June 3, 1998, 4,085,268 shares of Common Stock, 2,040,000 shares of Series A Preferred Stock, 2,333,334 shares of Series B Preferred Stock, 1,176,471 shares of Series C Preferred Stock and 939,927 shares of Series D Preferred Stock were issued and outstanding.

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

D. The respective Boards of Directors of Actuate Software Corporation-Delaware and Actuate Software Corporation-California have approved this Agreement and have directed that this Agreement be submitted to a vote of their respective sole stockholder and shareholders, and executed by the undersigned officers.

E. Actuate Software Corporation-Delaware is a wholly owned subsidiary of Actuate Software Corporation-California.

NOW, THEREFORE, in consideration of the mutual agreements and covenants set forth herein, Actuate Software Corporation-Delaware and Actuate Software Corporation-California hereby agree, subject to the terms and conditions hereinafter set forth, as follows:

I. MERGER

1.1 Merger. In accordance with the provisions of this Agreement, the Delaware General Corporation Law and the California Corporations Code, Actuate Software Corporation-California shall be merged with and into Actuate Software Corporation-Delaware (the "Merger"), the separate existence of Actuate Software Corporation-California shall cease and Actuate Software Corporation-Delaware shall be, and is herein sometimes referred to as, the "Surviving Corporation," and the name of the Surviving Corporation shall be "Actuate Software Corporation"

1.2 Filing and Effectiveness. The Merger shall become effective when the following actions shall have been completed:

(a) This Agreement and the Merger shall have been adopted and approved by the shareholders of Actuate Software Corporation-California and the sole stockholder of Actuate Software Corporation-Delaware in accordance with the requirements of the Delaware General Corporation Law and the California Corporations Code;

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

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

The date and time when the Merger shall become effective, as aforesaid, is herein called the "Effective Date of the Merger."

1.3 Effect of the Merger. Upon the Effective Date of the Merger, the separate existence of Actuate Software Corporation-California shall cease and Actuate Software Corporation-Delaware, as the Surviving Corporation (i) shall continue to possess all of its assets, rights, powers and property as constituted immediately prior to the Effective Date of the Merger, (ii) shall be subject to all actions previously taken by its and Actuate Software Corporation-California's Board of Directors, (iii) shall succeed, without other transfer, to all of the assets, rights, powers and property of Actuate Software Corporation-California, including all shares of any subsidiary held by Actuate Software Corporation-California, in the manner more fully set forth in Section 259 of the Delaware General Corporation Law, (iv) shall continue to be subject to all of the debts, liabilities and obligations of Actuate Software Corporation-California as constituted immediately prior to the Effective Date of the Merger, and (v) shall succeed, without

other transfer, to all of the debts, liabilities and obligations of Actuate Software Corporation-California in the same manner as if Actuate Software Corporation-Delaware had itself incurred them, all as more fully provided under the applicable provisions of the Delaware General Corporation Law and the California Corporations Code.

II. CHARTER DOCUMENTS, DIRECTORS AND OFFICERS

2.1 Certificate of Incorporation. The Certificate of Incorporation of Actuate Software Corporation-Delaware in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect as the Certificate of Incorporation of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

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

2.3 Directors and Officers. The directors and officers of Actuate Software Corporation-Delaware immediately prior to the Effective Date of the Merger shall be the directors and officers of the Surviving Corporation until their successors shall have been duly elected and qualified or until as otherwise provided by law, the Amended and Restated Certificate of Incorporation of the Surviving Corporation or the Bylaws of the Surviving Corporation.

III. MANNER OF CONVERSION OF STOCK

3.1 Actuate Software Corporation-California Common Shares. Upon the Effective Date of the Merger, each share of Actuate Software Corporation-California Common Stock issued and outstanding immediately prior to the Merger shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into and exchanged for one (1) fully paid and nonassessable share of Common Stock, par value \$0.001 per share, of the Surviving Corporation. No fractional share interests of the Surviving Corporation's Common Stock shall be issued but shall, instead, be paid in cash or check by Actuate Software Corporation-Delaware to the holder of such shares in that amount equal to the fair market value of such fractional shares.

3.2 Actuate Software Corporation-California Preferred Shares. Upon the Effective Date of the Merger each share of Series A Preferred Stock of Actuate Software Corporation-California issued and outstanding immediately prior to the Merger shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into or exchanged for one (1) fully paid and nonassessable share of Series A Preferred Stock of the Surviving Corporation, par value \$0.001 per share. The rights, preferences and privileges of the Series A Preferred Stock of the Surviving Corporation are as set forth in the Certificate of Incorporation of the Surviving Corporation. No fractional share interests of the Surviving Corporation's Preferred Stock shall be issued but shall, instead, be paid in cash or check by Actuate Software Corporation-Delaware to the holder of such shares in that amount equal to the fair market value of such fractional shares.

Upon the Effective Date of the Merger each share of Series B Preferred Stock of Actuate Software Corporation-California issued and outstanding immediately prior to the Merger shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into or exchanged for one (1) fully paid and nonassessable share of Series B Preferred Stock of the Surviving Corporation, par value \$0.001 per share. The rights, preferences and privileges of the Series B Preferred Stock of the Surviving Corporation are as set forth in the Certificate of Incorporation of the Surviving Corporation. No fractional share interests of the Surviving Corporation's Preferred Stock shall be issued but shall, instead, be paid in cash or check by Actuate Software Corporation-Delaware to the holder of such shares in that amount equal to the fair market value of such fractional shares.

Upon the Effective Date of the Merger each share of Series C Preferred Stock of Actuate Software Corporation-California issued and outstanding immediately prior to the Merger shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into or exchanged for one (1) fully paid and nonassessable share of Series C Preferred Stock of the Surviving Corporation, par value \$0.001 per share. The rights, preferences and privileges of the Series C Preferred Stock of the Surviving Corporation are as set forth in the Certificate of Incorporation of the Surviving Corporation. No fractional share interests of the Surviving Corporation's Preferred Stock shall be issued but shall, instead, be paid in cash or check by Actuate Software Corporation-Delaware to the holder of such shares in that amount equal to the fair market value of such fractional shares.

Upon the Effective Date of the Merger each share of Series D Preferred Stock of Actuate Software Corporation-California issued and outstanding immediately prior to the Merger shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into or exchanged for one (1) fully paid and nonassessable share of Series D Preferred Stock of the Surviving Corporation, par value \$0.001 per share. The rights, preferences and privileges of the Series D Preferred Stock of the Surviving Corporation are as set forth in the Certificate of Incorporation of the Surviving Corporation. No fractional share interests of the Surviving Corporation's Preferred Stock shall be issued but shall, instead, be paid in cash or check by Actuate Software Corporation-Delaware to the holder of such shares in that amount equal to the fair market value of such fractional shares.

3.3 Actuate Software Corporation-California 1994 Stock Option Plan, as Amended.

(a) Upon the Effective Date of the Merger, the Surviving Corporation shall assume the obligations of Actuate Software Corporation-California under its 1994 Stock Option Plan, as amended (the "1994 Plan"). Each outstanding and unexercised option to purchase one (1) share of Common Stock of Actuate Software Corporation-California (an "Option") under the 1994 Plan shall be converted into, subject to the provisions in paragraph (b) of this section 3.4, an option to purchase one (1) share of the Surviving Corporation's Common Stock (a "New Option") on the same terms and described above.

(b) Following the Effective Date of the Merger, the number of shares of the Surviving Corporation's Common Stock to which an Option holder would be otherwise entitled upon exercise of an assumed Option shall be rounded down to the nearest whole number.

In addition, no "additional benefits" (within the meaning of Section 424(a)(2) of the Internal Revenue Code of 1986, as amended) shall be accorded to the optionees pursuant to the assumption of their options.

3.4 Actuate Software Corporation-Delaware Common Stock. Upon the Effective Date of the Merger, each share of Common Stock, par value \$0.001 per share, of Actuate Software Corporation-Delaware issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by Actuate Software Corporation-Delaware, the holder of such shares or any other person, be canceled and returned to the status of authorized but unissued shares.

3.5 Exchange of Certificates. After the Effective Date of the Merger, each holder of an outstanding certificate representing shares of Actuate Software Corporation-California Common Stock or Preferred Stock may be asked to surrender the same for cancellation to an exchange agent, whose name will be delivered to holders prior to any requested exchange (the "Exchange Agent"), and each such holder shall be entitled to receive in exchange therefor a certificate or certificates representing the number of shares of the Surviving Corporation's Common Stock or Preferred Stock, as the case may be, into which the surrendered shares were converted as herein provided. Until so surrendered, each outstanding certificate theretofore representing shares of Actuate Software Corporation-California Common Stock or Preferred Stock shall be deemed for all purposes to represent the number of shares of the Surviving Corporation's Common Stock or Preferred Stock, respectively, into which such shares of Actuate Software Corporation-California Common Stock or Preferred Stock, as the case may be, were converted in the Merger.

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

Each certificate representing Common Stock or Preferred Stock of the Surviving Corporation so issued in the Merger shall bear the same legends, if any, with respect to the restrictions on transferability as the certificates of Actuate Software Corporation-California so converted and given in exchange therefore, unless otherwise determined by the Board of Directors of the Surviving Corporation in compliance with applicable laws, or other such additional legends as agreed upon by the holder and the Surviving Corporation.

If any certificate for shares of Actuate Software Corporation-Delaware stock is to be issued in a name other than that in which the certificate surrendered in exchange therefor is registered, it shall be a condition of issuance thereof that the certificate so surrendered shall be properly endorsed and otherwise in proper form for transfer, that such transfer otherwise be proper and comply with applicable securities laws and that the person requesting such transfer pay to the Exchange Agent any transfer or other taxes payable by reason of issuance of such new certificate in a name other than that of the registered holder of the certificate surrendered or

establish to the satisfaction of Actuate Software Corporation-Delaware that such tax has been paid or is not payable.

IV. GENERAL

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

(a) Qualify to do business as a foreign corporation in the State of California and in connection therewith irrevocably appoint an agent for service of process as required under the provisions of Section 2105 of the California Corporations Code.

(b) File any and all documents with the California Franchise Tax Board necessary for the assumption by Actuate Software Corporation-Delaware of all of the franchise tax liabilities of Actuate Software Corporation-California.

(c) Take such other actions as may be required by the California Corporations Code.

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

4.3 Abandonment. At any time before the Effective Date of the Merger, this Agreement may be terminated and the Merger may be abandoned for any reason whatsoever by the Board of Directors of either Actuate Software Corporation-California or of Actuate Software Corporation-Delaware, or of both, notwithstanding the approval of this Agreement by the shareholders of Actuate Software Corporation-California.

4.4 Amendment. The Boards of Directors of the Constituent Corporations may amend this Agreement at any time prior to the filing of this Agreement (or certificate in lieu thereof) with the Secretary of State of the State of Delaware, provided that an amendment made subsequent to the adoption of this Agreement by the stockholders of either Constituent Corporation shall not: (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such Constituent Corporation, (2) alter or change any term of the Certificate of Incorporation of the Surviving Corporation to be effected by the Merger, or (3) alter or change any of the terms and conditions of this Agreement if such alteration or change

would adversely affect the holders of any class or series of capital stock of any Constituent Corporation.

4.5 Registered Office. The registered office of the Surviving Corporation in the State of Delaware is 15 East North Street, Dover, Delaware 19901 and Incorporating Services, Inc. is the registered agent of the Surviving Corporation at such address.

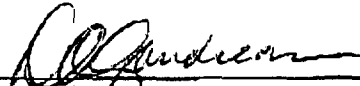
4.6 Agreement. Executed copies of this Agreement will be on file at the principal place of business of the Surviving Corporation at 999 Baker Way, Suite 330, San Mateo, California, 94404, and copies thereof will be furnished to any stockholder of either Constituent Corporation, upon request and without cost.

4.7 Governing Law. This Agreement shall in all respects be construed, interpreted and enforced in accordance with and governed by the laws of the State of Delaware and, so far as applicable, the merger provisions of the California Corporations Code.

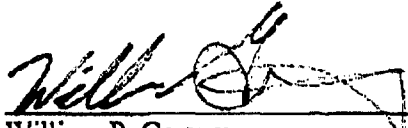
4.8 Counterparts. In order to facilitate the filing and recording of this Agreement, the same may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, this Agreement having first been approved by the resolutions of the Board of Directors of Actuate Software Corporation-Delaware and Actuate Software Corporation-California is hereby executed on behalf of each of such two corporations and attested by their respective officers thereunto duly authorized.


ACTUATE SOFTWARE CORPORATION,
a Delaware corporation

By: 
Daniel A. Gaudreau
Chief Financial Officer


ATTEST:


William P. Garvey
Assistant Secretary

ACTUATE SOFTWARE CORPORATION
a California corporation

By: 
Daniel A. Gaudreau
Chief Financial Officer

ATTEST:


William P. Garvey
Assistant Secretary

ACTUATE SOFTWARE CORPORATION

OFFICERS' CERTIFICATE
OF
APPROVAL OF MERGER

The undersigned, Nicolas C. Nierenberg and William P. Garvey, each of them, do hereby certify that:

1. They are the President and Assistant Secretary, respectively, of Acutate Software Corporation, a corporation duly organized and existing under the laws of the State of Delaware.

2. The corporation is authorized to issue: (i) 20,000,000 shares of Common Stock, 100 of which are issued and outstanding; and (ii) 10,939,464 shares of Preferred Stock, none of which are issued and outstanding; all issued and outstanding shares of Common Stock are entitled to vote on the Agreement of Merger in the form attached.

3. The Agreement of Merger in the form attached was duly approved by the board of directors of the corporation in accordance with the General Corporation Law of the State of California.


4. The Agreement of Merger in the form attached was duly approved by the holders of this corporation's Common and Preferred Stock by the vote of a number of shares which equaled or exceeded the vote required.

5. Approval of the Agreement of Merger by the holders of more than 50% of the outstanding shares of Common Stock of this corporation was required.

Each of the undersigned declares under penalty of perjury that the statements contained in the foregoing certificate are true and correct to his own knowledge. Executed in Menlo Park, California on July 6, 1998.



Nicolas C. Nierenberg, President



William P. Garvey, Assistant Secretary

ACTUATE SOFTWARE CORPORATION

OFFICERS' CERTIFICATE
OF
APPROVAL OF MERGER

The undersigned, Nicolas C. Nierenberg and William P. Garvey, each of them, do hereby certify that:

1. They are the President and Assistant Secretary, respectively, of Acutate Software Corporation, a corporation duly organized and existing under the laws of the State of California.

2. The corporation is authorized to issue: (i) 20,000,000 shares of Common Stock, 4,085,268 of which are issued and outstanding; and (ii) 10,939,464 shares of Preferred Stock, 6,489,732 of which are issued and outstanding; all issued and outstanding shares of Common and Preferred Stock are entitled to vote on the Agreement of Merger in the form attached.

3. The Agreement of Merger in the form attached was duly approved by the board of directors of the corporation in accordance with the General Corporation Law of the State of California.

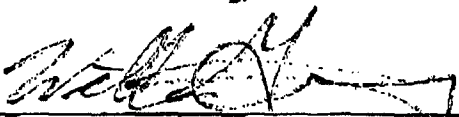
4. The Agreement of Merger in the form attached was duly approved by the holders of this corporation's Common and Preferred Stock by the vote of a number of shares which equaled or exceeded the vote required.

5. Approval of the Agreement of Merger by the holders of more than 50% of the outstanding shares of Common and Preferred Stock of this corporation was required.

Each of the undersigned declares under penalty of perjury that the statements contained in the foregoing certificate are true and correct to his own knowledge. Executed in Menlo Park, California on July 6, 1998.



Nicolas C. Nierenberg, President



William P. Garvey, Assistant Secretary

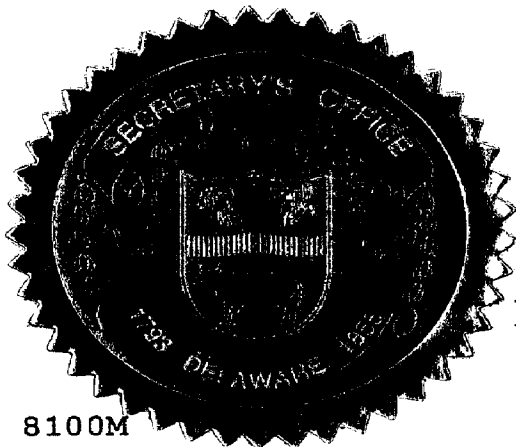
Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF MERGER, WHICH MERGES:

"ACTUATE SOFTWARE CORPORATION", A CALIFORNIA CORPORATION, WITH AND INTO "ACTUATE SOFTWARE CORPORATION" UNDER THE NAME OF "ACTUATE SOFTWARE CORPORATION", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE SEVENTH DAY OF JULY, A.D. 1998, AT 9 O'CLOCK A.M.



Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

2900660 8100M

AUTHENTICATION: 1843953

020400089

DATE: 06-20-02

RECORDED: 07/01/2002

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