

9122103

REC  
TI



To the Honorable Director of Patents and Trademarks. Please

102558623

hereof.

1. Name of conveying party(ies): findtheDOT, Inc.

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

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

3. Nature of Conveyance:

Assignment  Merger  
 Security Agreement  Change of Name  
 Other \_\_\_\_\_

Execution Date: February 13, 2003

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

A. Trademark Application No.(s)  
 78/176,758, 78/187,596

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

Name: IntelliDOT Corporation  
 Internal Address: \_\_\_\_\_  
 \_\_\_\_\_  
 Street Address: 100 East Marcos Boulevard  
Suite 400  
 City San Marcos State California ZIP 92069

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

(Designation must be a separate document from Assignment)

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

B. Trademark Registration No.(s)

Additional numbers attached?  Yes  No

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

Name: K. Alison de Runtz  
 Internal Address: PARSONS HSUE & DE RUNTZ LLP  
 Street Address: 655 MONTGOMERY STREET, SUITE 1800  
 City SAN FRANCISCO State CALIFORNIA ZIP 94111

6. Total number of applications and registrations involved: 2

7. Total fee (37 CFR 3.41): .....\$ 80.00

Enclosed

Authorized to charge any additional fees, and credit any over payments to Deposit Account.

8. Deposit account number: 502664

(Attach duplicate copy of this page if paying by deposit account)

09/24/2003 DBYRNE 00000078 78176758

01 FC: 8521 40.00 OP  
 02 FC: 8522 25.00 OP

DO NOT USE THIS SPACE

Print name 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.

K. Alison de Runtz - 37,119  
Name of Person Signing

*Alison de Runtz*  
Signature

9/15/03  
Date

Total number of pages including cover sheet, attachments and document: 16

Do not detach this portion

Repln. Ref: 09/24/2003 DBYRNE 0009151300  
 DA#: 502664 Name/Number: 78176758  
 FC: 9204 \$15.00 CR

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

Mail Stop Assignment Recordation Services  
 Director of the United States Patent and Trademark Office  
 P.O. Box 1450, Alexandria VA 22313-1450

Public burden reporting for this sample cover sheet is estimated to average about 30 minutes per document to be recorded, including time for reviewing the document and gathering the data needed, and completing and reviewing the sample cover sheet. Send comments regarding this burden estimate to the U.S. Patent and Trademark Office, Office of Information Systems, PK2-1000C, Washington, D.C. 20231, and to the Office of Management and Budget, Paperwork Reduction Project, (0651-011), Washington, D.C. 20231.

RECEIVED  
 SEP 22 AM 7:54  
 OPR/FINANCE

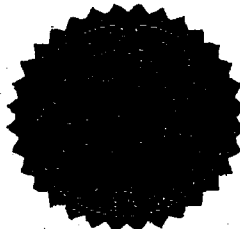
# Delaware

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 RESTATED CERTIFICATE OF "FINDTHEDOT, INC.", CHANGING ITS NAME FROM "FINDTHEDOT, INC." TO "INTELLIDOT CORPORATION", FILED IN THIS OFFICE ON THE THIRTEENTH DAY OF FEBRUARY, A.D. 2003, AT 9 O'CLOCK A.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

3153734 8100

AUTHENTICATION: 2259501

TRADEMARK  
REEL: 002829 FRAME: 0925

AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
FINDTHEDOT, INC.

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

1. The original Certificate of Incorporation was filed with the Secretary of State of Delaware on January 3, 2000.
2. The Amended and Restated Certificate of Incorporation in the form attached hereto as Exhibit A has been duly adopted in accordance with the provisions of Sections 228, 242 and 245 of the General Corporation Law of the State of Delaware by the directors and stockholders of the Corporation.
3. The Amended and Restated Certificate of Incorporation so adopted reads in full as set forth in Exhibit A attached hereto and is hereby incorporated herein by this reference.

IN WITNESS WHEREOF, findtheDOT, Inc. has caused this Amended and Restated Certificate of Incorporation to be signed by the President and Chief Executive Officer on this February 13, 2003.

FindtheDOT, Inc.

By:     /s/ Gerald E. Forth      
Gerald E. Forth  
President and Chief Executive Officer

**EXHIBIT A****AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF  
FINDTHEDOT, INC.****ARTICLE 1. NAME**

The name of the Corporation is IntelliDOT Corporation.

**ARTICLE 2. ADDRESS**

The address of the registered office of the Corporation in the State of Delaware is 2711 Centerville Road, Suite 400, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is Corporation Service Company.

**ARTICLE 3. PURPOSE**

The purpose of the Corporation is to engage in any lawful acts or activity for which a corporation may be organized under the General Corporation Law of the State of Delaware, as amended from time to time.

**ARTICLE 4. AUTHORIZED CAPITAL**

The Corporation is authorized to issue two classes of shares, designated "Common Stock" and "Preferred Stock" respectively. The total number of shares of Common Stock which the Corporation is authorized to issue is 5,000,000, with a par value of \$0.0001 per share, and the total number of shares of Preferred Stock which the Corporation is authorized to issue is 2,500,000, with a par value of \$0.0001 per share. 2,500,000 of the shares of Preferred Stock are designated "Series A Preferred Stock" (the "*Series A Preferred*"), which number shall not include the shares of Series A Preferred Stock outstanding immediately prior to the amendment of this Certificate of Incorporation (the "*Old Series A Preferred*"), all of which shall be converted into shares of Common Stock pursuant to the "Series A Conversion" (as defined below). Upon conversion of the Old Series A Preferred, such shares shall not be reissuable. Effective immediately upon amendment of this Certificate of Incorporation to read as set forth herein, (i) each issued and outstanding share of Old Series A Preferred shall automatically, without any action by the holders thereof, be converted into one share of Common Stock (the "*Series A Conversion*"), and (ii) immediately upon the effectiveness of the Series A Conversion, each 25 issued and outstanding shares of Common Stock, including the shares of Common Stock issued pursuant to the Series A Conversion, shall automatically, without any action by the holders thereof, be combined and converted into one share of Common Stock (the "*Reverse Stock Split*"). No fractions of shares will be issued, and shareholders otherwise entitled to receive fractions of shares shall have no further interest as a shareholder with respect to such

fractions of shares. The Corporation will pay in cash the fair value, as determined by the Board of Directors, of fractions of shares which would otherwise result from the Reverse Stock Split.

#### **ARTICLE 5. RIGHTS, PREFERENCES, PRIVILEGES AND RESTRICTIONS OF CAPITAL STOCK**

The relative rights, preferences, privileges, and restrictions granted to or imposed upon the respective classes of the shares of capital stock or the holders thereof are as follows:

##### **1. Dividend Preference.**

(a) The holders of Series A Preferred shall be entitled to receive, out of funds legally available therefor, dividends at an annual rate equal to \$0.072 (appropriately adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) for each outstanding share of Series A Preferred held by them, payable when and if declared by the Corporation's Board of Directors, in preference and priority to the payment of dividends on any shares of Common Stock (other than those payable solely in Common Stock or involving the repurchase of shares of Common Stock from terminated directors, officers, employees, consultants or advisors of the Corporation or its subsidiaries pursuant to contractual arrangements). In the event dividends are paid to the holders of Series A Preferred that are less than the full amounts to which such holders are entitled pursuant to this Section 1(a), such holders shall share ratably in the total amount of dividends paid according to the respective amounts due each such holder if such dividends were paid in full.

(b) The dividends payable to the holders of the Series A Preferred shall not be cumulative, and no right shall accrue to the holders of the Series A Preferred by reason of the fact that dividends on the Series A Preferred are not declared or paid in any previous fiscal year of the Corporation, whether or not the earnings of the Corporation in that previous fiscal year were sufficient to pay such dividends in whole or in part.

(c) After payment of dividends to the holders of Series A Preferred as set forth above, dividends may be declared and distributed among all holders of Common Stock; provided, however, that no dividend may be declared and distributed among holders of Common Stock at a rate greater than the rate at which dividends are paid to the holders of Series A Preferred based on the number of shares of Common Stock into which such shares of Series A Preferred are convertible on the date such dividend is declared.

(d) In the event that the Corporation shall have declared but unpaid dividends outstanding immediately prior to, and in the event of, a conversion of Series A Preferred (as provided in Section 4 of this Article 5), the Corporation shall, at the option of the Corporation, pay in cash to the holder(s) of Series A Preferred subject to conversion the full amount of any such dividends or allow such dividends to be converted into Common Stock in accordance with, and pursuant to the terms specified in, Section 4 of this Article 5.

## 2. *Liquidation Preference.*

(a) Unless the holders of a majority of the outstanding Series A Preferred determine otherwise, in the event of (i) any liquidation, dissolution or winding up of the Corporation, whether voluntary or not, (ii) the sale, lease, assignment, transfer, conveyance or disposal of all or substantially all of the assets of the Corporation or (iii) the acquisition of the Corporation by another entity by means of consolidation, corporate reorganizations, merger or other transaction or series of related transactions in which stockholders of the Corporation immediately prior to such transaction do not own at least a majority of the outstanding securities of the successor entity (each a "*Liquidation Event*"), distributions to the Corporation's stockholders shall be made in the following manner:

(i) Each holder of Series A Preferred shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of Common Stock, by reason of their ownership of such stock, the amount of \$0.90 (appropriately adjusted for combinations, consolidations, subdivisions, recapitalizations, stock splits and the like with respect to such shares) (the "*Original Series A Issue Price*") multiplied by 1.5 for each share of Series A Preferred then held by such holder, plus an amount equal to all declared but unpaid dividends on such shares of Series A Preferred (collectively, the "*Series A Preference*"). If, upon the occurrence of a Liquidation Event, the assets and funds available to be distributed among the holders of Series A Preferred shall be insufficient to permit the payment to such holders of the full Series A Preference, then the entire assets and funds of the Corporation legally available for distribution to the holders of Series A Preferred shall be distributed ratably based on the total Series A Preference due each such holder under this Section 2(a)(i).

(ii) After payment has been made to the holders of Series A Preferred of the full amounts to which they are entitled pursuant to Section 2(a)(i) and Section 2(a)(ii) above, the remaining assets of the Corporation available for distribution to stockholders shall be distributed ratably among the holders of Common Stock and Series A Preferred based on the number of shares of Common Stock held by each such holder or issuable upon conversion of the Series A Preferred held by each such holder.

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

(c) The value of securities and property paid or distributed pursuant to this Section 2 shall be computed at fair market value at the time of payment to the Corporation or at the time made available to stockholders, all as determined by the Board of Directors in the good faith exercise of its reasonable business judgment, provided that any securities shall be valued as follows:

(i) The value of securities not subject to investment letter or other similar restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall be:

(1) if traded on a securities exchange or through the Nasdaq National Market, the value shall be deemed to be the average of the closing prices of the securities on such exchange or system over the 30 day period (or portion thereof) ending three days prior to the closing;

(2) if actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or sale prices (whichever is applicable) over the 30 day period (or portion thereof) ending three days prior to the closing; and

(3) if there is no active public market, the value shall be the fair market value thereof, as determined by the Board of Directors.

(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 value determined as above in Section 2(c)(i) of this Article 5 to reflect the approximate fair market value thereof, as determined by the Board of Directors.

(d) Nothing hereinabove set forth shall affect in any way the right of each holder of Series A Preferred to convert such shares at any time and from time to time into Common Stock in accordance with Section 4 of this Article 5.

### 3. *Voting Rights.*

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

(b) Notwithstanding the provisions of Section 3(a) above, at each annual or special meeting called for the purpose of electing directors, (i) the holders of Series A Preferred, voting as a single class, shall be entitled to elect three members of the Board of Directors (the "*Series A Directors*"), (ii) the holders of Common Stock, voting as a single class, shall be

entitled to elect one member of the Board of Directors, and (iii) the remaining members of the Board of Directors, if any, shall be elected by the holders of Common Stock and Series A Preferred Stock voting together as a single class. The provisions of this Section 3(b) shall expire and be of no further force or effect with respect to the right of the holders of Series A Preferred to elect directors pursuant to clause (i) above if at any time fewer than 1,000,000 shares of Series A Preferred (appropriately adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) remain outstanding. In the case of any vacancy in the office of a director elected by a specified group of stockholders, a successor shall be elected to hold office for the unexpired term of such director by the affirmative vote of the shares of such specified group given at a special meeting of such stockholders duly called or by an action by written consent for that purpose, provided that in the absence of such stockholder action, such vacancy shall be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director then in office. Any director who shall have been elected by a specified group of stockholders may be removed during the aforesaid term of office, either for or without cause, by, and only by, the affirmative vote of the holders of the shares of such specified group, given at a special meeting of such stockholders duly called or by an action by written consent for that purpose, and any such vacancy thereby created, may be filled by the vote of the holders of the shares of such specified group represented at such meeting or in such consent.

#### 4. *Conversion Rights.*

The holders of Series A Preferred shall have conversion rights as follows:

(a) *Right to Convert.* Each share of Series A Preferred shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for such Series A Preferred, into such number of fully-paid and non-assessable shares of Common Stock as is determined by dividing the Original Series A Issue Price by the then effective Conversion Price for such Series A Preferred, determined as hereinafter provided, in effect at the time of conversion. The "*Series A Conversion Price*" shall initially be the Original Series A Issue Price. The Series A Conversion Price shall be subject to adjustment as provided in accordance with Section 4(d) below.

(b) *Automatic Conversion.* Each share of Series A Preferred shall automatically be converted into shares of Common Stock at the then effective applicable Conversion Price upon the earliest of: (i) the closing of a firm commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, (the "*Securities Act*") covering the offer and sale of Common Stock for the account of the Corporation to the public with aggregate proceeds to the Corporation of at least \$25,000,000 (before deduction for underwriters commissions and expenses) and a per share price not less than \$5.00 per share (appropriately adjusted for combinations, consolidations, subdivisions, stock splits or other similar transaction) (a "*Qualified Public Offering*") or (ii) the affirmative vote or written consent of the holders of at least two-thirds of the then outstanding shares of Series A Preferred (each such event is an "*Automatic Conversion*"). In the event of an Automatic Conversion of the Series A Preferred upon a public offering as aforesaid, the person(s) entitled to receive the Common Stock issuable upon such conversion of such Series A Preferred shall not be



deemed to have converted such Series A Preferred until immediately prior to the closing of such sale of securities.

(c) ***Mechanics of Conversion.*** No fractional shares of Common Stock shall be issued upon conversion of Series A Preferred. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the fair value of such fractional share, as determined in good faith by the Board of Directors. Before any holder of Series A Preferred shall be entitled to convert the same into full shares of Common Stock and to receive certificates therefor, such holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Series A Preferred, and shall give written notice to the Corporation at such office that it elects to convert the same; provided, however, that in the event of an Automatic Conversion pursuant to Section 4(b) above, the outstanding shares of Series A Preferred 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, and provided further that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion unless the certificates evidencing such shares of Series A Preferred are either delivered to the Corporation or its transfer agent as provided above, or the holder notifies the Corporation or its transfer agent that such certificates have been lost, stolen, or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. The Corporation shall, as soon as practicable after such delivery, or such agreement and indemnification in the case of a lost certificate, issue and deliver at such office to such holder, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Series A Preferred to be converted, or in the case of Automatic Conversion, on the date of closing of the offering, the date of the affirmative vote or written consent or the date of conversion of the Series A Preferred, as applicable, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

(d) ***Adjustments to Conversion Price.***

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

Common Stock, the Series A Conversion Price then in effect shall, concurrently with the effectiveness of such event, be increased in proportion to the percentage decrease in the outstanding number of shares of Common Stock.

(ii) *Adjustments for Other Distributions.* In the event the Corporation at any time or from time to time makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, any distribution payable in securities of the Corporation other than shares of Common Stock and other than as otherwise adjusted in this Section 4, then and in each such event provision shall be made so that the holders of Series A Preferred shall receive upon conversion thereof, the amount of securities of the Corporation which they would have received had their Series A Preferred been converted into Common Stock on the date of such event.

(iii) *Adjustments for Reclassification, Exchange and Substitution.* If the Common Stock issuable upon conversion of the Series A Preferred shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification, or otherwise (other than a subdivision or combination of shares provided for above), the Series A Conversion Price then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted such that the Series A Preferred shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of such Series A Preferred immediately before that change.

(iv) *Adjustments on Issuance of Additional Stock.*

(1) *Adjustments to Conversion Price.* If the Corporation shall issue "Additional Stock" (as defined in Section 4(d)(iv)(2) below) after the date on which the first share of Series A Preferred was issued (the "*Series A Original Issue Date*") for a consideration per share less than the Series A Conversion Price in effect on the date and immediately prior to such issue, then and in such event, (A) if such issuance occurs prior to the date on which the Corporation has raised at least \$5,000,000 in the aggregate from all sales of preferred equity securities after the Series A Original Issue Date (the "*Financing Threshold*"), the Series A Conversion Price shall be reduced concurrently with such issue to a price equal to the price per share of such Additional Stock, or (B) if such issuance occurs on or after the Financing Threshold, the Series A Conversion Price shall be reduced concurrently with such issue to a price (calculated to three decimal places) determined by multiplying such Conversion Price by a fraction (A) the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of Additional Stock so issued (or deemed to be issued) would purchase at such Conversion Price; and (B) the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Additional Stock so issued; provided that for purposes of this Section 4(d)(iv)(1), all shares of Common Stock issuable upon conversion of the outstanding Series A Preferred, all shares of Common Stock issuable upon exercise of

outstanding stock options, all shares of Common Stock reserved for issuance under the Corporation's current employee stock option plan, and all shares of Common Stock issuable upon exercise or conversion of any other outstanding security or debt instrument of the Corporation shall be deemed to be Common Stock outstanding.

(2) *Definition of Additional Stock.* For purposes of this Section 4(d)(iv), "*Additional Stock*" shall mean all Common Stock issued or deemed to be issued pursuant to Section 4(d)(iv)(3) below by the Corporation after the Series A Original Issue Date other than (a) as described in subsections (i), (ii), and (iii) of this Section 4(d); (b) as a dividend or distribution with respect to the Series A Preferred; (c) up to 1,076,710 shares to directors, officers, employees, consultants and advisors of the Corporation as designated and approved by the Board of Directors; (d) up to 82,835 shares of capital stock or warrants for the purchase thereof issued in connection with (1) a business partnership or other strategic business relationship including but not limited to the acquisition by the Corporation of another business entity or majority ownership therein, (2) in connection with a strategic investment the purpose of which is not capital raising, or (3) the acquisition of technology or intellectual property; provided, that any such transaction is approved by a majority of the Board of Directors and each of the Series A Directors; (e) in connection with equipment leasing, real estate, bank financing or similar transactions approved by each of the Series A Directors; (f) to vendors or customers as approved by each of the Series A Directors; (g) upon conversion of the Series A Preferred; (h) in a Qualified Public Offering; (i) pursuant to currently outstanding options, warrants, notes, or other rights to acquire securities of the Corporation; (j) on terms approved by the holders of a majority of the then outstanding shares of Series A Preferred; or (k) on terms or pursuant to arrangements unanimously approved by the Board of Directors.

(3) *Deemed Issuance of Common Stock.*

(a) If the Corporation (i) grants any rights or options to subscribe for, purchase, or otherwise acquire shares of Common Stock, or (ii) issues or sells any security convertible into, or exchangeable for, shares of Common Stock, then, in each case, such granting, issue or sale shall be considered to be an issue or sale for cash of the maximum number of shares of Common Stock issuable on exercise, conversion or exchange at the price per share determined under this Section 4(d)(iv)(3), and the Series A Conversion Price shall be subject to adjustment as provided in this Section 4(d)(iv)(3) to reflect (on the basis of that determination) the issue or sale. No further adjustment of the Series A Conversion Price shall be made as a result of the actual issuance of shares of Common Stock on the exercise of any such rights or options or the conversion or exchange of any such convertible securities. The price per share of Common Stock issuable on the exercise of such rights or options or the conversion or exchange of the securities shall be determined by dividing the total amount, if any, received or receivable by the Corporation as consideration for the granting of the rights or options or the issue or sale of the convertible or exchangeable securities, plus the minimum aggregate amount of additional consideration payable to the Corporation on exercise or conversion of the securities, by the maximum number of shares of Common Stock issuable on the exercise, conversion or exchange.

(b) Upon the redemption or repurchase of any such securities or the expiration or termination of the right to convert into, exchange for, or exercise

with respect to, Common Stock, the Series A Conversion Price shall be readjusted to such price as would have been obtained had the adjustment made upon their issuance been made upon the basis of the issuance of only the number of such securities as were actually converted into, exchanged for, or exercised with respect to, Common Stock. If the purchase price, conversion rate or exchange rate provided for in any such security changes at any time, then, upon such change becoming effective, the Series A Conversion Price then in effect shall be readjusted forthwith to such price as would have been obtained had the adjustment made upon the issuance of such securities been made upon the basis of (i) the issuance of only the number of shares of Common Stock theretofore actually delivered upon the conversion, exchange or exercise of such securities, and the total consideration received therefor, and (ii) the granting or issuance, at the time of such change, of any such securities then still outstanding for the consideration, if any, received by the Corporation therefor and to be received on the basis of such changed price or rate.

(4) **Determination of Consideration.** For the purpose of making any adjustment in the Series A Conversion Price as provided above, the consideration received by the Corporation for any issue or sale of Common Stock shall be computed:

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

(b) to the extent it consists of property other than cash, at the fair market value of that property as determined in accordance with Section 2(c) of this Article 5; and

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

(e) **No Impairment.** Except as provided in Section 6 of this Article 5, the Corporation shall not, by amendment of its Certificate of Incorporation or through any voluntary liquidation, dissolution, winding up, transfer of assets, consolidation, corporate reorganization, merger or issue or sale of securities, or through 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 shall at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of the Series A Preferred against impairment.

(f) **Certificate as to Adjustments.** Upon the occurrence of each adjustment or readjustment of the Series A Conversion Price pursuant to this Section 4, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Series A Preferred 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 of any holder of Series A Preferred, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Series A Conversion Price at the time in effect and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of such series of Series A Preferred.

(g) **Notices of Record Date.** In the event that the Corporation shall propose at any time:

(i) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock, or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus;

(ii) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of stock of any class or series or other rights;

(iii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or

(iv) to merge or consolidate with or into any other corporation, or sell, lease, or convey all or substantially all its property or business, or to liquidate, dissolve, or wind up; then, in connection with each such event, the Corporation shall send to the holders of the Series A Preferred:

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

(2) in the case of the matters referred to in (iii) and (iv) above, at least 10 days' prior written notice of the date when the same shall take place (and specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event or the record date for the determination of such holders if such record date is earlier).

Each such written notice shall be delivered personally or via overnight courier, or given by first class mail, postage prepaid, addressed to the holders of the Series A Preferred at the address for each such holder as shown on the books of the Corporation.

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

(i) **Reservation of Stock Issuable Upon Conversion.** The 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 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 A Preferred; 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 A Preferred, the Corporation shall take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to its Certificate of Incorporation.

**5. Redemption Rights.** The Series A Preferred shall not be redeemable.

**6. Covenants.** In addition to any other rights provided by law, so long as at least 1,000,000 shares of Series A Preferred (appropriately adjusted for combinations, consolidations, subdivisions, stock splits and the like with respect to such shares) remain issued and outstanding, the Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of a majority of the then outstanding shares of Series A Preferred, voting as a separate class:

(a) amend or repeal any provision of, or add any provision to, its Certificate of Incorporation if such action would adversely alter or change the preferences, rights, privileges or powers of, or the restrictions provided for the benefit of, the Series A Preferred;

(b) amend or repeal any provision of, or add any provision to, the Corporation's Bylaws;

(c) authorize or issue shares of any class or series of stock or reclassify any shares of capital stock of the Corporation into shares having any preference or priority as to dividends or redemption rights, liquidation preferences, conversion rights, or voting rights, superior to or on a parity with any preference or priority of the Series A Preferred;

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

(e) declare or pay dividends on or make any distributions with respect to the Corporation's Common Stock;

(f) any redemption or repurchase of any securities (other than the repurchase of the Corporation's Common Stock from employees, directors, consultants, and advisors in connection with the termination of such individuals);

(g) change the authorized number of members of the Corporation's Board of Directors; or

(h) increase the authorized number of shares of Common Stock or Preferred Stock.

**7. Residual Rights.**

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

**ARTICLE 6. BOARD OF DIRECTORS**

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

**1. Bylaws.** Subject to Section 6(b) of Article 5, the Board of Directors of the Corporation is expressly authorized to adopt, amend or repeal the Bylaws of the Corporation.

**2. Election of Directors.** The election of directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

**ARTICLE 7. DISSOLUTION**

Whenever a compromise or arrangement is proposed between the Corporation and its creditors or any class of them and/or between the 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 the Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for the 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 the 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 the 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 the Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of the 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 the Corporation, as the case may be, and also on the Corporation.

**ARTICLE 8. LIMITATION OF DIRECTORS' LIABILITY**

A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the 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 the General Corporation Law of the State of

Delaware, or (iv) for any transaction from which the director derived any improper personal benefit. If the General Corporation Law of the State of Delaware is amended hereafter to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law of the State of Delaware, as so amended.

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

#### **ARTICLE 9. RESERVATION OF RIGHTS**

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.