

12-23-2002

Form PTO-1594 (Rev. 10/02) OMB No. 0651-0027 (exp. 6/30/2005) Tab settings ⇨ ⇨ ⇨



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

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

1. Name of conveying party(ies):
Blue Ocean Software, Inc. 12/19/02

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

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

2. Name and address of receiving party(ies)
Name: Blue Ocean Software, Inc.
Internal
Address: Suite 370
Street Address: 15310 Amberly
City: Tampa State: Florida ZIP: 33647

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

If assignee is not domiciled in the United States, a domestic representative designation is attached: Yes No
(Designations must be a separate document from assignment)
Additional name(s) & address(es) attached? Yes No

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FINANCE SECTION

3. Nature of conveyance:
 Assignment Merger
 Security Agreement Change of Name
 Other _____

Execution Date: April 10, 2001

4. Application number(s) or registration number(s):
A. Trademark Application No.(s)
B. Trademark Registration No.(s)
1790802
1748294

Additional number(s) attached Yes No

5. Name and address of party to whom correspondence concerning document should be mailed:
Name: Linda G. Henry
Internal Address: Fenwick & West LLP
Street Address: Two Palo Alto Square
City: Palo Alto State: CA Zip: 94306

6. Total number of applications and registrations involved: 2

7. Total fee (37 CFR 3.41).....\$ 65.00
 Enclosed and
 Authorized to be charged to deposit account, if necessary

8. Deposit account number:
50-0261

DO NOT USE THIS SPACE

9. Signature.
Linda G. Henry Linda G. Henry Dec. 12, 2002
Name of Person Signing Signature Date

Total number of pages including cover sheet, attachments, and document: 20

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

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STATE OF DELAWARE
 SECRETARY OF STATE
 DIVISION OF CORPORATIONS
 FILED 01:30 PM 04/10/2001
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CERTIFICATE OF MERGER

of

BLUE OCEAN SOFTWARE, INC.
 (a Delaware corporation)

and

BLUE OCEAN SOFTWARE, INC.
 (a Florida corporation)

April 10, 2001

Pursuant to the provisions of Section 252 of the Delaware General Corporation Law (the "DGCL"), the undersigned corporation adopts this Certificate of Merger for the purpose of merging (the "Merger") Blue Ocean Software, Inc., a Florida corporation ("Blue Ocean-FL"), with and into Blue Ocean Software, Inc., a Delaware corporation ("Blue Ocean-DE" or the "Surviving Corporation").


1. The constituent corporations are Blue Ocean Software Inc., a Delaware corporation, and Blue Ocean Software, Inc., a Florida corporation.
2. An Agreement and Plan of Merger (the "Agreement") between the parties to the merger has been approved, adopted, certified, executed and acknowledged by each of the parties in accordance with the requirements of Section 252(c) of the DGCL.
3. The name of the Surviving Corporation is "Blue Ocean Software, Inc."
4. The certificate of incorporation of Blue Ocean-DE shall be the certificate of incorporation of the Surviving Corporation.
5. The complete, executed Agreement is on file at the principal place of business of the Surviving Corporation, which is located at 15310 Amberly Drive, Suite 370, Tampa, FL 33647.
6. A copy of the Agreement will be furnished by the Surviving Corporation, on request and without cost, to any stockholder of either constituent corporation.
7. The authorized capital stock of Blue Ocean-FL consists of 30,000,000 shares of common stock, par value \$,000 per share.
8. The Merger shall become effective upon the filing of both this Certificate of Merger with the Secretary of State of the State of Delaware and the Articles of Merger with the Department of State of the State of Florida.

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IN WITNESS WHEREOF, the undersigned has caused this Certificate of Merger to be duly executed as of the date first above written.

BLUE OCEAN SOFTWARE, INC.
a Delaware corporation

By: 
Russell D. Hobbs, III
President

Delaware

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The First State

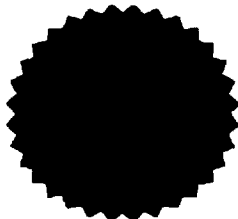
I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS ON FILE OF "BLUE OCEAN SOFTWARE, INC." AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

CERTIFICATE OF INCORPORATION, FILED THE TENTH DAY OF APRIL, A.D. 2001, AT 10:15 O'CLOCK A.M.

CERTIFICATE OF MERGER, FILED THE TENTH DAY OF APRIL, A.D. 2001, AT 1:30 O'CLOCK P.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CERTIFICATES ARE THE ONLY CERTIFICATES ON RECORD OF THE AFORESAID CORPORATION.



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

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AUTHENTICATION: 1910707

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DATE: 07-30-02

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STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
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CERTIFICATE OF INCORPORATION

OF

BLUE OCEAN SOFTWARE, INC.

FIRST. The name of the corporation is Blue Ocean Software, Inc. (the "Corporation").

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

THIRD. The Corporation may engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.

FOURTH. The total number of shares of all classes of capital stock which the Corporation shall have authority to issue is 35,172,414 shares, consisting of 30,000,000 shares of Common Stock, par value \$.0001 per share (the "Common Stock"), and 5,172,414 shares of Preferred Stock, par value \$.0001 per share (the "Preferred Stock").

A description of the respective classes of stock and a statement of the designations, preferences, voting powers (or no voting powers), relative, participating, optional or other special rights and privileges and the qualifications, limitations and restrictions of the Preferred Stock and Common Stock are as follows:

A. PREFERRED STOCK

1. Designation and Amount. The Corporation shall be authorized to issue 5,172,414 shares designated Series A Convertible Preferred Stock, par value \$0.0001 per share ("Series A Preferred Stock"). The Series A Preferred Stock shall have the preferences, limitations and rights set forth below.

2. Dividends. Except as provided in this Section 2, the holders of shares of Series A Preferred Stock shall not be entitled to receive dividends. In the event the Corporation shall make or issue, or shall fix a record date for the determination of holders of Common Stock (as hereafter defined) entitled to receive, a dividend or other distribution with respect to such class of Common Stock payable in (i) securities of the Corporation other than shares of any class of Common Stock, (ii) cash, or (iii) assets, then and in each such event the holders of Series A Preferred Stock shall be entitled to receive out of funds legally available therefor, at the same time such distribution is made with respect to such class of Common Stock, the number of

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securities (other than shares of any class of Common Stock) or such cash or other assets of the Corporation which they would have received had their Series A Preferred Stock been converted in accordance with Section 5 hereof immediately prior to the record date for determining holders of such class of Common Stock entitled to receive such distribution.

3. Liquidation, Dissolution or Winding Up.

(a) Treatment at Liquidation, Dissolution and Winding Up. In the event of a Liquidity Event (as herein defined), before any distribution or payment may be made with respect to the Common Stock or any other series or class of capital stock ranking junior in liquidation preference to the Series A Preferred Stock, holders of each share of Series A Preferred Stock shall be entitled to be paid out of the assets of the Corporation available for distribution to holders of the Corporation's capital stock of all classes, whether such assets are capital, surplus, or capital earnings, an amount in cash equal to the greater of (1) \$4.814 per share of Series A Preferred Stock (the "Series A Liquidation Amount") or (2) such amount per share of Series A Preferred Stock as would have been payable had each such share been converted, pursuant to the provisions of Section 5, into Common Stock immediately prior to such Liquidity Event. The term "Liquidity Event" shall mean any one or more of the following: (i) the liquidation, dissolution or winding-up of the Corporation, whether voluntary or involuntary; (ii) a sale, merger or similar transaction involving the Corporation, which results in any person (or group of affiliated persons) who did not hold voting stock of the Corporation on the day after the first shares of Series A Preferred Stock shall have been issued holding more than 50% of the voting stock of the Corporation (or the surviving or resulting entity) after giving effect to such transaction; or (iii) the sale of all or substantially all of the assets of the Corporation. In connection with any Liquidity Event, all consideration payable to the stockholders of the Corporation, in connection with a merger or consolidation, or all consideration payable to the Corporation, together with all other available assets of the Corporation (net of obligations owed by the Corporation), in the case of an asset sale, shall be paid to and deemed (to the fullest extent permitted by law) distributed (in the case of a merger or consolidation) or available for distribution and payment as provided herein (in the case of a sale of assets), as applicable, to the holders of capital stock of the Corporation in accordance with the preference and priorities set forth in the Corporation's certificate of incorporation, with such preferences and priorities specifically intended to be applicable in any such merger, consolidation or sale transaction as if the same were a liquidation, dissolution or winding up. If applicable, the Corporation shall either (i) cause the agreement and plan of merger or consolidation to provide as a consequence of such merger or consolidation for the conversion of the Series A Preferred Stock into the right to receive an amount (either in cash or, in the case of a merger or consolidation for stock, stock of the surviving or resulting corporation) equal to the applicable amount payable under this paragraph 3; or (ii) concurrently with the consummation with the sale of all or substantially all of the assets of the Corporation, the redemption of all outstanding shares of the Series A Preferred Stock for an amount either in cash or, in the case of a sale of assets for stock, stock of the surviving or resulting corporation equal to the applicable amount payable under this paragraph 3. In the event of the foregoing redemption, (i) the Corporation shall revalue its assets and liabilities to the fullest extent permitted by law to determine lawfully available funds for such redemption, and (ii) if the

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Corporation shall not have such funds available to redeem all such shares, the Corporation shall redeem such shares to the fullest extent of available funds as the same became available.

If upon any such Liquidity Event the assets of the Corporation available for distribution to its shareholders shall be insufficient to permit payment to the holders of the Series A Preferred Stock of the full amount of the Series A Liquidation Amount to which they are entitled to be paid, the holders of shares of Series A Preferred Stock shall share ratably in any distribution of assets according to the amounts which would be payable with respect to the shares of Series A Preferred Stock held by them upon such distribution if all amounts payable on or with respect to said shares were paid in full.

After the payment of the Series A Liquidation Amount shall have been made in full to the holders of the Series A Preferred Stock or funds necessary for such payment shall have been set aside by the Corporation in trust for the account of holders of the Series A Preferred Stock so as to be available for such payments, the holders of the Series A Preferred Stock shall be entitled to no further participation in the distribution of the assets of the Corporation, and the remaining assets of the Corporation legally available for distribution to its shareholders shall be distributed among the holders of other classes of securities of the Corporation in accordance with their respective terms.

(b) Distributions in Cash. The Series A Liquidation Amount shall be paid in cash to the extent the Corporation has cash available. Whenever a distribution provided for in this Section 3 is payable in property other than cash, the value of such distribution shall be the fair market value of such property as determined in good faith by the Corporation's Board of Directors, including the Board member designated by Summit Ventures VI-A, L.P. pursuant to that certain Shareholders' Agreement of the Corporation entered into in connection with the first issuance of shares of Series A Preferred Stock.

4. Voting Power. Except as otherwise expressly provided in the Corporation's certificate of incorporation or as required by law, each holder of Series A Preferred Stock shall be entitled to vote on all matters to be acted upon by the stockholders of the Corporation and shall be entitled to that number of votes equal to the number of shares of Common Stock, par value \$0.0001 per share, of the Corporation ("Common Stock") into which such holder's shares of Series A Preferred Stock could be converted pursuant to the provisions of Section 5 hereof, as of the record date for the determination of shareholders entitled to vote on such matter or, if no such record date is established, at the date such vote is taken or any written consent of shareholders is solicited. Except as otherwise expressly provided in the Corporation's certificate of incorporation or as required by law, the Series A Preferred Stock shall vote together with all other classes and series of stock of the Corporation as a single class on all actions to be taken by the stockholders of the Corporation, including actions amending the Corporation's certificate of incorporation to increase the number of authorized shares of Common Stock.

5. Conversion Rights of the Series A Preferred Stock. The holders of the Series A Preferred Stock shall have the following rights with respect to the conversion of the Series A Preferred Stock into shares of Common Stock:

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(a) General.

(i) Optional Conversion. Subject to and in compliance with the provisions of this Section 5, any share of the Series A Preferred Stock may, at the option of the holder, be converted at any time into fully-paid and non-assessable shares of Common Stock. The number of shares of Common Stock to which a holder of Series A Preferred Stock shall be entitled upon conversion shall be a number of shares of Common Stock equal to the product obtained by multiplying the number of shares of Series A Preferred Stock being converted by the Applicable Conversion Rate (as determined by Section 5(b)). Upon conversion of shares of the Series A Preferred Stock all dividends declared thereon but unpaid shall be paid.

(ii) Automatic Conversion. Immediately prior to consummation of a Qualified Public Offering (as defined below), all shares of Series A Preferred Stock shall automatically be converted into shares of Common Stock as provided in this Section 5 without further action on the part of the Corporation or the holders of Series A Preferred Stock. As used herein, "Qualified Public Offering" means the first public offering of securities of the Corporation pursuant to a registration statement filed under the Securities Act of 1933, as amended (or successor statute), pursuant to which the price per share to the public is at least three times the Applicable Conversion Value (as defined below) then in effect and the aggregate gross proceeds paid by the public equals at least \$40,000,000.

(b) Applicable Conversion Rate. The conversion rate in effect at any time (the "Applicable Conversion Rate") shall be the quotient obtained by dividing \$4.814 by the Applicable Conversion Value, calculated as provided in Section 5(c).

(c) Applicable Conversion Value. The Applicable Conversion Value shall be \$4.814, except that such amount shall be adjusted from time to time in accordance with this Section 5.

(d) Adjustments to Applicable Conversion Values.

(i) (A) Upon Sale of Common Stock. If the Corporation shall, while there are any shares of Series A Preferred Stock outstanding, issue or sell shares of its Common Stock without consideration or at a price per share less than the Applicable Conversion Value in effect immediately prior to such issuance or sale, then in each such case such Applicable Conversion Value for the Series A Preferred Stock, upon each such issuance or sale, except as hereinafter provided, shall be lowered so as to be equal to an amount determined by multiplying the Applicable Conversion Value by a fraction:

(1) the numerator of which shall be (a) the number of shares of Common Stock outstanding or deemed outstanding, determined on a fully-diluted basis assuming the exercise, conversion and exchange (as the case may be) of all outstanding shares of Series A Preferred Stock and Common Stock Equivalents (as defined below), immediately prior to the issuance of such additional shares of Common Stock, plus (b) the number of shares of Common Stock which the net aggregate consideration, if any, received by the Corporation for the total number of such additional shares of Common

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Stock so issued would purchase at the Applicable Conversion Value in effect immediately prior to such issuance, and

(2) the denominator of which shall be (a) the number of shares of Common Stock outstanding or deemed outstanding, determined on a fully-diluted basis assuming the exercise, conversion and exchange (as the case may be) of all outstanding shares of Series A Preferred Stock and Common Stock Equivalents (as defined below), immediately prior to the issuance of such additional shares of Common Stock plus (b) the number of such additional shares of Common Stock so issued.

(B) Upon Issuance of Warrants, Options and Rights to Common Stock.

(1) Except as otherwise set forth in Section 5(d)(1)(E) below, for the purposes of this Section 5(d)(1), the issuance of any warrants, options, subscriptions, or purchase rights with respect to shares of Common Stock and the issuance of any securities convertible into or exchangeable for shares of Common Stock (or the issuance of any warrants, options or any rights with respect to such convertible or exchangeable securities) (collectively, "Common Stock Equivalents") shall be deemed an issuance of Common Stock at such time if the Net Consideration Per Share (as hereinafter determined) which may be received by the Corporation for such Common Stock shall be less than the Applicable Conversion Value at the time of such issuance. Any obligation, agreement, or undertaking to issue warrants, options, subscriptions, or purchase rights at any time in the future shall be deemed to be an issuance at the time such obligation, agreement or undertaking is made or arises. No adjustment of the Applicable Conversion Value shall be made under this Section 5(d)(1) upon the issuance of any shares of Common Stock which are issued pursuant to the exercise, exchange or conversion of any Common Stock Equivalents if any adjustment shall previously have been made or deemed not required hereunder, upon the issuance of any such Common Stock Equivalents as above provided.

Should the Net Consideration Per Share of any such Common Stock Equivalents be increased or decreased from time to time, then, upon the effectiveness of each such change, the Applicable Conversion Value shall be adjusted to such Applicable Conversion Value as would have obtained (1) had the adjustments made upon the issuance of such Common Stock Equivalents been made upon the basis of the increased or decreased Net Consideration Per Share of such securities, and (2) had the adjustments made to the Applicable Conversion Value since the date of issuance of such Common Stock Equivalents been made to the Applicable Conversion Value as adjusted pursuant to (1) above. Any adjustment of the Applicable Conversion Value with respect to this paragraph which relates to Common Stock Equivalents shall be disregarded if, as, when and to the extent such Common Stock Equivalents expire or are canceled without being exercised or converted, so that the Applicable Conversion Value effective immediately upon such cancellation or expiration shall be equal to the Applicable Conversion Value in effect at the time of the issuance of the expired or canceled Common Stock Equivalents with such additional adjustments as would have been made to that Applicable Conversion Value had the expired or canceled Common Stock Equivalents not been issued.

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(2) For purposes of this paragraph, the "Net Consideration Per Share" which may be received by the Corporation shall be determined as follows:

(a) The "Net Consideration Per Share" shall mean the amount equal to the total amount of consideration, if any, received by the Corporation for the issuance of such Common Stock Equivalents, plus the minimum amount of consideration, if any, payable to the Corporation upon exercise or conversion thereof, divided by the aggregate number of shares of Common Stock that would be issued if all such Common Stock Equivalents were exercised, exchanged, or converted.

(b) The "Net Consideration Per Share" which may be received by the Corporation shall be determined in each instance as of the date of issuance of Common Stock Equivalents without giving effect to any possible future upward price adjustments or rate adjustments which may be applicable with respect to such Common Stock Equivalents.

(c) For purposes of determining the "Net Consideration Per Share," the consideration received shall be deemed to be the amount received by the Corporation therefor, without deduction therefrom of any expenses incurred or any underwriting commissions or concessions or placement fees paid or allowed by the Corporation in connection therewith.

(C) Stock Dividends. In the event the Corporation shall make or issue a dividend or other distribution payable in Common Stock or securities of the Corporation convertible into or otherwise exchangeable for Common Stock of the Corporation, then such Common Stock or other securities issued in payment of such dividend shall be deemed to have been issued without consideration (except for dividends payable in shares of Common Stock payable pro rata to holders of Series A Preferred Stock and to holders of any other class of stock, in which case the securities so issued shall be deemed to have been issued with the consideration equal to the Applicable Conversion Value then in effect).

(D) Consideration Other than Cash. For purposes of this Section 5(d), if a part or all of the consideration received by the Corporation in connection with the issuance of shares of the Common Stock or the issuance of any of the securities described in this Section 5(d) consists of property other than cash, such consideration shall be deemed to have a fair market value as is reasonably determined in good faith by the Board of Directors of the Corporation.

(E) Exceptions. This Section 5(d) shall not apply under any of the circumstances which would constitute an Extraordinary Common Stock Event (as hereinafter defined in Section 5(d)(i)). Further, the provisions of this Section 5(d) shall not apply to (i) shares issued upon conversion of the Series A Preferred Stock, (ii) the issuance of, or grant of options (and the issuance of shares issuable upon exercise thereof) to purchase, up to an aggregate of 4,500,000 shares of Common Stock to directors, officers, employees or consultants of the Corporation in connection with their service as directors of the Corporation.

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their employment by the Corporation or their retention as consultants by the Corporation, pursuant to any stock or option plan or agreement approved by the Board of Directors (a "Plan") (plus any additional shares of Common Stock reserved for such issuances by the Board of Directors and expressly approved as not triggering an adjustment to any Applicable Conversion Value by the holders of a majority of the then outstanding shares of Series A Preferred Stock, respectively, given in writing or by vote at a meeting, consenting or voting (as the case may be) as a separate class), plus such number of additional shares of Common Stock as again become available for issuance by the Corporation under the terms of a Plan due to the expiration of options previously granted, plus such number of additional shares of Common Stock which are repurchased by the Corporation from such persons pursuant to contractual rights held by the Corporation, (iii) shares issued in connection with a merger, consolidation or other acquisition by the Corporation resulting in the acquisition of a business which is approved by the Corporation's Board of Directors; (iv) shares issued to strategic partners or joint venturers in connection with a joint venture or similar transaction entered into with the approval of the Corporation's Board of Directors, including the approval of the director designated by Summit Ventures VI-A, L.P.; or (v) shares issued to financial institutions or lessors in connection with loan transactions or leasing transactions approved by the Corporation's Board of Directors, including the approval of the director designated by Summit Ventures VI-A, L.P. In each instance set forth above, the number of shares shall be proportionately adjusted to reflect any stock dividend, stock split, stock combination or the like.

(ii) Upon Extraordinary Common Stock Event. Upon the happening of an Extraordinary Common Stock Event (as hereinafter defined), the Applicable Conversion Value for the Series A Preferred Stock shall, simultaneously with the happening of such Extraordinary Common Stock Event, be adjusted by multiplying the then effective Applicable Conversion Value with respect to the Series A Preferred Stock by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such Extraordinary Common Stock Event and the denominator of which shall be the number of shares of Common Stock outstanding immediately after such Extraordinary Common Stock Event, and the product so obtained shall thereafter be the Applicable Conversion Value; provided, however, that the Applicable Conversion Value shall not be adjusted if the Series A Preferred Stock are subdivided or combined at the same rates and in the same manner as the Common Stock. The Applicable Conversion Value for the Series A Preferred Stock shall be readjusted in the same manner upon the happening of any successive Extraordinary Common Stock Event or Events.

"Extraordinary Common Stock Event" shall mean (i) a subdivision of outstanding shares of Common Stock into a greater number of shares of Common Stock, or (ii) a combination of outstanding shares of the Common Stock into a smaller number of shares of Common Stock.

(e) Capital Reorganization or Reclassification. If the Common Stock issuable upon the conversion of the Series A Preferred Stock shall be changed into the same or different number of shares of any class or classes of stock, whether by capital reorganization, reclassification or otherwise (other than a subdivision or combination of shares or stock

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dividend provided for elsewhere in this Section 5 or by a Liquidity Event), then and in each such event, the holder of each share of Series A Preferred Stock shall have the right thereafter to convert such share into the kind and amount of shares of stock and other securities and property receivable upon such capital reorganization, reclassification or other change by holders of the number of shares of Common Stock into which such share of Series A Preferred Stock would have been converted immediately prior to such capital reorganization, reclassification or other change.

(f) Liquidity Event. If at any time or from time to time there shall be a Liquidity Event (other than a subdivision, combination, reclassification or exchange of shares provided for elsewhere in this Section 5), then as a part of such Liquidity Event, provision shall be made so that the holders of the Series A Preferred Stock shall thereafter be entitled to receive upon conversion of the Series A Preferred Stock, the number of shares of stock or other securities or property of the Corporation, or of the successor corporation resulting from such Liquidity Event, to which such holder would have been entitled if such holder had converted its shares of Series A Preferred Stock immediately prior to such Liquidity Event. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 5 with respect to the rights of the holders of the Series A Preferred Stock after the Liquidity Event, to the end that the provisions of this Section 5 (including adjustment of the Applicable Conversion Value then in effect and the number of shares issuable upon conversion of the Series A Preferred Stock) shall be applicable after that event in as nearly equivalent a manner as may be practicable.

Except as otherwise provided in Section 3, upon the occurrence of a Liquidity Event, under circumstances which make the preceding paragraph applicable, the holders of at least a majority of the then outstanding shares of Series A Preferred Stock shall have the option of electing treatment for the shares of Series A Preferred Stock under either this Section 5(f) or Section 3 hereof, notice of which election shall be submitted in writing to the Corporation at its principal offices no later than ten (10) business days before the effective date of such event.

(g) Certificate as to Adjustments; Notice by Corporation. In each case of an adjustment or readjustment of the Applicable Conversion Rate, the Corporation at its expense will furnish each holder of Series A Preferred Stock with a certificate, executed by the president and chief financial officer (or in the absence of a person designated as the chief financial officer, by the treasurer) showing such adjustment or readjustment, and stating in detail the facts upon which such adjustment or readjustment is based.

(h) Exercise of Conversion Privilege. To exercise its conversion privilege, a holder of Series A Preferred Stock shall surrender the certificate or certificates representing the shares being converted to the Corporation at its principal office, and shall give written notice to the Corporation at that office that such holder elects to convert such shares. Such notice shall also state the name or names (with address or addresses) in which the certificate or certificates for shares of Common Stock issuable upon such conversion shall be issued. The certificate or certificates for shares of Series A Preferred Stock surrendered for conversion shall be accompanied by proper assignment thereof to the Corporation or in blank. The date when such written notice is received by the Corporation, together with the certificate or

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certificates representing the shares of Series A Preferred Stock being converted, shall be the "Conversion Date." As promptly as practicable after the Conversion Date, the Corporation shall issue and shall deliver to the holder of the shares of Series A Preferred Stock being converted, or on its written order, such certificate or certificates as it may request for the number of whole or fractional shares of Common Stock issuable upon the conversion of such shares of Series A Preferred Stock in accordance with the provisions of this Section 5. Such conversion shall be deemed to have been effected immediately prior to the close of business on the Conversion Date, and at such time the rights of the holder as holder of the converted shares of Series A Preferred Stock shall cease and the person or persons in whose name or names any certificate or certificates for shares of Common Stock shall be issuable upon such conversion shall be deemed to have become the holder or holders of record of the shares of Common Stock represented thereby. The Corporation shall pay any taxes payable with respect to the issuance of Common Stock upon conversion of the Series A Preferred Stock, other than any taxes payable with respect to income by the holders thereof or any tax payable in respect of any transfer involved in the issuance and delivery of any certificate in a name other than that of the holder of the Series A Preferred Stock being converted.

(i) Cash in Lieu of Fractional Shares. The Corporation may, if it so elects, issue fractional shares of Common Stock or scrip representing fractional shares upon the conversion of shares of Series A Preferred Stock. If the Corporation does not elect to issue fractional shares, the Corporation shall pay to the holder of the shares of Preferred Stock which were converted a cash adjustment in respect of such fractional shares in an amount equal to the same fraction of the market price per share of the Common Stock (as determined in a reasonable manner prescribed by the Board of Directors) at the close of business on the Conversion Date. The determination as to whether or not any fractional shares are issuable shall be based upon the total number of shares of Series A Preferred Stock being converted at any one time by any holder thereof, not upon each share of Series A Preferred Stock being converted.

(j) Partial Conversion. In the event some but not all of the shares of Series A Preferred Stock represented by a certificate or certificates surrendered by a holder are converted, the Corporation shall execute and deliver to or on the order of the holder, at the expense of the Corporation, a new certificate representing the number of shares of Series A Preferred Stock which were not converted.

(k) Reservation of Common Stock. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series A Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A Preferred Stock, and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series A Preferred Stock, the Corporation shall take such corporate action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

6. Redemption.

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(a) Optional Redemption of Series A Preferred Stock by Holders. At the election of the holders of at least a majority of the then outstanding shares of Series A Preferred Stock on or after April 10, 2008, the Corporation shall, to the extent it may do so under applicable law, redeem pro rata from all holders of Series A Preferred Stock, all shares of Series A Preferred Stock then outstanding at a price per share equal to the Series A Liquidation Amount (the "Redemption Price"); provided, however, that the Corporation shall not be required to redeem, in any 12-month period, more than fifty percent (50%) of the Series A Preferred Stock originally issued on the date hereof (proportionately adjusted to reflect any stock dividend, stock split, stock combination or the like).

(b) Procedures. If the holders of the Series A Preferred Stock elect to require redemption under Section 6(a) hereof, such holder shall so notify the Corporation in writing at least thirty (30) days in advance of the date of redemption, specifying the date of redemption ("Redemption Date") and the number of shares to be redeemed (subject to the proviso in Section 6(a)) (the "Redemption Shares"). Each holder of shares of Series A Preferred Stock to be redeemed under this Section 6 shall surrender the certificate or certificates representing such shares to the Corporation at the principal office of the Corporation, and thereupon the Redemption Price or the Redemption Price, as the case may be, for such shares as set forth in this Section 6 shall be paid to the order of the person whose name appears on such certificate or certificates.

(c) Remedies. If the Corporation fails to redeem the Redemption Shares on the Redemption Date, the Redemption Price shall bear interest (the "Interest Rate") at the prime rate (as announced from time to time by Fleet Bank, N.A.) (the "Prime Rate") plus two percent (2%) per annum, compounded annually, from the applicable Redemption Date until the first anniversary of the applicable Redemption Date. Thereafter, if the Redemption Shares are not redeemed in accordance with the terms hereof, the Interest Rate shall increase on each successive anniversary of the applicable Redemption Date by an additional one percent (1%) over the Prime Rate (up to a maximum Interest Rate of the Prime Rate plus five percent (5%)) until such time Redemption Shares have been redeemed.

7. Restrictions and Limitations.

(a) Corporate Action. Except as expressly provided herein or as required by law, so long as at least 1,724,138 shares of Series A Preferred Stock (proportionately adjusted to reflect any stock dividend, stock split, stock combination or the like) remain outstanding, the Corporation shall not, and shall not permit any subsidiary (which shall mean any corporation, association or other business entity of which the Corporation and/or any of its other subsidiaries directly or indirectly owns at the time more than fifty percent (50%) of the outstanding voting securities, other than directors' qualifying shares) to, without the approval by vote or written consent by the holders of at least a majority of the then outstanding shares of Series A Preferred Stock, voting as a separate class:

(i) redeem, purchase or otherwise acquire for value (or pay into or set aside for a sinking fund for such purpose), or declare and pay or set aside funds for the payment of any dividend or other distribution with respect to, any shares of capital stock, except as required or

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permitted under the terms of the Series A Preferred Stock and that certain Stock Purchase and Redemption Agreement dated as of the date hereof, or the redemption, purchase or other acquisition in connection with an employee benefit plan approved by the Board of Directors;

(ii) authorize or issue, or obligate itself to authorize or issue, additional shares of Series A Preferred Stock;

(iii) authorize or issue, or obligate itself to authorize or issue, any equity security senior to or on parity with the Series A Preferred Stock as to redemption, dividends or the distribution of assets on any event constituting a Liquidity Event hereunder;

(iv) merge or consolidate with any other corporation, or sell, assign, lease or otherwise dispose of or voluntarily part with the control of (whether in one transaction or in a series of transactions) all or substantially all of its assets (whether now owned or hereafter acquired) or otherwise engage in a sale, the result of which those persons who held 100% of the voting stock of the Corporation immediately prior to such transaction do not hold more than 50% of the voting stock of the Corporation (or the surviving or resulting entity) after giving effect to such transaction or any liquidation, dissolution or winding up of the Corporation (in each case, a "Sale"); except for (1) the merger or consolidation of any wholly-owned subsidiary with any other wholly-owned subsidiary or the Corporation; (2) the transfer by any wholly-owned subsidiary of assets to another wholly-owned subsidiary or to the Corporation; or (3) a Sale in which the Common Stock is valued at a price per share, or is to receive an amount per share, of at least three times the Applicable Conversion Value then in effect and in which the consideration received by the holders of the Series A Preferred Stock in such Sale is either (i) cash, or (ii) shares of equity securities (A) which are freely tradeable under the securities laws without regard to volume limitations, (B) which are listed on the New York Stock Exchange or quoted on the Nasdaq National Market, and (C) the aggregate number of which does not exceed five (5) times the average daily trading volume for such securities during the sixty (60) trading days immediately preceding the closing of the Sale;

(v) acquire the assets, capital stock or other property of any third party which is material to the Corporation (assets, capital stock and other property acquired with a fair market value of less than ten percent (10%) of the Corporation's assets or capital stock, as the case may be, shall not be deemed "material"); provided, however, that any such acquisition may be made in accordance with the other terms of this instrument; or

(vi) amend, restate, modify or alter the by-laws of the Corporation in any way which alters the rights, preferences or privileges of the holders of the Series A Preferred Stock.

8. Notices of Record Date. In the event of

(a) 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 or other distribution, or 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

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(b) any capital reorganization of the Corporation, any reclassification or recapitalization of the capital stock of the Corporation, any merger of the Corporation, or any transfer of all or substantially all of the assets of the Corporation to any other corporation, or any other entity or person, or

(c) any voluntary or involuntary dissolution, liquidation or winding up of the Corporation;

then and in each such event the Corporation shall mail or cause to be mailed to each holder of Series A Preferred Stock a notice specifying (i) the date on which any such record is to be taken for the purpose of such dividend, distribution or right and a description of such dividend, distribution or right, (ii) the date on which any such reorganization, reclassification, recapitalization, transfer, merger, dissolution, liquidation or winding up is expected to become effective and (iii) the time, 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 reorganization, reclassification, recapitalization, transfer, merger, dissolution, liquidation or winding up. Such notice shall be mailed at least ten (10) days prior to the date specified in such notice on which such action is to be taken.

9. No Reissuance of Preferred Stock. No share or shares of Series A Preferred Stock acquired by the Corporation by reason of redemption, purchase or otherwise shall be reissued, and all such shares shall be canceled, retired and eliminated from the shares which the Corporation shall be authorized to issue. The Corporation may from time to time take such appropriate corporate action as may be necessary to reduce the authorized number of shares of the Series A Preferred Stock accordingly.

B. COMMON STOCK

1. Priority. All preferences, voting powers, relative, participating, optional or other special rights and privileges, and qualifications, limitations, or restrictions of the Common Stock are expressly made subject and subordinate to those that may be fixed with respect to any shares of the Preferred Stock.

2. Voting Rights. Except as otherwise required by law or this certificate of incorporation, each holder of Common Stock shall have one vote in respect of each share of stock held by such stockholder of record on the books of the Corporation for the election of directors and on all matters submitted to a vote of stockholders of the Corporation. Except as may be otherwise provided in this certificate of incorporation or by law, the Common Stock shall vote together with all other classes and series of stock of the Corporation (including the Preferred Stock) as a single class on all actions to be taken by the stockholders of the Corporation. Notwithstanding anything to the contrary contained herein, the number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding or reserved for the exercise of options or warrants or conversion of the Preferred Stock) by the affirmative vote of the holders of a majority of the

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stock of the Corporation entitled to vote, voting together as a single class, irrespective of the provisions of Section 242(b)(2) of the General Corporation Law of the State of Delaware.

3. Dividends. Subject to any preferential rights of the Preferred Stock, the holders of shares of Common Stock shall be entitled to receive, when, as and if declared by the Board of Directors of the Corporation, out of the assets of the Corporation which are by law available therefor, dividends payable either in cash, in property or in shares of capital stock.

4. Liquidation. In the event of any dissolution, liquidation or winding up of the affairs of the Corporation, after distribution in full of the preferential amounts to be distributed to the holders of Preferred Stock, the holders of Common Stock shall be entitled to receive all of the remaining assets of the Corporation of whatever kind available for distribution to stockholders ratably in proportion to the number of shares of Common Stock held by them respectively, unless otherwise provided by law or this certificate of incorporation, including any amendment or restatement thereof.

FIFTH. The Corporation is to have perpetual existence.

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

A. The Board of Directors of the Corporation is expressly authorized to adopt, amend or repeal the By-Laws of the Corporation.

B. Elections of directors need not be by written ballot unless the By-Laws of the Corporation shall so provide.

C. The books of the Corporation may be kept at such place within or without the State of Delaware as the By-Laws of the Corporation may provide or as may be designated from time to time by the Board of Directors of the Corporation.

SEVENTH. The Corporation eliminates the personal liability of each member of its Board of Directors to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director; provided, however, that, to the extent provided by applicable law, the foregoing shall not eliminate the liability of a director (i) for any breach of such director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of Title 8 of the Delaware Code or (iv) for any transaction from which such director derived an improper personal benefit. No amendment to or repeal of this provision shall apply to or have any effect on the liability or alleged liability of any director for or with respect to any acts or omissions of such director occurring prior to such amendment or repeal.

EIGHTH. To the maximum extent permitted from time to time under the laws of the State of Delaware, the Corporation shall indemnify and upon request shall advance expenses to any person who is or was a party or is threatened to be made a party to any threatened,

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pending or completed action, suit, proceeding or claim, whether civil, criminal, administrative or investigative, by reason of the fact that he is or was or has agreed to be a director or officer of the Corporation or while a director or officer is or was serving at the request of the Corporation as a director, officer, partner, trustee, employee or agent of any corporation, partnership, joint venture, trust or other enterprise, including service with respect to employee benefit plans, against any and all expenses (including attorney's fees and expenses), judgments, fines, penalties and amounts paid in settlement or incurred in connection with the investigation, preparation to defend or defense of such action, suit, proceeding or claim; provided, however, that the foregoing shall not require the Corporation to indemnify or advance expenses to any person in connection with any action, suit, proceeding, claim or counterclaim initiated by or on behalf of such person. Such indemnification shall not be exclusive of other indemnification rights arising under any by-law, agreement, vote of directors or stockholders or otherwise and shall inure to the benefit of the heirs and legal representatives of such person. No amendment or repeal of this Article EIGHTH shall apply to or adversely affect any right or protection of a director or officer of the Corporation with respect to any act or omission of such director occurring prior to such amendment or repeal.

NINTH. 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 the provisions of Section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 279 of Title 8 of the Delaware Code, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of 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 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.

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

ELEVENTH. The name and mailing address of the sole incorporator is as follows:

<u>Name</u>	<u>Mailing Address</u>
Joseph L. Farmer	Testa, Hurwitz & Thibault, LLP

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Boston, MA 02110

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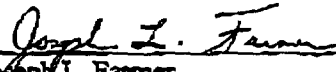
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I, **THE UNDERSIGNED**, being the sole incorporator hereinabove named, for the purpose of forming a corporation pursuant to the General Corporation Law of the State of Delaware, do make this certificate, hereby declaring and certifying that this is my act and deed and the facts herein stated are true, and accordingly have hereunto set my hand this 10th day of April, 2001.



Joseph L. Farmer
Sole Incorporator

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