

TRADEMARK ASSIGNMENT

Electronic Version v1.1
 Stylesheet Version v1.1

SUBMISSION TYPE:	NEW ASSIGNMENT
NATURE OF CONVEYANCE:	CHANGE OF NAME

CONVEYING PARTY DATA

Name	Formerly	Execution Date	Entity Type
FactoryWare Inc.		12/15/2004	CORPORATION: DELAWARE

RECEIVING PARTY DATA

Name:	Informance International, Inc.
Street Address:	2711 Centerville Road
Internal Address:	Suite 400
City:	Wilmington
State/Country:	DELAWARE
Postal Code:	19808
Entity Type:	CORPORATION: DELAWARE

PROPERTY NUMBERS Total: 7

Property Type	Number	Word Mark
Registration Number:	2992962	INFORMANCE
Registration Number:	2992961	INFORMANCE INTERNATIONAL
Registration Number:	2964775	DRIVING MANUFACTURING PERFORMANCE
Registration Number:	2964774	INFORMANCE INTERNATIONAL DRIVING MANUFACTURING PERFORMANCE
Registration Number:	2581947	FACTORYPULSE
Registration Number:	2617764	CYCLE EROSION
Registration Number:	2774550	AN INDUSTRIAL ENGINEER IN A BOX!

CORRESPONDENCE DATA

Fax Number: (312)759-5646
Correspondence will be sent via US Mail when the fax attempt is unsuccessful.
 Phone: 312-357-1313
 Email: mvallone@btlaw.com
 Correspondent Name: Melissa A. Vallone

CH \$190.00 2992962

Address Line 1: P.O. Box 2786
Address Line 4: Chicago, ILLINOIS 60690-2786

ATTORNEY DOCKET NUMBER:	30451-92556
NAME OF SUBMITTER:	Melissa A. Vallone
Signature:	/mvallone/
Date:	03/18/2008

Total Attachments: 20

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Delaware

PAGE 1

The First State

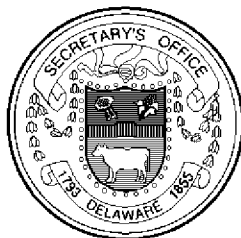
I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS FILED FROM AND INCLUDING THE RESTATED CERTIFICATE OR A MERGER WITH A RESTATED CERTIFICATE ATTACHED OF "INFORMANCE INTERNATIONAL, INC." AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

RESTATED CERTIFICATE, CHANGING ITS NAME FROM "FACTORYWARE INC." TO "INFORMANCE INTERNATIONAL, INC.", FILED THE FIFTEENTH DAY OF DECEMBER, A.D. 2004, AT 1:01 O'CLOCK P.M.

3704684 8100X

080191776



You may verify this certificate online
at corp.delaware.gov/authver.shtml

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 6394748

DATE: 02-20-08

TRADEMARK
REEL: 003741 FRAME: 0853

**SECOND AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
FACTORYWARE INC.**

John Oskin hereby certifies that:

ONE: The original name of this company is FactoryWare Inc. and the date of filing the original Certificate of Incorporation of this company with the Secretary of State of the State of Delaware was September 16, 2003.

TWO: He is the duly elected and acting Chief Executive Officer of FactoryWare Inc., a Delaware corporation.

THREE: The Amended and Restated Certificate of Incorporation of this company is hereby amended and restated to read as follows:

I.

The name of this company is **INFORMANCE INTERNATIONAL, INC.** (the "**Company**" or the "**Corporation**").

II.

The address of the registered office of this Company in the State of Delaware is 2711 Centerville Road, Suite 400, City of Wilmington, County of New Castle, 19808. The name of the registered agent of this Company in the State of Delaware at such address is Corporation Service Company.

III.

The purpose of the Company is to engage in any lawful act or activity for which a corporation may be organized under the Delaware General Corporation Law ("**DGCL**").

IV.

A. The Company is authorized to issue two classes of stock to be designated, respectively, "**Common Stock**" and "**Preferred Stock**." The total number of shares which the Company is authorized to issue is Thirty-Four Million Four Hundred Fifty-Five Thousand (34,455,000) shares, Twenty-One Million Five Hundred (21,500,000) shares of which shall be Common Stock (the "**Common Stock**") and Twelve Million Nine Hundred Fifty-Five Thousand (12,955,000) shares of which shall be Preferred Stock (the "**Preferred Stock**"). The Preferred Stock shall have a par value of \$0.001 per share and the Common Stock shall have a par value of \$0.001 per share.

B. The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares of Common Stock then outstanding) by the affirmative vote of the holders of a majority of the stock of the Company (voting together on an as-if-converted basis).

C. Six Million Two Hundred Twenty-Seven Thousand Five Hundred (6,227,500) of the authorized shares of Preferred Stock are hereby designated "Series A Preferred Stock" (the "*Series A Preferred*").

D. Six Million Seven Hundred Twenty-Seven Thousand Five Hundred (6,727,500) of the authorized shares of Preferred Stock are hereby designated "Series B Preferred Stock" (the "*Series B Preferred*").

E. The rights, preferences, privileges, restrictions and other matters relating to the Preferred Stock are as follows:

1. DIVIDEND RIGHTS.

(a) Holders of Series B Preferred, in preference to the holders of Series A Preferred and Common Stock, shall be entitled to receive, when and as declared by the Board of Directors (the "*Board*"), but only out of funds that are legally available therefor, cash dividends at the rate of eight percent (8%) of the Original Series B Issue Price (as defined below) per annum on each outstanding share of Series B Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof). Such dividends shall be payable only when, as and if declared by the Board and shall be non-cumulative.

(b) Holders of Series A Preferred, in preference to the holders of Common Stock, shall be entitled to receive, when and as declared by the Board, but only out of funds that are legally available therefor, cash dividends at the rate of eight percent (8%) of the Original Series A Issue Price (as defined below) per annum on each outstanding share of Series A Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof). Such dividends shall be payable only when, as and if declared by the Board and shall be non-cumulative.

(c) The "*Original Series A Issue Price*" shall mean \$0.64231232436 per share and the "*Original Series B Issue Price*" shall mean \$0.8919 per share.

(d) So long as any shares of Series B Preferred are outstanding, the Company shall not pay or declare any dividend, whether in cash or property, or make any other distribution on the Series A Preferred or Common Stock, or purchase, redeem or otherwise acquire for value any shares of Series A Preferred or Common Stock until all dividends as set forth in Section 1(a) above on the Series B Preferred shall have been paid or declared and set apart, except for:

(i) acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares at cost (or the lesser of cost or fair market value) upon termination of services to the Company; or

(ii) acquisitions of Common Stock in exercise of the Company's right of first refusal to repurchase such shares.

(e) So long as any shares of Series A Preferred are outstanding, the Company shall not pay or declare any dividend, whether in cash or property, or make any other distribution on the Common Stock, or purchase, redeem or otherwise acquire for value any shares of Common Stock until all dividends as set forth in Section 1(b) above on the Series A Preferred shall have been paid or declared and set apart, except for:

(i) acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares at cost (or the lesser of cost or fair market value) upon termination of services to the Company; or

(ii) acquisitions of Common Stock in exercise of the Company's right of first refusal to repurchase such shares.

(f) After payment of any such dividends required by Section 1(a) and Section 1(b) above, additional dividends or distributions, if any, shall be distributed ratably to all holders of Common Stock and Preferred Stock on an as-if-converted to Common Stock basis.

(g) The provisions of Sections 1(d), 1(e) and 1(f) shall not apply to a dividend payable in Common Stock, or any repurchase of any outstanding securities of the Company that is approved by (i) the Board, (ii) the holders of at least sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the Series B Preferred then outstanding and (iii) the holders of at least sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the Series A Preferred then outstanding, which approval in clauses (ii) and (iii) may be evidenced by the written or oral approval of the persons serving as the representatives of the Series B Preferred and the Series A Preferred, respectively, on the Company's Board of Directors (together, the "*Preferred Designees*").

2. VOTING RIGHTS.

(a) **General Rights.** Each holder of shares of Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Preferred Stock could be converted (pursuant to Section 4 hereof) immediately after the close of business on the record date fixed for such meeting or the effective date of such written consent and shall have voting rights and powers equal to the voting rights and powers of the Common Stock and shall be entitled to notice of any stockholders' meeting in accordance with the bylaws of the Company. Except as otherwise provided herein or as required by law, the Preferred Stock shall vote together with the Common Stock at any annual or special meeting of the stockholders and not as a separate class, and may act by written consent in the same manner as the Common Stock.

(b) Separate Vote of Preferred Stock. For so long as any shares of Preferred Stock remain outstanding, in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least fifty-five percent (55%) of the outstanding Preferred Stock (voting on an as-if-converted basis) shall be necessary for effecting or validating (whether by amendment, merger, consolidation or otherwise) the following actions:

(i) Amend, alter, repeal or change of any provision of the Bylaws or Certificate of Incorporation of the Company (including any filing of a Certificate of Designation);

(ii) Any increase or decrease in the authorized number of shares of Preferred Stock;

(iii) Any redemption, repurchase, payment of dividends or other distributions with respect to Common Stock (except for acquisitions of Common Stock by the Company permitted by Section 1 hereof);

(iv) Any agreement by the Company or its stockholders regarding an Asset Transfer or Acquisition (each as defined in Section 4(b));

(v) Any action that results in the payment or declaration of a dividend on any shares of Common Stock or Preferred Stock;

(vi) Any voluntary dissolution or liquidation of the Company;

(vii) Any action that creates a subsidiary of the Company or that results in the issuance of any equity securities by a subsidiary of the Company to any third party; or

(viii) Any increase or decrease in the authorized number of members of the Company's Board.

(c) Separate Vote of Series B Preferred. For so long as any shares of Series B Preferred remain outstanding, in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the outstanding Series B Preferred shall be necessary for effecting or validating (whether by amendment, merger, consolidation or otherwise) the following actions:

(i) Any amendment alteration or repeal of, or change to, the voting or other powers, preferences, or other special rights, privileges or restrictions of the Series B Preferred; or

(ii) Any authorization, designation or creation of, or act that obligates the Company to issue, any new class or series of stock or any other securities convertible into equity securities of the Company ranking on a parity with or senior to the Series B Preferred.

(d) Separate Vote of Series A Preferred. For so long as any shares of Series A Preferred remain outstanding, in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the outstanding Series A Preferred shall be necessary for effecting or validating (whether by amendment, merger, consolidation or otherwise) the following actions:

(i) Any amendment, alteration or repeal of, or change to, the voting or other powers, preferences, or other special rights, privileges or restrictions of the Series A Preferred; or

(ii) Any authorization, designation or creation of, or act that obligates the Company to issue, any new class or series of stock or any other securities convertible into equity securities of the Company ranking on a parity with or senior to the Series A Preferred.

(e) Election of Board of Directors.

(i) Number of Directors. The authorized number of directors shall be set at seven (7) and shall not be increased or decreased without the vote or written consent of the holders of at least sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the outstanding Series B Preferred.

(ii) Series B Preferred Director. For so long as at least One Million Five Hundred Fifty-Six Thousand Eight Hundred Twenty-Four (1,556,824) shares of Series B Preferred remain outstanding (subject to adjustment for any stock split, reverse stock split or similar event affecting the Series B Preferred after the filing date hereof), the holders of Series B Preferred, voting as a separate class, shall be entitled to elect one (1) member of the Board at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and no one other than the holders of Series B Preferred, voting as a separate class, shall be entitled to remove from office such director or to fill any vacancy caused by the resignation, death or removal of such director.

(iii) Series A Preferred Directors. For so long as at least One Million Five Hundred Fifty-Six Thousand Eight Hundred Seventy-Five (1,556,875) shares of Series A Preferred remain outstanding (subject to adjustment for any stock split, reverse stock split or similar event affecting the Series A Preferred after the filing date hereof), the holders of Series A Preferred, voting as a separate class, shall be entitled to elect two (2) members of the Board at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and no one other than the holders of Series A Preferred, voting as a separate class, shall be entitled to remove from office such directors or to fill any vacancy caused by the resignation, death or removal of such directors.

(iv) Common Stock Directors. The holders of Common Stock, voting as a separate class, shall be entitled to elect two (2) members of the Board at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and no one other than the holders of Common Stock, voting as a separate class, shall be entitled to

remove from office such directors or to fill any vacancy caused by the resignation, death or removal of such directors; and

(v) Other Directors. The holders of a majority of Common Stock and Preferred Stock, voting together as a single class on an as-if-converted basis, shall be entitled to elect any remaining members of the Board at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and no one other than such holders shall be entitled to remove from office such directors or to fill any vacancy caused by the resignation, death or removal of such directors.

3. LIQUIDATION RIGHTS.

(a) **Series B Preferred Liquidation Preference.** Upon any liquidation, dissolution, or winding up of the Company, whether voluntary or involuntary (a "**Liquidation Event**"), before any distribution or payment shall be made to the holders of any Series A Preferred or Common Stock, the holders of Series B Preferred shall be entitled to be paid out of the assets of the Company or the consideration received in such transaction, legally available for distribution, for each share of Series B Preferred held by them, an amount per share of Series B Preferred equal to the Original Series B Issue Price (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof) plus all declared and unpaid dividends, if any, on the Series B Preferred. If, upon any such Liquidation Event, the assets of the Company (or the consideration received in such transaction) shall be insufficient to make payment in full to all holders of Series B Preferred of the liquidation preference set forth in this Section 3(a), then such assets (or consideration), legally available for distribution, shall be distributed among the holders of Series B Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled pursuant to this Section 3(a).

(b) **Series A Preferred Liquidation Preference.** Upon any Liquidation Event, after payment has been made to the holders of Series B Preferred of the full amounts to which such holders are entitled, as set forth above, and before any distribution or payment shall be made to the holders of any Common Stock, the holders of Series A Preferred shall be entitled to be paid out of the remaining assets of the Company or the remaining consideration received in such transaction, legally available for distribution, for each share of Series A Preferred held by them, an amount per share of Series A Preferred equal to the Original Series A Issue Price (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares after the filing date hereof) plus all declared and unpaid dividends, if any, on the Series A Preferred. If, upon any such Liquidation Event, such assets of the Company (or such consideration received in such transaction) shall be insufficient to make payment in full to all holders of Series A Preferred of the liquidation preference set forth in this Section 3(b), then such assets (or consideration), legally available for distribution, shall be distributed among the holders of Series A Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled pursuant to this Section 3(b).

(c) **Participation.** After the payment of the full liquidation preference of the Series B Preferred and Series A Preferred as set forth in Section 3(a) and Section 3(b) above, the remaining assets of the Company (or the remaining consideration received in such transaction) legally available for distribution in such Liquidation Event, if any, shall be distributed ratably to the holders of the Common Stock and Preferred Stock on an as-if-converted to Common Stock basis.

4. ASSET TRANSFER OR ACQUISITION RIGHTS.

(a) In the event that the Company is a party to an Acquisition or Asset Transfer (as hereinafter defined), then each holder of Preferred Stock shall be entitled to receive, for each share of Preferred Stock then held, out of the proceeds of such Acquisition or Asset Transfer, the amount of cash, securities or other property to which such holder would be entitled to receive in a Liquidation Event pursuant to Section 3 above.

(b) For the purposes of this Section 4: (i) "**Acquisition**" shall mean (A) any consolidation or merger of the Company with or into any other corporation or other entity or person, or any other corporate reorganization, in which the stockholders of the Company immediately prior to such consolidation, merger or reorganization, own less than 50% of the voting power of the surviving entity immediately after such consolidation, merger or reorganization; or (B) any transaction or series of related transactions to which the Company is a party in which in excess of fifty percent (50%) of the Company's voting power is transferred; *provided* that an Acquisition shall not include (x) any consolidation or merger effected exclusively to change the domicile of the Company, or (y) any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by the Company or any successor or indebtedness of the Company is cancelled or converted or a combination thereof; and (ii) "**Asset Transfer**" shall mean a sale, lease or other disposition of all or substantially all of the assets of the Company, including a sale or exclusive license of all or substantially all of the Company's intellectual property.

(c) In any Acquisition or Asset Transfer, (i) if the consideration to be received is securities of a corporation or other property other than cash, its value will be deemed its fair market value as determined in good faith by the Board on the date such determination is made and (ii) any payments or proceeds that could be made or distributed following the closing of any Acquisition or Asset Transfer as the result of termination or expiration of an escrow or operation of an earn-out or similar arrangement or termination of dissenter's or appraisal rights, shall be allocated and distributed in accordance with this Section 4 upon such termination, expiration or achievement, as the case may be.

5. CONVERSION RIGHTS.

The holders of the Preferred Stock shall have the following rights with respect to the conversion of the Preferred Stock into shares of Common Stock (the "**Conversion Rights**");

(a) **Optional Conversion.** Subject to and in compliance with the provisions of this Section 5, any shares of Preferred Stock may, at the option of the holder, be converted at any time into fully-paid and nonassessable shares of Common Stock. The number of shares of Common Stock to which a holder of Preferred Stock shall be entitled upon conversion shall be the product obtained by multiplying the Conversion Rate then in effect for such series of Preferred Stock (determined as provided in Section 5(b) and Section 5(d)) by the number of shares of Preferred Stock being converted.

(b) **Series A Preferred Conversion Rate.** The conversion rate in effect at any time for conversion of the Series A Preferred (the "**Series A Preferred Conversion Rate**") shall be the quotient obtained by dividing the Original Series A Issue Price by the "Series A Preferred Conversion Price," calculated as provided in Section 5(c).

(c) **Series A Preferred Conversion Price.** The conversion price for the Series A Preferred shall initially be the Original Series A Issue Price (the "**Series A Preferred Conversion Price**"). Such initial Series A Preferred Conversion Price shall be adjusted from time to time in accordance with this Section 5. All references to the Series A Preferred Conversion Price herein shall mean the Series A Preferred Conversion Price as so adjusted.

(d) **Series B Preferred Conversion Rate.** The conversion rate in effect at any time for conversion of the Series B Preferred (the "**Series B Preferred Conversion Rate**") shall be the quotient obtained by dividing the Original Series B Issue Price by the "Series B Preferred Conversion Price," calculated as provided in Section 5(e).

(e) **Series B Preferred Conversion Price.** The conversion price for the Series B Preferred shall initially be the Original Series B Issue Price (the "**Series B Preferred Conversion Price**"). Such initial Series B Preferred Conversion Price shall be adjusted from time to time in accordance with this Section 5. All references to the Series B Preferred Conversion Price herein shall mean the Series B Preferred Conversion Price as so adjusted.

(f) **Mechanics of Conversion.** Each holder of Preferred Stock who desires to convert the same into shares of Common Stock pursuant to this Section 5 shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or any transfer agent for the Preferred Stock, and shall give written notice to the Company at such office that such holder elects to convert the same. Such notice shall state the number of shares of Preferred Stock being converted. Thereupon, the Company shall promptly 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 is entitled and shall promptly pay (i) in cash or, to the extent sufficient funds are not then legally available therefor, in Common Stock (at the Common Stock's fair market value determined by the Board as of the date of such conversion), any declared and unpaid dividends on the shares of Preferred Stock being converted and (ii) in cash (at the Common Stock's fair market value determined by the Board as of the date of conversion) the value of any fractional share of Common Stock otherwise issuable to any holder of Preferred Stock. Such conversion shall be deemed to have been made at the close of business on the date of such surrender of the certificates representing the shares of Preferred Stock to be converted, and the person entitled to receive the shares of Common Stock issuable upon such conversion

shall be treated for all purposes as the record holder of such shares of Common Stock on such date. If the conversion is in connection with an underwritten offering of securities registered pursuant to the Securities Act of 1933, as amended, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the persons entitled to receive the Common Stock upon conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities.

(g) Adjustment for Stock Splits and Combinations. If at any time or from time to time after the date that the first share of Series B Preferred is issued (the "**Original Issue Date**") the Company effects a subdivision of the outstanding Common Stock without a corresponding subdivision of the Preferred Stock, the Series A Preferred Conversion Price and the Series B Preferred Conversion Price in effect immediately before that subdivision shall be proportionately decreased. Conversely, if at any time or from time to time after the Original Issue Date the Company combines the outstanding shares of Common Stock into a smaller number of shares without a corresponding combination of the Preferred Stock, the Series A Preferred Conversion Price and the Series B Preferred Conversion Price in effect immediately before the combination shall be proportionately increased. Any adjustment under this Section 5(g) shall become effective at the close of business on the date the subdivision or combination becomes effective.

(h) Adjustment for Common Stock Dividends and Distributions. If at any time or from time to time after the Original Issue Date the Company pays to holders of Common Stock a dividend or other distribution in additional shares of Common Stock or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock without a corresponding dividend or other distribution to holders of Preferred Stock pursuant to Section 1(f), the Series A Conversion Price and the Series B Conversion Price that are then in effect shall be decreased as of the time of such issuance, as provided below:

(i) The Series A Preferred Conversion Price and the Series B Preferred Conversion Price shall be adjusted by multiplying each of them by a fraction equal to:

(A) the numerator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance, and

(B) the denominator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance plus the number of shares of Common Stock issuable in payment of such dividend or distribution;

(ii) If the Company fixes a record date to determine which holders of Common Stock are entitled to receive such dividend or other distribution, the Series A Preferred Conversion Price and the Series B Preferred Conversion Price shall be fixed as of the

close of business on such record date and the number of shares of Common Stock shall be calculated immediately prior to the close of business on such record date; and

(iii) If such record date is fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series A Preferred Conversion Price and the Series B Preferred Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series A Preferred Conversion Price and the Series B Preferred Conversion Price shall be adjusted pursuant to this Section 5(h) to reflect the actual payment of such dividend or distribution.

(i) **Adjustment for Reclassification, Exchange, Substitution, Reorganization, Merger or Consolidation.** If at any time or from time to time after the Original Issue Date, the Common Stock issuable upon the conversion of the Preferred Stock is changed into the same or a different number of shares of any class or classes of stock, whether by recapitalization, reclassification, merger, consolidation or otherwise (other than an Acquisition or Asset Transfer as defined in Section 4 or a subdivision or combination of shares or stock dividend or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 5), in any such event each holder of Preferred Stock shall then have the right to convert such stock into the kind and amount of stock and other securities and property receivable upon such recapitalization, reclassification, merger, consolidation or other change by holders of the maximum number of shares of Common Stock into which such shares of Preferred Stock could have been converted immediately prior to such recapitalization, reclassification, merger, consolidation or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof. 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 Preferred Stock after the capital reorganization to the end that the provisions of this Section 5 (including adjustment of the Series A Preferred Conversion Price and the Series B Preferred Conversion Price, as applicable, then in effect and the number of shares issuable upon conversion of the Preferred Stock) shall be applicable after that event and be as nearly equivalent as practicable.

(j) **Adjustment Upon Issuance of Additional Shares of Common Stock.**

(i) If at any time or from time to time after the Original Issue Date, the Company issues or sells, or is deemed by the express provisions of this Section 5(j) to have issued or sold, Additional Shares of Common Stock (as defined below), other than as provided in Sections 1, 5(h) or 5(i) above, for an Effective Price (as defined below) less than the then effective Series A Preferred Conversion Price and/or Series B Preferred Conversion Price, as applicable (a "**Qualifying Dilutive Issuance**"), then and in each such case, the Series A Preferred Conversion Price or the Series B Preferred Conversion Price, as applicable, shall be reduced, as of the opening of business on the date of such issue or sale, to a price determined by multiplying the Series A Preferred Conversion Price or the Series B Preferred Conversion Price, as applicable, in effect immediately prior to such issuance or sale by a fraction equal to:

(A) the numerator of which shall be (A) the number of shares of Common Stock deemed outstanding (as determined below) immediately prior to such issue or sale, plus (B) the number of shares of Common Stock which the Aggregate Consideration (as defined below) received by the Company for the total number of Additional Shares of Common Stock so issued would purchase at such then-existing Series A Preferred Conversion Price or Series B Preferred Conversion Price, as applicable, and

(B) the denominator of which shall be the number of shares of Common Stock deemed outstanding (as determined below) immediately prior to such issue or sale plus the total number of Additional Shares of Common Stock so issued.

For the purposes of the preceding sentence, the number of shares of Common Stock deemed to be outstanding as of a given date shall be the sum of (A) the number of shares of Common Stock outstanding, (B) the number of shares of Common Stock into which the then outstanding shares of Preferred Stock could be converted if fully converted immediately prior to the issuance or sale of Additional Shares of Common Stock, and (C) the number of shares of Common Stock which could be obtained through the exercise or conversion of all other rights, options and convertible securities outstanding immediately prior to the issuance or sale of Additional Shares of Common Stock.

(ii) No adjustment shall be made to the Series A Preferred Conversion Price or Series B Preferred Conversion Price in an amount less than one cent per share. Any adjustment otherwise required by this Section 5(j) that is not required to be made due to the preceding sentence shall be included in any subsequent adjustment to the Series A Preferred Conversion Price or Series B Preferred Conversion Price, as applicable.

(iii) For the purpose of making any adjustment required under this Section 5(j), the aggregate consideration received by the Company for any issue or sale of securities (the "*Aggregate Consideration*") shall be defined as: (A) to the extent the consideration consists of cash, it shall be the net amount of cash received by the Company after deduction of any underwriting or similar commissions, compensation or concessions paid or allowed by the Company in connection with such issue or sale but without deduction of any expenses payable by the Company, (B) to the extent the consideration consists of property other than cash, it shall be the fair value of that property as determined in good faith by the Board, and (C) if Additional Shares of Common Stock, Convertible Securities (as defined below) or rights or options to purchase either Additional Shares of Common Stock or Convertible Securities are issued or sold together with other stock or securities or other assets of the Company for a consideration which covers both, the consideration shall be the portion of the consideration so received that may be reasonably determined in good faith by the Board to be allocable to such Additional Shares of Common Stock, Convertible Securities or rights or options.

(iv) For the purpose of the adjustment required under this Section 5(j), if the Company issues or sells (x) Preferred Stock or other stock, options, warrants, purchase rights or other securities convertible into or exercisable for, Additional Shares of Common Stock (such convertible stock or securities being herein referred to as "*Convertible Securities*") or (y) rights or options for the purchase of Additional Shares of Common Stock or

Convertible Securities and if the Effective Price of such Additional Shares of Common Stock is less than the Series A Preferred Conversion Price or the Series B Preferred Conversion Price, as applicable, in each case the Company shall be deemed to have issued at the time of the issuance of such rights or options or Convertible Securities the maximum number of Additional Shares of Common Stock issuable upon exercise or conversion thereof and to have received as consideration for the issuance of such shares an amount equal to the total amount of the consideration, if any, received by the Company for the issuance of such rights or options or Convertible Securities plus:

(A) in the case of such rights or options, the minimum amounts of consideration, if any, payable to the Company upon the exercise of such rights or options; and

(B) in the case of Convertible Securities, the minimum amounts of consideration, if any, payable to the Company upon the conversion thereof (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities); *provided* that if the minimum amounts of such consideration cannot be ascertained, but are a function of antidilution or similar protective clauses, the Company shall be deemed to have received the minimum amounts of consideration without reference to such clauses.

(C) If the minimum amount of consideration payable to the Company upon the exercise or conversion of rights, options or Convertible Securities is reduced over time or on the occurrence or non-occurrence of specified events other than by reason of antidilution adjustments, the Effective Price shall be recalculated using the figure to which such minimum amount of consideration is reduced; *provided further*, that if the minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities is subsequently increased, the Effective Price shall be again recalculated using the increased minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities.

(D) In the event of any change in the number of Additional Shares of Common Stock deliverable or in the consideration payable to the Company upon exercise of such rights, options or Convertible Securities, the Series A Conversion Price and the Series B Conversion Price, to the extent in any way affected by or computed using such options, rights or Convertible Securities, shall be recomputed to reflect such change, but no further adjustment of the Series A Preferred Conversion Price or the Series B Preferred Conversion Price, as adjusted upon the issuance of such rights, options or Convertible Securities, shall be made as a result of the actual issuance of Additional Shares of Common Stock or the exercise of any such rights or options or the conversion of any such Convertible Securities. If any such rights or options or the conversion privilege represented by any such Convertible Securities shall expire, lapse, terminate or be cancelled without having been exercised, the Series A Preferred Conversion Price and the Series B Preferred Conversion Price, as applicable, as adjusted, upon the issuance of such rights, options or Convertible Securities shall be readjusted to the Series A Preferred Conversion Price and the Series B Preferred Conversion Price, as applicable, which would have been in effect had an adjustment been made on the basis that the only Additional Shares of Common Stock so issued were the Additional Shares of Common

Stock, if any, actually issued or sold on the exercise of such rights or options or rights of conversion of such Convertible Securities, and such Additional Shares of Common Stock, if any, were issued or sold for the consideration actually received by the Company upon such exercise, plus the consideration, if any, actually received by the Company for the granting of all such rights or options, whether or not exercised, plus the consideration received for issuing or selling the Convertible Securities actually converted, plus the consideration, if any, actually received by the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) on the conversion of such Convertible Securities, *provided* that such readjustment shall not apply to prior conversions of Preferred Stock.

(v) For the purpose of making any adjustment to the Series A Preferred Conversion Price and the Series B Preferred Conversion Price required under this Section 5(j), "*Additional Shares of Common Stock*" shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 5(j) (including shares of Common Stock subsequently reacquired or retired by the Company), other than:

(A) shares of Common Stock issued upon conversion of the Preferred Stock;

(B) shares of Common Stock or Convertible Securities issued after the Original Issue Date to employees, officers or directors of, or consultants or advisors to the Company or any subsidiary pursuant to stock purchase or stock option plans or other arrangements that are approved by the Board (including the approval of the Preferred Designees then in office);

(C) shares of Common Stock issued pursuant to the exercise of Convertible Securities outstanding as of the Original Issue Date;

(D) shares of Common Stock or Convertible Securities issued for consideration other than cash pursuant to a merger, consolidation, acquisition, strategic alliance or similar business combination approved by (i) the Board and (ii) Preferred Stock, which approval may be evidenced by the approval of the Preferred Designees then in office;

(E) shares of Common Stock or Convertible Securities issued pursuant to any equipment loan or leasing arrangement, real property leasing arrangement or debt financing from a bank or similar financial institution approved by (i) the Board; and (ii) the Preferred Stock, which approval may be evidenced by the approval of the Preferred Designees then in office;

(F) any Common Stock or Convertible Securities issued in connection with strategic transactions involving the Company and other entities, including (i) joint ventures, manufacturing, marketing or distribution arrangements or (ii) technology transfer or development arrangements; *provided* that the issuance of shares therein has been approved (i) the Board; and (ii) the Preferred Stock, which approval may be evidenced by the approval of the Preferred Designees then in office; and

(G) shares of Common Stock issued or deemed issued pursuant to Section 5(j)(iv) as a result of a decrease in the Conversion Price of any series of Preferred Stock resulting from the operation of Section 5(j).

References to Common Stock in the subsections of this clause (v) above shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 5(j). The "**Effective Price**" of Additional Shares of Common Stock shall mean the quotient determined by dividing the total number of Additional Shares of Common Stock issued or sold, or deemed to have been issued or sold by the Company under this Section 5(j), into the Aggregate Consideration received, or deemed to have been received by the Company for such issue under this Section 5(j), for such Additional Shares of Common Stock.

(vi) After the first occasion when the Company issues or sells, or is deemed to have issued or sold, Additional Shares of Common Stock in a Qualifying Dilutive Issuance (the "**First Dilutive Issuance**"), then when the Company subsequently issues or sells, or is deemed to have issued or sold, Additional Shares of Common Stock in a Qualifying Dilutive Issuance other than the First Dilutive Issuance but in the same transaction pursuant to the same instruments as the First Dilutive Issuance (a "**Subsequent Dilutive Issuance**"), then, in each such case upon a Subsequent Dilutive Issuance, the Series A Preferred Conversion Price or the Series B Preferred Conversion Price, as applicable, shall be reduced to the Series A Preferred Conversion Price or the Series B Preferred Conversion Price, as applicable, that would have been in effect had the First Dilutive Issuance and each Subsequent Dilutive Issuance all occurred on the closing date of the First Dilutive Issuance, *provided* that such readjustment shall not apply to prior conversions of Preferred Stock.

(k) **Certificate of Adjustment.** In each case of an adjustment or readjustment of the Series A Preferred Conversion Price or the Series B Preferred Conversion Price, as applicable, if the Preferred Stock is then convertible pursuant to this Section 5, the Company, at its expense, shall compute such adjustment or readjustment in accordance with the provisions hereof and prepare a certificate showing such adjustment or readjustment, and shall mail such certificate, by first class mail, postage prepaid, to each registered holder of shares of Preferred Stock at the holder's address as shown in the Company's books. The certificate shall set forth such adjustment or readjustment, showing in detail the facts upon which such adjustment or readjustment is based, including a statement of (i) the Aggregate Consideration received or deemed to be received by the Company for any Additional Shares of Common Stock issued or sold or deemed to have been issued or sold, (ii) the Series A Preferred Conversion Price and the Series B Preferred Conversion Price at the time in effect, (iii) the number of Additional Shares of Common Stock issued or sold or deemed issued or sold and (iv) the type and amount, if any, of other property which at the time would be received upon conversion of the Preferred Stock.

(l) **Notices of Record Date.** Upon (i) any taking by the Company of a record date 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 (ii) any Acquisition (as defined in Section 4) or other capital reorganization of the Company, any reclassification or recapitalization of the capital stock of the Company, any merger or consolidation of the Company

with or into any other corporation, or any Asset Transfer (as defined in Section 4), or any voluntary or involuntary dissolution, liquidation or winding up of the Company, the Company shall mail to each holder of Preferred Stock at least ten (10) days prior to the record date specified therein (or such shorter period approved by the holders of at least sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the outstanding Preferred Stock) a notice specifying (A) the date on which any such record is to be taken for the purpose of such dividend or distribution and a description of such dividend or distribution, (B) the date on which any such Acquisition, reorganization, reclassification, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up is expected to become effective, and (C) the date, if any, that is to be fixed as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up.

(m) Automatic Conversion.

(i) Each share of Series A Preferred and Series B Preferred shall automatically be converted into shares of Common Stock, based on the then-effective Series A Preferred Conversion Price and the Series B Preferred Conversion Price, as applicable, (A) in the case of the Series A Preferred, any time upon the affirmative election of the holders of at least sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the outstanding shares of the Series A Preferred, (B) in the case of the Series B Preferred, any time upon the affirmative election of the holders of at least sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the outstanding shares of the Series B Preferred, or (C) in the case of the Preferred Stock, immediately upon the closing of a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Company in which the net cash proceeds to the Company (after underwriting discounts, commissions and fees) are at least \$60,000,000 (a "*Qualified IPO*"). Upon such automatic conversion, any declared and unpaid dividends shall be paid in accordance with the provisions of Section 5(f).

(ii) Upon the occurrence of any of the events specified in Section 5(m)(i) above, the outstanding shares of Series A Preferred, Series B Preferred and/or the Preferred Stock, as applicable, shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Company or its transfer agent; *provided, however*, that (A) if the conversion is in connection with Section 5(m)(i)(C) above, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the persons entitled to receive the Common Stock upon conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities, (B) if the conversion is in connection with Sections 5(m)(i)(A) or (B) above, such conversion shall be deemed to have been made on the conversion date described in the stockholder consent approving such conversion, and the persons entitled to receive shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holders of such shares of Common Stock as of such date, and (C) the Company shall not be obligated to issue certificates

evidencing the shares of Common Stock issuable upon such conversion unless the certificates evidencing such shares of Preferred Stock are either delivered to the Company or its transfer agent as provided below, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. Upon the occurrence of such automatic conversion of the Preferred Stock, the holders of Preferred Stock shall surrender the certificates representing such shares at the office of the Company or any transfer agent for the Preferred Stock. Thereupon, there shall be issued and delivered to such holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common Stock into which the shares of Preferred Stock surrendered were convertible on the date on which such automatic conversion occurred, and any declared and unpaid dividends shall be paid in accordance with the provisions of Section 5(f).

(n) Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of any share or shares of Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Company shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Common Stock's fair market value (as determined by the Board) on the date of conversion.

(o) Reservation of Stock Issuable Upon Conversion. The Company shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Preferred Stock. 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 Preferred Stock, the Company will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

(p) Notices. Any notice required by the provisions of this Section 5 shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified, (ii) when sent by confirmed electronic mail or facsimile if sent during normal business hours of the recipient; if not, then on the next business day, (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (iv) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with verification of receipt, in each case with all postage and fees prepaid. All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Company or at such other address as the holder of record may designate by ten (10) days advance written notice to the Company.

(q) Payment of Taxes. The Company will pay all taxes (other than taxes based upon income) and other governmental charges that may be imposed with respect to

the issue or delivery of shares of Common Stock upon conversion of shares of Preferred Stock, excluding any tax or other charge imposed in connection with any transfer involved in the issue and delivery of shares of Common Stock in a name other than that in which the shares of Preferred Stock so converted were registered.

6. NO REISSUANCE OF PREFERRED STOCK.

No shares or shares of Preferred Stock acquired by the Company by reason of redemption, purchase, conversion or otherwise shall be reissued.

V.

A. The liability of the directors of the Company for monetary damages shall be eliminated to the fullest extent under applicable law. To the fullest extent permitted by applicable law, the Company is authorized to provide indemnification of (and advancement of expenses to) agents of the Company (and any other persons to whom General Corporation Law permits this corporation to provide indemnification) through Bylaw provisions, written agreements with such agents or other persons, vote of stockholders or disinterested directors or otherwise, in excess of the indemnification and advancement otherwise permitted by Section 145 of the General Corporation Law (statutory or non-statutory), with respect to actions for breach of duty to the Company, its stockholders, and others.

B. Any repeal or modification of this Article V shall only be prospective and shall not affect the rights under this Article V in effect at the time of the alleged occurrence of any action or omission to act giving rise to liability.

VI.

For the management of the business and for the conduct of the affairs of the Company, and in further definition, limitation and regulation of the powers of the Company, of its directors and of its stockholders or any class thereof, as the case may be, it is further *provided* that:

A. The management of the business and the conduct of the affairs of the Company shall be vested in its Board. The number of directors which shall constitute the whole Board shall be fixed by the Board in the manner provided in the Bylaws, subject to any restrictions which may be set forth in this Restated Certificate.

B. Except as otherwise provided herein, the Board of Directors is expressly empowered to adopt, amend or repeal the Bylaws of the Company. The stockholders shall also have the power to adopt, amend or repeal the Bylaws of the Company; *provided, however*, that, in addition to any vote of the holders of any class or series of stock of the Company required by law or by this Certificate of Incorporation, the affirmative vote of the holders of at least a majority of the voting power of all of the then-outstanding shares of the capital stock of the Company entitled to vote generally in the election of directors, voting together as a single class, shall be required to adopt, amend or repeal any provision of the Bylaws of the Company.

C. The directors of the Company need not be elected by written ballot unless the Bylaws so provide.

D. In connection with repurchases by the Company of its Common Stock from employees, officers, directors, advisors, consultants or other persons performing services for the Company or any subsidiary pursuant to agreements under which the Company has the option to repurchase such shares upon the occurrence of certain events, such as termination of employment, Sections 502 and 503 of the California Corporations Code shall not apply in all or in part with respect to such repurchases.

* * * *

FOUR: This Second Amended and Restated Certificate of Incorporation has been duly approved by the Board of the Company.

FIVE: This Second Amended and Restated Certificate of Incorporation was approved by the holders of the requisite number of shares of said corporation in accordance with Section 228 of the General Corporation Law. This Second Amended and Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of Sections 242 and 245 of the DGCL by the stockholders of the Company.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, FactoryWare Inc. has caused this Second Amended and Restated Certificate of Incorporation to be signed by its Chief Executive Officer this 15th day of December, 2004.

FACTORYWARE INC.

Signature: /s/ John Oskin
John Oskin
Chief Executive Officer