

06-07-1999



SHEET

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MRD 6-1-99

TO: The Commissioner of Patents and Trademarks: Please record the attached original document(s) or copy(ies).

**SUBMISSION TYPE**

- New
- Resubmission (Non-Recordation)  
Document ID#
- Correction of PTO Error  
Reel #  Frame#
- Corrective Document  
Reel #  Frame#

**CONVEYANCE TYPE**

- Assignment
- License
- Security Agreement
- Nunc Pro Tunc Assignment
- Merger  
Effective Date  
Month Day Year
- Change of Name
- Other

**CONVEYING PARTY**

Mark if additional names of conveying parties attached

Name

Execution Date  
Month Day Year

Formerly

- Individual
- General Partnership
- Limited Partnership
- Corporation
- Association

Other

Citizenship/State of Incorporation/Organization

**RECEIVING PARTY**

Mark if additional names of conveying parties attached

Name

DBA/AKA/TA

Composed of

Address (line 1)

Address (line 2)

Address: (line 3)     
City State/Country Zip Code

- Individual
  - General Partnership
  - Limited Partnership
  - Corporation
  - Association
  - Other
- If document to be recorded is an assignment and the receiving party is not domiciled in the United States, an appointment of a domestic representative should be attached. (Designation must be a separate document from *Assignment*.)

Citizenship/State of Incorporation/Organization

06/05/1999 IS48AZZ 0900012: 500208 1/27/05

FOR OFFICE USE ONLY

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**DOMESTIC REPRESENTATIVE NAME AND ADDRESS** Enter for the first Receiving Party only.

Name

Address (line 1)

Address (line 2)

Address (line 3)

Address (line 4)

**CORRESPONDENT NAME AND ADDRESS** Area Code and Telephone Number

Name

Address (line 1)

Address (line 2)

Address (line 3)

Address (line 4)

**Pages** Enter the total number of pages of the attached conveyance document #

**TRADEMARK APPLICATION NUMBER(S) OR REGISTRATION NUMBER(S)**  Mark if additional numbers attached  
*Enter either the Trademark Application Number or the Registration Number (DO NOT ENTER BOTH numbers for the same property).*

Trademark Application Number(s)

Registration Number(s)

**NUMBER OF PROPERTIES** Enter the total number of properties involved. #

**Fee Amount** Fee Amount for Properties Listed (37 C.F.R. § 3.41): \$

Method of Payment: Enclosed  Deposit Account

Deposit Account

(Enter for payment by deposit account or if additional fees can be charged to the account.)

Deposit Account Number:

#

Authorization to charge additional fees:

Yes  No

**STATEMENT AND SIGNATURE**

*To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document. Charges to deposit account are authorized, as indicated herein.*

John T. Mockler, State Bar No. TX 00789495  
Name of Person Signing

  
Signature

28 May 1999  
Date Signed

State of Delaware  
Office of the Secretary of State PAGE 1

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I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AGREEMENT OF MERGER, WHICH MERGES:  
"RF MONOLITHICS, INC.", A TEXAS CORPORATION,  
WITH AND INTO "RF MONOLITHICS MERGER, INC." UNDER THE NAME OF "RF MONOLITHICS, INC.", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE EIGHTH DAY OF JUNE, A.D. 1994, AT 4 O'CLOCK P.M.



A handwritten signature in cursive script, reading "Edward J. Freel".

Edward J. Freel, Secretary of State

2396198 8100M

991213053

AUTHENTICATION:

9772067

DATE:

05-27-99

TRADEMARK  
REEL: 001907 FRAME: 0623

## AGREEMENT AND PLAN OF MERGER

THIS AGREEMENT AND PLAN OF MERGER (the "Merger Agreement") is made as of May 2, 1994, by and between RF MONOLITHICS, INC., a Texas corporation ("RFM Texas"), and RF MONOLITHICS MERGER, INC., a Delaware corporation ("RFM Delaware"; RFM Texas and RFM Delaware, collectively, the "Constituent Corporations").

The authorized capital stock of RFM Texas consists of 34,178,566 shares of Common Stock, par value Five Cents (\$0.05) per share, and 26,811,199 shares of Preferred Stock, par value Five Cents (\$0.05) per share, of which (i) 2,287,527 shares are designated "Series A Preferred Stock," (ii) 1,923,672 shares are designated "Series B Preferred Stock," (iii) 3,205,231 shares are designated "Series C Preferred Stock," and (iv) 8,304,432 shares are designated "Series D Preferred Stock." The authorized capital stock of RFM Delaware consists of 34,178,566 shares of Common Stock, par value one-tenth of One Cent (\$0.001) per share and 26,811,199 shares of Preferred Stock, par value one-tenth of One Cent (\$0.001) per share. The authorized capital stock of RFM Delaware, upon effectuation of the transactions set forth in this Merger Agreement, is set forth on Exhibit I hereto.

The directors of the Constituent Corporations deem it advisable and to the advantage of the Constituent Corporations that RFM Texas merge with and into RFM Delaware upon the terms and conditions provided herein.

NOW, THEREFORE, the parties do hereby adopt the plan of reorganization encompassed by this Merger Agreement and do hereby agree that RFM Texas shall merge into RFM Delaware on the following terms, conditions and other provisions:

### I. TERMS AND CONDITIONS

1.1 **Merger.** RFM Texas shall be merged with and into RFM Delaware (the "Merger"), and RFM Delaware shall be the surviving corporation (the "Surviving Corporation") effective upon the issuance of a Certificate of Merger by the Secretary of State of the State of Texas and the filing of the Merger Agreement with the Secretary of State of the State of Delaware.

1.2 **Name Change.** On the Effective Date, the name of RFM Delaware shall be RF Monolithics, Inc.

1.3 **Succession.** On the Effective Date, RFM Delaware shall continue its corporate existence under the laws of the State of Delaware, and the separate existence and corporate organization of RFM Texas, except insofar as it may be continued by operation of law, shall be terminated and cease.

1.4 **Transfer of Assets and Liabilities.** On the Effective Date, the rights, privileges, powers and franchises, both of a public as well as of a private nature, of each of the Constituent Corporations shall be vested in and possessed by the Surviving Corporation, subject to all of the

disabilities, duties and restrictions of or upon each of the Constituent Corporations; and all and singular rights, privileges, powers and franchises of each of the Constituent Corporations, and all property, real, personal and mixed, of each of the Constituent Corporations, and all debts due to each of the Constituent Corporations on whatever account, and all things in action or belonging to each of the Constituent Corporations shall be transferred to and vested in the Surviving Corporation; and all property, rights, privileges, powers and franchises, and all and every other interest, thereafter shall be the property of the Surviving Corporation as they were of the Constituent Corporations, and the title to any real estate vested by deed or otherwise in either of the Constituent Corporations shall not revert or be in any way impaired by reason of the Merger; provided, however, that the liabilities of the Constituent Corporations and of their shareholders, directors and officers shall not be affected and all rights of creditors and all liens upon any property of either of the Constituent Corporations shall be preserved unimpaired, and any claim existing or action or proceeding pending by or against either of the Constituent Corporations may be prosecuted to judgment as if the Merger had not been consummated, except as they may be modified with the consent of such creditors, and all debts, liabilities and duties of or upon each of the Constituent Corporations shall attach to the Surviving Corporation, and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it.

**1.5 Common Stock of RFM Texas and RFM Delaware.** On the Effective Date, by virtue of the Merger and without any further action on the part of the Constituent Corporations or their respective shareholders, (i) each share of Common Stock of RFM Texas issued and outstanding immediately prior thereto shall be combined, changed and converted into one fully paid and nonassessable share of the Common Stock of RFM Delaware and (ii) each share of Common Stock of RFM Texas issued and outstanding immediately prior thereto shall be canceled and returned to the status of authorized but unissued shares.

**1.6 Preferred Stock of RFM Texas and RFM Delaware.** On the Effective Date, by virtue of the Merger and without any further action on the part of the Constituent Corporations or their respective shareholders, (i) each share of Series A Preferred Stock of RFM Texas issued and outstanding immediately prior thereto shall be combined, changed and converted into one fully paid and nonassessable share of Series A Preferred Stock of RFM Delaware, (ii) each share of Series B Preferred Stock of RFM Texas issued and outstanding immediately prior thereto shall be changed and converted into one fully paid and nonassessable share of Series B Preferred Stock of RFM Delaware, (iii) each share of Series C Preferred Stock of RFM Texas issued and outstanding immediately prior thereto shall be changed and converted into one fully paid and nonassessable share of Series C Preferred Stock of RFM Delaware, and (iv) each share of Series D Preferred Stock of RFM Texas issued and outstanding immediately prior thereto shall be changed and converted into one fully paid and nonassessable share of Series D Preferred Stock of RFM Delaware.

**1.7 Stock Certificates.** On and after the Effective Date, all of the outstanding certificates that, prior to that time, represented shares of Common Stock or Preferred Stock of RFM Texas shall be deemed for all purposes to evidence ownership of and to represent the shares of RFM Delaware into which the shares of RFM Texas represented by such certificates have been converted as herein provided and shall be so registered on the books and records of the Surviving Corporation or its transfer agents. The registered owner of any such outstanding

stock certificate shall, until such certificate shall have been surrendered for transfer or conversion or otherwise accounted for to the Surviving Corporation or its transfer agent, have and be entitled to exercise any voting and other rights with respect to and to receive any dividend and other distribution upon the shares of RFM Delaware evidenced by such outstanding certificate as above provided.

**1.8 Options.** On the Effective Date, the Surviving Corporation will assume and continue the 1982 Incentive Stock Option Plan and the 1986 Supplemental Stock Option Plan maintained by RFM Texas immediately prior to the Merger, and the outstanding and unexercised portions of all options to purchase Common Stock of RFM Texas, including without limitation all options outstanding under such stock option plans and any other outstanding options, shall be combined, changed, and converted into options to purchase Common Stock of RFM Delaware, such that an option to purchase one share of Common Stock of RFM Texas shall be converted into an option to purchase one share of Common Stock of RFM Delaware. No other changes in the terms and conditions of such options will occur. Effective on the Effective Date, RFM Delaware hereby assumes the outstanding and unexercised portions of such options and the obligations of RFM Texas with respect thereto.

**1.9 Employee Benefit Plans.** On the Effective Date, the Surviving Corporation shall assume all obligations of RFM Texas under any and all employee benefit plans in effect as of such date with respect to which employee rights or accrued benefits are outstanding as of such date; provided, however, that one share of Common Stock of RFM Delaware shall be substituted for each share of Common Stock of RFM Texas (if any) thereunder. On the Effective Date, the Surviving Corporation shall adopt and continue in effect all such employee benefit plans upon the same terms and conditions as were in effect immediately prior to the Merger and shall reserve that number of shares of RFM Delaware Common Stock with respect to each such employee benefit plan as is proportional to the number of shares of RFM Texas Common Stock (if any) so reserved on the Effective Date.

## **II. CHARTER DOCUMENTS, DIRECTORS AND OFFICERS**

**2.1 Certificate of Incorporation and Bylaws.** From and after the Effective Date, the certificate of incorporation of RFM Delaware shall be amended and shall read in its entirety as set forth in full in Exhibit 2 attached hereto and made a part hereof. The Bylaws of RFM Delaware in effect on the Effective Date shall continue to be the Bylaws of the Surviving Corporation without change or amendment until further amended in accordance with the provisions thereof and applicable law.

**2.2 Directors.** The directors of RFM Delaware immediately preceding the Effective Date shall become the directors of the Surviving Corporation on and after the Effective Date to serve until the expiration of their terms and until their successors are elected and qualified.

**2.3 Officers.** The officers of RFM Delaware immediately preceding the Effective Date shall become the officers of the Surviving Corporation on and after the Effective Date to serve at the pleasure of its Board of Directors.

### III. MISCELLANEOUS

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

**3.2 Amendment.** At any time before or after approval by the shareholders of RFM Texas, this Merger Agreement may be amended in any manner (except that, after the approval of the Merger Agreement by the shareholders of RFM Texas, the principal terms may not be amended without the further approval of the shareholders of RFM Texas) as may be determined in the judgment of the respective Board of Directors of RFM Delaware and RFM Texas to be necessary, desirable, or expedient in order to clarify the intention of the parties hereto or to effect or facilitate the purpose and intent of this Merger Agreement.

**3.3 Conditions to Merger.** The obligation of the Constituent Corporations to effect the transactions contemplated hereby is subject to satisfaction of the following conditions (any or all of which may be waived by either of the Constituent Corporations in its sole discretion to the extent permitted by law):

(a) the Merger shall have been approved by the shareholders of RFM Texas in accordance with applicable provisions of the General Corporation Law of the State of Texas; and

(b) RFM Texas, as sole stockholder of RFM Delaware, shall have approved the Merger in accordance with the General Corporation Law of the State of Delaware; and

(c) any and all consents, permits, authorizations, approvals, and orders deemed in the sole discretion of RFM Texas to be material to consummation of the Merger shall have been obtained.


**3.4 Abandonment or Deferral.** Notwithstanding the approval of this Merger Agreement by the shareholders of RFM Texas or RFM Delaware, at any time before the Effective Date, (a) this Merger Agreement may be terminated and the Merger may be abandoned by the Board of Directors of either RFM Texas or RFM Delaware or both, including by reason of a determination, in the sole discretion of either Board of Directors, that holders of an unacceptable number of shares intend to exercise their statutory appraisal rights pursuant to

Article 5.11 of the Texas Business Corporation Act, or (b) the consummation of the Merger may be deferred for a reasonable period of time if, in the opinion of the Boards of Directors of RFM Texas and RFM Delaware, such action would be in the best interests of such corporations. In the event of termination of this Merger Agreement, this Merger Agreement shall become void and of no effect and there shall be no liability on the part of either Constituent Corporation or their respective Board of Directors or shareholders with respect thereto, except that RFM Texas shall pay all expenses incurred in connection with the Merger or in respect of this Merger Agreement or relating thereto.


**3.5 Counterparts.** In order to facilitate the filing and recording of this Merger Agreement, the same may be executed in any number of counterparts, each of which shall be deemed to be an original.

IN WITNESS WHEREOF, this Merger Agreement, having first been duly approved by the Board of Directors of RF Monolithics, Inc. and RF Monolithics Merger, Inc., hereby is executed on behalf of each such corporations and attested by their respective officers thereunto duly authorized.

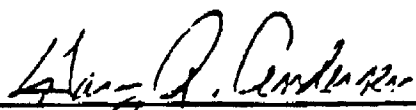
RF MONOLITHICS, INC.,  
A Texas Corporation

  
\_\_\_\_\_  
Gary A. Andersen  
President

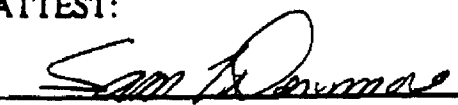
ATTEST:

  
\_\_\_\_\_  
Sam L. Densmore  
Secretary

RF MONOLITHICS MERGER, INC.  
A Delaware Corporation

  
\_\_\_\_\_  
Gary A. Andersen  
President

ATTEST:

  
\_\_\_\_\_  
Sam L. Densmore  
Secretary



RF MONOLITHICS MERGER, INC.

OFFICERS' CERTIFICATE OF APPROVAL OF MERGER

The undersigned, Gary A. Andersen and Sam L. Densmore do hereby certify that:

1. They are the President and Secretary, respectively, of RF Monolithics Merger, Inc., a Delaware corporation (the "Corporation").
2. The Agreement and Plan of Merger attached to this Certificate providing for the merger of RF Monolithics, Inc., a Texas corporation, with and into the Corporation was duly approved by the Board of Directors and by the stockholders of Corporation.
3. The Corporation has two authorized classes of shares, designated Common Stock and Preferred Stock. The Preferred Stock is designated in four series. The number of shares of Common Stock outstanding and entitled to vote upon the merger was One Hundred (100) shares of Common Stock. There are no shares of Preferred Stock outstanding.
4. The terms of the Agreement and Plan of Merger were approved by the Corporation by the vote of the number of shares of Common Stock of the Corporation that equaled or exceeded the vote required. The percentage vote required for such approval was more than fifty percent (50%).


IN WITNESS WHEREOF, the undersigned have executed this Certificate this 2nd day of May, 1994.

  
\_\_\_\_\_  
Gary A. Andersen, President

  
\_\_\_\_\_  
Sam L. Densmore, Secretary

Each of the undersigned declares under penalty of perjury that he has read the foregoing Certificate and knows the contents thereof and that the same is true of his own knowledge.

Executed at Dallas, Texas on May 2, 1994.

  
\_\_\_\_\_  
Gary A. Andersen, President

  
\_\_\_\_\_  
Sam L. Densmore, Secretary

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**Exhibit 1**

The authorized capital stock of RFM Delaware upon effectuation of the transactions set forth in the Merger Agreement will consist of 34,178,566 shares of Common Stock, \$0.001 par value per share, and 26,811,199 shares of Preferred Stock, \$0.001 par value per share, of which (i) 2,287,527 shares will be designated "Series A Preferred Stock," (ii) 1,923,672 shares will be designated "Series B Preferred Stock," (iii) 3,205,231 shares will be designated "Series C Preferred Stock," and (iv) 8,304,432 shares will be designated "Series D Preferred Stock."

**CERTIFICATE OF INCORPORATION**

**OF**

**RF MONOLITHICS, INC.**

The undersigned, a natural person (the "Sole Incorporator"), for the purpose of organizing a corporation to conduct the business and promote the purposes hereinafter stated, under the provisions and subject to the requirements of the laws of the State of Delaware hereby certifies that:

**I.**

The name of this corporation is RF Monolithics, Inc. (the "Corporation").

**II.**

The address of the registered office of the Corporation in the State of Delaware is 32 Loockerman Square, Suite L-100, City of Dover, County of Kent, and the name of the registered agent of the corporation in the State of Delaware at such address is The Prentice-Hall Corporation System, Inc.

**III.**

The purpose of this Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of the State of Delaware.

**IV.**

**A.** This Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares the Corporation is authorized to issue is Sixty Million Nine Hundred Eighty-Nine Thousand Seven Hundred Sixty-Five (60,989,765) shares, par value one-tenth of one cent (\$0.001) per share, of which (i) Thirty-Four Million One Hundred Seventy-Eight Thousand Five Hundred Sixty-Six (34,178,566) shares are Common Stock and (ii) Twenty-Six Million Eight Hundred Eleven Thousand One Hundred Ninety-Nine (26,811,199) shares are Preferred Stock.

**B.** The Preferred Stock may be issued from time to time in one or more series. The Board of Directors hereby is authorized, within the limitations and restrictions stated in this Certificate of Incorporation, to fix or alter the dividend rights, dividend rate, conversion rights, voting rights, rights and terms of redemption (including sinking fund provisions), the redemption price or prices, and the liquidation preferences of any wholly unissued series of Preferred Stock, and the number of shares constituting any such series and the designation thereof, or any of them; and to increase or decrease the number of shares of any series subsequent to the issue of shares of that series, but not below the number of shares of such series then outstanding. In case the number of shares of any series shall be so decreased, the shares constituting such decrease shall resume the status they had prior to the adoption of the resolution originally fixing the number of shares of such series.

C. The rights, preferences, restrictions and other matters relating to Fifteen Million Seven Hundred Twenty Thousand Eight Hundred Sixty-Two (15,720,862) shares of Preferred Stock are as follows:

1. **Designation.** Two Million Two Hundred Eighty-Seven Thousand Five Hundred Twenty-Seven (2,287,527) of the shares of Preferred Stock hereby are designated "Series A Preferred Stock" (hereinafter referred to as the "Series A Stock"); One Million Nine Hundred Twenty-Three Thousand Six Hundred Seventy-Two (1,923,672) of the shares of Preferred Stock hereby are designated "Series B Preferred Stock" (hereinafter referred to as the "Series B Stock"); Three Million Two Hundred Five Thousand Two Hundred Thirty-One (3,205,231) of the shares of Preferred Stock hereby are designated "Series C Preferred Stock" (hereinafter referred to as the "Series C Stock"); and Eight Million Three Hundred Four Thousand Four Hundred Thirty-Two (8,304,432) of the shares of Preferred Stock hereby are designated "Series D Preferred Stock" (hereinafter referred to as the "Series D Stock"), each with the rights, preferences and privileges specified herein.

2. **Dividends.** Dividends shall accrue on the Series A Stock at the rate of four and fifty-five one-hundredths cents (\$0.0455) per share per annum. Except in the case of redemption or conversion, such dividends shall be paid at such times as the Board of Directors deems advisable. No dividends shall accrue on the Series B Stock, the Series C Stock or the Series D Stock. At the time any shares of Series A Stock are redeemed pursuant to paragraph 4, or converted pursuant to paragraph 6, any accrued and unpaid dividends on such converted shares immediately shall become due and payable. After all accrued dividends on the Series A Stock shall have been declared and paid or set apart for payment, if the Board of Directors shall elect to declare additional dividends out of funds legally available therefor, such additional dividends shall be declared in equal amounts per share on all shares of Series A Stock, Series B Stock, Series C Stock, Series D Stock and Common Stock then outstanding.

3. **Liquidation Preference.** In the event of any liquidation, dissolution, or winding up of the Corporation, either voluntary or involuntary, distributions to the stockholders of the Corporation shall be made in the following manner:

(a) The holders of Series D Stock shall be entitled to receive, prior and in preference to any distribution of assets or surplus funds of the Corporation to the holders of Series A Stock, Series B Stock, Series C Stock or Common Stock by reason of their ownership of such stock, an amount equal to \$1.00 per share for each share of Series D Stock held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the assets and funds thus distributed among the holders of Series D Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among the holders of Series D Stock in proportion to the shares of Series D stock then held by them.

(b) If, after payment to the holders of the Series D Stock of the amounts set forth in subsection (a) above, assets and funds of the Corporation are legally available for distribution, the holders of Series C Stock shall be entitled to receive, prior and in preference to any distribution of assets or surplus funds of the corporation to the holders of Series A Stock, Series B Stock, or Common Stock by reason of their ownership of such stock, an amount of \$1.56 per share for each share of Series C Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the assets and funds thus distributed among the holders of Series C Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire assets and funds of the Corporation

legally available for distribution shall be distributed among the holders of Series C Stock in proportion to the shares of Series C Stock then held by them.

(c) If, after payment as set forth in subsections (a) and (b) above, assets and funds of the Corporation are legally available for distribution, the holders of Series B Stock shall be entitled to receive, prior and in preference to any distribution of assets or surplus funds of the Corporation to the holders of Series A Stock or Common Stock by reason of their ownership of such stock, the amount of \$2.10 per share for each share of Series B Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the assets and funds thus distributed among the holders of Series B Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among the holders of Series B Stock in proportion to the shares of Series B Stock then held by them.

(d) If, after payment as set forth in subsections (a), (b) and (c) above, assets and funds of the Corporation are legally available for distribution, the holders of Series A Stock 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 the Common Stock by reason of their ownership of such stock, the amount of \$0.91 per share for each share of Series A Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the assets and funds thus distributed among the holders of the Series A Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among the holders of the Series A Stock in proportion to the shares of Series A Stock then held by them.

(e) If, after payment as set forth in subsections (a), (b), (c) and (d) above, assets and funds of the Corporation are legally available for distribution to the holders of the Common Stock, such holders shall be entitled to receive, prior and in preference to any further distribution of any of the assets or surplus funds of the Corporation to the holders of Series A Stock, Series B Stock, Series C Stock and Series D Stock by reason of their ownership of such stock, the amount of \$1.00 per share for each share of Common Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the assets and funds thus distributed among the holders of the Common Stock shall be insufficient to permit the payment of the full aforesaid amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among the holders of the Common Stock in proportion to the shares of Common Stock then held by them.

(f) If, after payment as set forth in subsections (a), (b), (c), (d) and (e) above, additional assets and funds of the Corporation are legally available for distribution to the holders of the Common Stock and the Series A Stock, Series B Stock, Series C Stock and Series D Stock, such funds shall be distributed to such holders, pro rata on the basis of the shares of Series A Stock, Series B Stock, Series C Stock and Series D Stock multiplied by the then existing applicable Conversion Rate (as that term hereinafter is defined), and of shares of Common Stock, then held by them until each such holder has received an additional amount (in the case of the Series A Stock, Series B Stock, Series C Stock and Series D Stock, on an as-converted basis) equal to \$2.90 per share of Common Stock. If the assets and funds thus distributed among such holders shall be insufficient to permit the payment of the full aforesaid amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among such holders pro rata on the basis of the shares of Series A Stock, Series B Stock, Series C Stock and Series D Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them.

(g) If, after payment as set forth in subsections (a), (b), (c), (d), (e) and (f) above, additional assets and funds of the Corporation are legally available for distribution to the holders of capital stock of the Corporation, such funds shall be distributed to the holders of the Common Stock and the Series A Stock and Series C Stock, pro rata on the basis of the shares of Series A Stock and Series C Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them until each holder has received an additional amount (in the case of the Series A and Series C Stock, on an as-converted basis) equal to \$.54 per share of Common Stock. If the assets and funds thus distributed among such holders shall be insufficient to permit the payment of the full aforesaid amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among such holders pro rata on the basis of the shares of Series A Stock and Series C Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them.

(h) If, after payment as set forth in subsections (a), (b), (c), (d), (e), (f) and (g) above, additional assets and funds of the Corporation are legally available for distribution to the holders of capital stock of the Corporation, such funds shall be distributed to the holders of Series A Stock and Common Stock, pro rata on the basis of the shares of Series A Stock multiplied by the then existing Conversion Rate therefor, and of shares of Common Stock, then held by them until each such holder has received an additional amount (in the case of the Series A Stock, on an as-converted basis) equal to \$0.65 per share of Common Stock. If the assets and funds thus distributed among such holders shall be insufficient to permit the payment of the full aforesaid amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among such holders pro rata on the basis of the shares of Series A Stock multiplied by the then existing Conversion Rate therefor, and of shares of Common Stock, then held by them.

(i) If, after payment as set forth in subsections (a), (b), (c), (d), (e), (f), (g) and (h) above, assets and funds of the Corporation are legally available for distribution to the holders of capital stock of the Corporation, then the holders of Common Stock shall be entitled to receive, prior and in preference to any further distribution of any of the assets or surplus funds of the Corporation to holders of Series A Stock, Series B Stock, Series C Stock and Series D Stock by reason of the ownership of such stock, the amount of \$0.41 per share for each share of Common Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the assets and funds thus distributed among the holders of the Common Stock shall be insufficient to permit the payment of the full aforesaid amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among holders of Common Stock then held by them.

(j) If, after payment as set forth in subsections (a), (b), (c), (d), (e), (f), (g), (h) and (i) above, additional assets and funds of the Corporation legally available for distribution to the holders of the Common Stock and the Series A Stock, Series B Stock, Series C Stock and Series D Stock, all such funds shall be distributed to such holders, pro rata on the basis of the shares of Series A Stock, Series B Stock, Series C Stock and Series D Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them.

(k) A consolidation or merger of the Corporation with or into any other corporation or corporations, or a sale of all or substantially all of the assets of the corporation, shall not be deemed to be a liquidation, dissolution, or winding up within the meaning of this paragraph, but instead shall be subject to the provisions of paragraph 7 of this article.

#### 4. Redemption.

(a) At any time after the earlier of (i) June 30, 1994 or (ii) the date on which the Corporation has received from holders of not less than 50% of the then outstanding shares of Series D Stock written consent to redemption of the Series D Stock, the Corporation may at any time it may lawfully do so, at the discretion of the Board of Directors, redeem in whole or in part the Series D Stock by paying in cash for each share of Series D Stock to be redeemed (appropriately adjusted for subdivisions, combinations, consolidations, or stock distributions or dividends or like events) the sum of \$1.00. Such amount hereinafter is referred to as the "Series D Redemption Price."

(b) In the event of any redemption of only a part of the then outstanding shares of Series D Stock, the Corporation shall effect such redemption pro rata among the holders of such series of stock being redeemed.

(c) At least 60 days prior to the date fixed for any redemption of any or all of the Series D Stock (hereinafter referred to as the "Redemption Date"), written notice shall be mailed, postage prepaid, to each holder of record of the stock to be redeemed, at his post office address last shown on the records of the Corporation, notifying such holder of the election of the Corporation to redeem such shares, specifying the Redemption Date, the applicable Redemption Price, and the date on which such holder's Conversion Rights (as defined in paragraph 6) as to such shares terminate and calling upon such holder to surrender to the Corporation, in the manner and at the place designated, his certificate or certificates representing the shares to be redeemed (such notice hereinafter is referred to as the "Redemption Notice"). On or after the Redemption Date, each holder of the stock to be redeemed shall surrender to the Corporation his certificate or certificates representing such shares, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner of such shares and each surrendered certificate shall be canceled. In the event less than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares. From and after the Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of the stock designated for redemption in the Redemption Notice as holders of the stock of the Corporation (except the right to receive the Redemption Price without interest upon surrender of their certificate or certificates) shall cease with respect to such shares, and such shares subsequently shall not be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever.

(d) On or prior to the Redemption Date, the Corporation shall deposit the Redemption Price of all shares of the stock designated for redemption in the Redemption Notice and not yet redeemed with a bank or trust company having aggregate capital and surplus in excess of \$20,000,000 as a trust fund for the benefit of the respective holders of the shares designated for redemption and not yet redeemed, with irrevocable instructions and authority to the bank or trust company to pay the Redemption Price for such shares to their respective holders on or after the Redemption Date upon receipt of notification from the Corporation that such holder has surrendered his share certificate to the Corporation pursuant to paragraph 4(c). Such instructions also shall provide that any funds deposited by the Corporation pursuant to this paragraph 4(d) for the redemption of shares subsequently converted into shares of Common Stock pursuant to paragraph 6 no later than the fifth day preceding the Redemption Date shall be returned to the Corporation forthwith upon such conversion. The balance of any funds deposited by the Corporation pursuant to this paragraph 4(d) remaining unclaimed at the expiration of two years following the Redemption Date shall be returned to the Corporation upon its request expressed in a resolution of its Board of Directors.

## 5. Voting Rights.

(a) The holders of the Series A Stock, Series B Stock, Series C Stock and Series D Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which the shares then held by such holders could be converted, 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 corporation. Fractional votes shall not be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which all shares of Series A Stock, Series B Stock, Series C Stock and Series D Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

(b) Any action which may be taken at any annual or special meeting of the stockholders, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of shares having not less than the minimum number of votes that would be necessary to take such action at a meeting at which the holder of all shares entitled to vote on the action were present and voted.

6. Conversion. The holders of the Series A Stock, Series B Stock, Series C Stock and Series D Stock shall have conversion rights as follows (the "Conversion Rights"):

### (a) Right to Convert.

(i) Each share of Series A Stock, Series B Stock, Series C Stock and Series D Stock initially shall be convertible, at the option of the holder, any time after the date of issuance of such share and on or prior to the fifth day prior to the Redemption Date, if any, as may have been fixed with respect to such shares in any Redemption Notice, at the office of the Corporation or any transfer agent for such stock, into fully paid and non-assessable shares of Common Stock, at the respective Conversion Prices (as hereafter defined) therefor in effect at the time of conversion determined as provided herein. In the event of a call for redemption of any shares of Series D Stock pursuant to paragraph 4, the Conversion Rights shall terminate as to the shares designated for redemption at the close of business on the fifth day preceding the Redemption Date, unless default is made in payment of the Redemption Price.

(ii) Each share of Series A Stock automatically shall be converted into shares of Common Stock at the then effective Conversion Price immediately upon the closing of the sale of any of the Corporation's Common Stock (as that term is defined under the Securities Act of 1933, as then in effect; such Act, the "1933 Act") in a public offering registered under the 1933 Act (other than an offering registered on Form S-8 or any similar form), in which the offering price to the public of such Common Stock exceeds \$2.00 per share and the aggregate proceeds to the Corporation and/or selling security holders, net of any selling expenses, printing costs and legal and accounting fees, when combined with the aggregate net proceeds of all previous registered public offerings of the Corporation's Common Stock, exceeds \$5,000,000.

(iii) Each share of Series B Stock automatically shall be converted into shares of Common Stock at the then effective Conversion Price immediately upon the closing of the sale of any of the Corporation's Common Stock (as that term is defined under the 1933 Act) in a public offering registered under the 1933 Act (other than an offering registered on Form S-8 or any similar form), in which the offering price to the public of such Common Stock exceeds \$4.00 per share and the aggregate proceeds to the Corporation and/or selling security holders, net of any selling



expenses, printing costs and legal and accounting fees, when combined with the aggregate net proceeds of all previous registered public offerings of the Corporation's Common Stock, exceeds \$5,000,000.

(iv) Each share of Series C Stock automatically shall be converted into shares of Common Stock at the then effective Conversion Price immediately upon the closing of the sale of any of the Corporation's Common Stock (as that term is defined under the 1933 Act) in a public offering registered under the 1933 Act (other than an offering registered on Form S-8 or any similar form), in which the offering price to the public of such Common Stock exceeds \$3.00 per share and the aggregate proceeds to the Corporation and/or selling security holders, net of any selling expenses, printing costs and legal and accounting fees, when combined with the aggregate net proceeds of all previous registered public offerings of the Corporation's Common Stock, exceeds \$5,000,000.

(v) Each share of Series D Stock automatically shall be converted into shares of Common Stock at the then effective Conversion Price immediately upon the closing of the sale of any of the Corporation's Common Stock (as that term is defined under the 1933 Act) in a public offering registered under the 1933 Act (other than an offering registered on Form S-8 or any similar form), in which the aggregate gross proceeds to the Corporation exceed \$5,000,000.

(b) Conversion Price.

(i) The Series A Stock shall be convertible into the number of shares of Common Stock that results from dividing the Conversion Price per share in effect at the time of conversion into \$0.91 for each share of Series A Stock being converted; the Conversion Price per share for the Series A Stock initially shall be \$0.91.

(ii) The Series B Stock shall be convertible into the number of shares of Common Stock that results from dividing the Conversion Price per share in effect at the time of conversion into \$2.10 for each share of Series B Stock being converted; the Conversion Price per share for the Series B Stock initially shall be \$2.10.

(iii) The Series C Stock shall be convertible into the number of shares of Common Stock that results from dividing the Conversion Price per share in effect at the time of conversion into \$1.56 for each share of Series C Stock being converted; the Conversion Price per share for the Series C Stock initially shall be \$1.56.

(iv) The Series D Stock shall be convertible into the number of shares of Common Stock that results from dividing the Conversion Price per share in effect at the time of conversion into \$0.50 for each share of Series D Stock being converted; the Conversion Price per share of the Series D Stock initially shall be \$0.50.

(v) The number of shares of Common Stock into which a share of Series A Stock, Series B Stock, Series C Stock or Series D Stock is convertible sometimes is referred to herein as the "Conversion Rate" for such series of Preferred Stock.

(c) **Mechanics of Conversion.** Before any holder of Preferred Stock shall be entitled to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Common Stock, and shall give written notice to the Corporation at such office that he elects to convert the same and shall state therein the number of shares of the Preferred Stock being converted. Thereupon, the Corporation promptly shall issue and deliver to such holder of Preferred Stock a certificate or

certificates for the number of shares of Common Stock to which he shall be entitled. 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 Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

(d) **Adjustment for Stock Splits and Combinations.** If the Corporation shall at any time or from time to time after the first issuance of the Series D Stock effect a subdivision of the outstanding Common Stock, the Conversion Prices then in effect immediately before that subdivision shall be decreased proportionately, and conversely, if the Corporation shall at any time or from time to time after the first issuance of the Series D Stock combine the outstanding shares of Common Stock, the Conversion Prices then in effect immediately before the combination shall be increased proportionately. Any adjustment under this paragraph 6(d) shall become effective at the close of business on the date the subdivision or combination becomes effective.

(e) **Adjustment for Certain Dividends and Distributions.** In the event the Corporation at any time, or from time to time after the first issuance of the Series D Stock, shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, then and in each such event the Conversion Prices then in effect shall be decreased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the Conversion Prices then in effect by a fraction:

(i) the numerator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and

(ii) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Conversion Prices shall be recomputed accordingly as of the close of business on such record date and thereafter the Conversion Prices shall be adjusted pursuant to this paragraph 6(e) as of the time of actual payment of such dividends or distributions.

(f) **Adjustments for Other Dividends and Distributions.** In the event the Corporation at any time or from time to time after the first issuance of the Series D Stock, shall make, issue, or fix a record date for the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in securities of the Corporation other than shares of Common Stock, then and in each such event provisions shall be made so that the holders of Preferred Stock shall receive upon conversion thereof in addition to the number of shares of Common Stock receivable thereupon, the amount of securities of the Corporation that they would have received had their Preferred Stock been converted into Common Stock on the date of such event and had thereafter, during the period from the date of such event to and including the conversion date, retained such securities receivable by them as aforesaid during such period, giving application to all adjustments called for during such period under this paragraph 6 with respect to the rights of the holders of the Preferred Stock.

(g) **Adjustment for Reclassifications, Exchanges, or Substitutions.** If the Common Stock issuable upon the conversion of the Preferred Stock shall be changed into the same

or different number of shares of any class or classes of stock, whether by capital reorganization, reclassification, or otherwise (other than a subdivision, or combination of shares or stock dividend provided for above, or a reorganization, merger, consolidation, or sale of assets provided for elsewhere in this paragraph 6), then and in each such event the holder of each share of Preferred Stock shall have the right thereafter to convert such share into the kind and amount of shares of stock and other securities and property receivable upon such reorganization, reclassification, or other change, by holders of the number of shares of Common Stock into which such shares of Preferred Stock might have been converted immediately prior to such reorganization, reclassification or change, all subject to further adjustment as provided herein.

(h) **Reorganization; Mergers; Consolidations; Sale of Assets.** If at any time or from time to time there shall be a capital reorganization of the Common Stock (other than a subdivision, combination, reclassification, or exchange of shares provided for elsewhere in this paragraph 6) or a merger or consolidation of the Corporation with or into another Corporation, or the sale of all or substantially all of the Corporation's properties and assets to any other person, then, as a part of such reorganization, merger, consolidation, or sale, provision shall be made so that the holders of the Preferred Stock thereafter shall be entitled to receive upon conversion of the Preferred Stock, the number of shares of stock or other securities or property of the Corporation, or of the successor corporation resulting from such merger or consolidation or sale, to which a holder of Common Stock deliverable upon conversion would have been entitled on such capital reorganization, merger, consolidation, or sale. In any such case, appropriate adjustment shall be made in the application of the provisions of this paragraph 6 with respect to the rights of the holders of the Preferred Stock after the reorganization, merger, consolidation, or sale to the end that the provisions of this paragraph 6 (including adjustment of the Conversion Prices then in effect and the number of shares purchasable upon conversion of the Preferred Stock) shall be applicable after the event as nearly equivalent as may be practicable.

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

(1) If at any time or from time to time after the first issuance of the Series D Stock the Corporation shall issue or sell Additional Shares of Common Stock (as hereinafter defined), other than as a dividend or other distribution on any class of stock as provided in paragraph 6(e) above and other than upon a subdivision or combination of shares of Common Stock as provided in paragraph 6(d) above, for a consideration per share less than the lower of (x) \$0.58, \$1.35, \$1.00 or \$0.50 per share in the case of the Series A Stock, Series B Stock, Series C Stock and Series D Stock, respectively (each as adjusted), or (y) the then existing Conversion Price (or, if an adjusted Conversion Price shall be in effect by reason of a previous adjustment, then less than such adjusted Conversion Price), then and in each case the then Conversion Price shall be reduced, as of the opening of business on the date of such issue or sale, to a price determined by multiplying that 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 or sale, plus the number of shares of Common Stock that the aggregate consideration received by the Corporation for the total number of Additional Shares of Common Stock so 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 or sale plus the number of such Additional Shares of Common Stock so issued. This paragraph 6(i) shall be applied separately to the Conversion Price of the Series A Stock, the Conversion Price of the Series B Stock, the Conversion Price of the Series C Stock and the Conversion Price of the Series D Stock.

(2) For the purpose of making any adjustment in the Conversion Price or number of shares of Common Stock purchasable on conversion of Preferred Stock as provided above, the consideration received by the Corporation for any issue or sale of securities shall

(A) to the extent it consists of cash, be computed at the net amount of cash received by the Corporation after deduction of 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, be computed at the fair market value of the property as determined in good faith by the Board; and

(C) if Additional Shares of Common Stock or Common Stock Equivalents (as hereinafter defined) are issued or sold together with other stock or securities or other assets of the Corporation for a consideration that encompasses both, be computed as 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 or Common Stock Equivalents.

(3) For the purpose of the adjustment provided in clause (i) of this paragraph 6(i), if at any time or from time to time after the first issuance of the Series D Stock the Corporation shall issue any rights or options for the purchase of, or stock or securities convertible into, Additional Shares of Common Stock (such rights or options and convertible stock or securities being hereinafter referred to as "Common Stock Equivalents"), then, in each case, if the Effective Price (as hereinafter defined) of such Common Stock Equivalents shall be less than the lower of (x) \$0.58, \$1.35, \$1.00 or \$0.50 per share in the case of the Series A Stock, Series B Stock, Series C Stock and Series D Stock, respectively (each as adjusted), or (y) the then existing Conversion Price of a series of the Preferred Stock, the Corporation shall be deemed to have issued with respect to such series at the time of the issuance of such Common Stock Equivalents the maximum number (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such 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 Corporation for the issuance of such Common Stock Equivalents, plus, the minimum additional amounts of consideration, if any, payable to the Corporation upon exercise or conversion of such Common Stock Equivalents. "Effective Price" shall mean the quotient determined by dividing the total of all of such consideration by such maximum number of Additional Shares of Common Stock. If a Common Stock Equivalent provides by its terms, with the passage of time or otherwise, for any decrease in the consideration payable to the Corporation or any increase in the number of shares of Common Stock issuable upon exercise or conversion thereof, the Conversion Price computed upon the original issuance thereof (or upon the occurrence of a record date with respect thereto), upon any such decrease or increase becoming effective, shall be recomputed to reflect such decrease or increase. No further adjustment of the Conversion Price adjusted upon the issuance of such Common Stock Equivalents shall be made as a result of the actual issuance of Additional Shares of Common Stock on the exercise or conversion of any such Common Stock Equivalents.

(j) **Definition.** The term "Additional Shares of Common Stock" as used herein shall mean, with respect to a series of the Preferred Stock, all shares of Common Stock issued or deemed issued by the Corporation after the first issuance of the Series D Stock, whether or not subsequently reacquired or retired by the Corporation other than (i) shares of Common Stock issued upon conversion of Series A Stock, Series B Stock, Series C and Series D Stock, (ii) 1,559,631 shares reserved for outstanding options to the officers or employees of, consultants to, directors of, or affiliates of directors of, the Corporation pursuant to a stock grant or option plan or other incentive stock programs, subject to adjustment for all subdivisions and combinations which may occur after the first issuance of the Series D Preferred Stock, (iii) 2,700,001 shares of Common Stock reserved for issuance upon exercise of outstanding warrants to purchase shares of Common Stock, (iv) up to an aggregate of 3,440,369 shares (in addition to shares excluded pursuant to clause (ii) above) of Common Stock to be

issued pursuant to any employee stock incentive program approved by the Board of Directors, subject to adjustment for all subdivisions and combinations which may occur after the first issuance of Series D Preferred Stock; and (v) up to 200,000 shares of common stock, adjusted for all subdivisions and combinations which may occur after the first issuance of Series D Preferred Stock, to be issued to any person other than employees, as approved by the Board of Directors.

(k) **No Impairment.** The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities, or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed under this article by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of paragraph 6 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 Stock, Series B Stock, Series C Stock and Series D Stock against impairment.

(l) **Certificate as to Adjustments.** Upon the occurrence of each adjustment or readjustment of the Conversion Price pursuant to paragraph 6, the Corporation at its expense, promptly shall compute such adjustment or readjustment in accordance with the terms of this article and cause independent public accountants selected by the Corporation to verify such computation and prepare and furnish to each holder of Series A Stock, Series B Stock, Series C Stock and Series D Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Series A Stock, Series B Stock, Series C Stock or Series D Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price in effect at the time, and (iii) the number of shares of Common Stock and the amount, if any, of other property that at the time would be received upon the conversion of the Series A Stock, Series B Stock, Series C Stock or Series D Stock.

(m) **Notices of Record Date.** In the event of any taking by the Corporation of a record of the holders of any class of securities for the purpose of determining the holders of such securities who are entitled to receive any dividend (other than a cash dividend) or other distribution, any security or right convertible into or entitling the owner thereof to receive Additional Shares of Common Stock, or any right to subscribe for, purchase, or otherwise acquire any shares of stock of any class or any other securities or property, or to receive any other right, the Corporation shall mail to each holder of Series A Stock, Series B Stock, Series C Stock and Series D Stock at least 20 days prior to the date specified in such notice, a notice specifying the date on which any such record is to be taken for the purpose of such dividend, distribution, or rights, and the amount and character of such dividend, distribution, or right.

(n) **Issue Taxes.** The Corporation shall pay any and all issue and other taxes that may be payable in respect of any issue or delivery of shares of Common Stock on conversion of shares of Series A Stock, Series B Stock, Series C Stock or Series D Stock.

(o) **Reservation of Stock Issuable Upon Conversion.** The Corporation at all times shall 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 Stock, Series B Stock, Series C Stock and Series D Stock such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A Stock, Series B Stock, Series C Stock and Series D 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 Series A Stock, Series B Stock, Series C Stock and Series D Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

(p) **Fractional Shares.** No fractional shares shall be issued upon the conversion of any share or shares of Series A Stock, Series B Stock, Series C Stock or Series D Stock. All shares of Common Stock (including fractions) issuable upon conversion of more than one share of Series A Stock, and/or Series B Stock, and/or Series C Stock and/or Series D Stock by a holder of such stock shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after aggregation, the conversion would result in the issuance of a fractional share of Common Stock, the Company Corporation shall, in lieu of issuing any fractional share, pay the holder otherwise entitled to such fraction a sum in cash equal to the fair market value of such fraction on the date of conversion (as determined in good faith by the Board of Directors of the Corporation).

(q) **Notices.** Any notice required by the provisions of paragraph 6 to be given to the holders of shares of Series A Stock, Series B Stock, Series C Stock or Series D Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at his address appearing on the books of the corporation.

## 7. Merger; Consolidation.

(a) At any time, in the event of:

(i) a consolidation or merger of the Corporation with or into any other corporation, or any other entity or person, or any other corporate reorganization in which the Corporation shall not be the continuing or surviving entity of such consolidation, merger, or reorganization (other than a consolidation, merger or reorganization of the the Corporation with and into a wholly owned subsidiary of the Corporation),

(ii) a sale of all or substantially all of the assets of the Corporation, or

(iii) a reorganization of the Corporation as defined in Section 368(a)(1)(B) of the Internal Revenue Code of 1986 or in which more than 50% of the outstanding stock of the Corporation is exchanged, distributions to the stockholders of the Corporation shall be made in the following manner:

(A) The holders of Series D Stock shall be entitled to receive, prior and in preference to any distribution to the holders of Series A Stock, Series B Stock, Series C Stock or Common Stock by reason of their ownership of such stock, an amount equal to \$1.00 per share for each share of Series D Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the amount thus distributed among the holders of Series D Stock shall be insufficient to permit payment to such holders of the full aforesaid preferential amount, then the entire amount received from the acquiring corporation shall be distributed among the holders of the Series D Stock in proportion to the shares of Series D Stock then held by them.

(B) If, after payment to the holders of Series D Stock of the amounts set forth in (A) above, amounts are available for distribution, the holders of Series C Stock shall be entitled to receive, prior and in preference to any distributions to the holders of Series A Stock, Series B Stock, or Common Stock by reason of their ownership of such stock, the amount of \$1.56 per share for each share of

Series C Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the amount thus distributed among the holders of Series C Stock shall be insufficient to permit payment to such holders of the full aforesaid preferential amount, then the entire amount received from the acquiring corporation shall be distributed among the holders of the Series C Stock in proportion to the shares of Series C Stock then held by them.

(C) If, after payment to the holders of Series D Stock and Series C Stock of the amounts set forth in (A) and (B) above, amounts are available for distribution, the holders of Series B Stock shall be entitled to receive, prior and in preference to any distribution to the holders of Series A Stock or Common Stock by reason of their ownership of such stock, the amount of \$2.10 per share for each share of Series B Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the amount thus distributed among the holders of Series B Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire amount received from the acquiring corporation shall be distributed among the holders of the Series B Stock in proportion to the shares of Series B Stock then held by them.

(D) If, after payment to the holders of Series D Stock, Series C Stock and Series B Stock of the amounts set forth in (A), (B) and (C) above, cash or securities received from the acquiring corporation are available for distribution to the holders of the Series A Stock, such holders shall be entitled to receive, prior and in preference to any distribution to the holders of the Common Stock by reason of their ownership of such stock, the amount of \$0.91 per share plus all accrued and unpaid dividends (in cash or in securities received from the acquiring corporation or in a combination of cash and securities) for each share of Series A Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the amount thus distributed among the holders of the Series A Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire amount received from the acquiring corporation shall be distributed among the holders of the Series A Stock in proportion to the shares of Series A Stock then held by them.

(E) If, after payment to the holders of Series D Stock, Series C Stock, Series B Stock and Series A Stock of the amounts set forth in (A), (B), (C) and (D) above, cash or securities received from the acquiring corporation are available for distribution to the holders of the Common Stock, such holders shall be entitled to receive, prior and in preference to any further distribution to the holders of Series A Stock and the holders of Series B Stock and the holders of Series C Stock and the holders of Series D Stock by reason of their ownership of such stock, the amount of \$0.50 per share (in cash or in securities received from the acquiring corporation or in a combination of cash and securities) for each share of Common Stock then held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the amount thus distributed among the holders of the Common Stock shall be insufficient to permit the payment of the full aforesaid amount, then the entire amount received from the acquiring corporation shall be distributed among the holders of the Common Stock in proportion to the shares of Common Stock then held by them.

(F) If, after payment of the amounts set forth in (A), (B), (C), (D) and (E) above, an additional amount received from the acquiring corporation is available for distribution to the holders of the Common Stock and Series A Stock, Series B Stock, Series C Stock, and Series D Stock, all of such amount shall be distributed to such holders, pro rata on the basis of the shares of Series A Stock, Series B Stock, Series C Stock and Series D Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them until each such holder has received an amount

(in the case of the Series A Stock, Series B Stock, Series C Stock and Series D Stock, on an as-converted basis) equal to \$2.90 per share of Common Stock. If the assets and funds thus distributed among such holders shall be insufficient to permit the payment of the full aforesaid amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among such holders pro rata on the basis of the shares of Series A Stock, Series B Stock, Series C Stock and Series D Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them.

(G) If, after payment of the amounts set forth in (A), (B), (C), (D), (E) and (F) above, additional assets and funds of the Corporation are legally available for distribution to the holders of capital stock of the Corporation, such funds shall be distributed to the holders of the Common Stock and Series A Stock and Series C Stock, pro rata on the basis of the shares of Series A Stock and Series C Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them until each holder has received an additional amount (in the case of the Series A Stock and Series C Stock, on an as-converted basis) equal to \$0.54 per share of Common Stock. If the assets and funds thus distributed among such holders shall be insufficient to permit the payment of the full aforesaid amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among such holders pro rata on the basis of the shares of the Series A Stock and Series C Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them.

(H) If after payment of the amounts set forth in (A), (B), (C), (D), (E), (F) and (G) above, an additional amount received from the acquiring corporation is available for distribution to the holders of capital stock of the Corporation, such amount shall be distributed to the holders of Series A Stock and Common Stock, pro rata on the basis of the shares of Series A Stock multiplied by the then existing Conversion Rate therefor, and of shares of Common Stock, then held by them until each such holder has received an additional amount (in the case of the Series A Stock, on an as converted basis) equal to \$0.65 per share of Common Stock. If the assets and funds thus distributed among such holders shall be insufficient to permit the payment of the full aforesaid amount, then the entire assets and funds of the corporation legally available for distribution shall be distributed among such holders pro rata on the basis of the shares of Series A Stock multiplied by the then existing Conversion Rate therefor, and of shares of Common Stock, then held by them.

(I) If, after payment of the amounts set forth in (A), (B), (C), (D), (E), (F), (G) and (H) above, cash or securities received from the acquiring corporation are available for distribution to the holders of capital stock of the Corporation, the holders of Common Stock shall be entitled to receive, prior and in preference to any further distribution to the holders of the Series A Stock, Series B Stock, Series C Stock and the holders of Series D Stock, the amount of \$0.41 per share (in cash or in securities received from the acquiring corporation or in a combination of cash and securities) for each share of Common Stock held by them, adjusted for any subdivisions, combinations, consolidations, or stock distributions or dividends or like events with respect to such shares. If the amount thus distributed among the holders of the Common stock shall be insufficient to permit the payment of the full aforesaid amount, then the entire remaining amount received from the acquiring corporation shall be distributed among the holders of the Common Stock in proportion to the shares of Common Stock then held by them.

(J) If, after payment of the amounts set forth in (A), (B), (C), (D), (E), (F), (G), (H) and (I) above, an additional amount received from the acquiring corporation is available for distribution to the holders of the Common Stock and Series A Stock, Series B Stock, Series C Stock and Series D Stock, all of such amount shall be distributed to such holders, pro rata on the basis of the shares of Series A Stock, Series B Stock, Series C Stock and Series D Stock multiplied by the then existing applicable Conversion Rate, and of shares of Common Stock, then held by them.



(b) Any securities to be delivered to the holders of the Common Stock, Series A Stock, Series B Stock, Series C Stock or Series D Stock pursuant to paragraph 7(a) above shall be valued as follows:

(i) with respect to securities not subject to investment letter or other similar restrictions on free marketability:

(A) If traded on a securities exchange, the value shall be deemed to be the average of the security's closing prices on such exchange over the 30-day period ending three days prior to the closing;

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

(C) If there is no active public market, the value shall be the fair market value, as mutually determined by the Corporation and the holders of not less than 70% of each of the outstanding Series A Stock, Series B Stock, Series C Stock and Series D Stock and Common Stock; and

(ii) The method of valuation of securities subject to an investment letter or other restrictions on free marketability shall be to make an appropriate discount from the market value determined in (i)(A), (B), or (C) to reflect the approximate fair market value, as mutually determined by the Corporation, the holders of not less than 70% of the outstanding Series A Stock, and the holders of not less than 70% of the outstanding Series B Stock, and the holders of not less than 70% of the outstanding Series C Stock, and the holders of not less than 70% of the outstanding Series D Stock.

(c) The Corporation shall give each holder of record of Series A Stock, Series B Stock, Series C Stock and of Series D Stock written notice of such impending transaction not later than 20 days prior to the stockholders' meeting called to approve such transaction or 20 days prior to the closing of such transaction, whichever is earlier, and also shall notify such holders in writing of the final approval of such transaction. The first of such notices shall describe the material terms and conditions of paragraph 7, and the Corporation subsequently shall give such holders prompt notice of any material changes thereto. In no event shall the transaction take place sooner than 20 days after the mailing by the Corporation of the first notice provided for in this paragraph or sooner than 10 days after the mailing by the Corporation of any notice of material changes provided for in this paragraph; provided, however, that such periods may be shortened upon the written consent of (i) the holders of a majority of the then outstanding Series A Stock, and (ii) the holders of a majority of the then outstanding Series B Stock, (iii) the holders of a majority of the then outstanding Series C Stock and (iv) the holders of a majority of the then outstanding Series D Stock.

8. Amendment. Any of the rights specified in this Section C. of Article IV may be reduced, restricted, or eliminated (either generally or in a particular instance and either retroactively or prospectively) with the written consent of (a) the Corporation, (b) holders of not less than two-thirds of all Series A Stock then outstanding, (c) holders of not less than two-thirds of all Series B Stock then outstanding, and (d) holders of not less than two-thirds of all Series C Stock then outstanding and (e) holders of not less than two-thirds of all Series D Stock then outstanding. All other amendments to this Certificate of Incorporation, and any waiver of the observance of any term thereof, shall be made in accordance with the provisions of the Delaware General Corporation Law, as in effect from time to time. Any such reduction, restriction, elimination, amendment, or waiver so effected shall be binding

upon the Company and any holder of Series A Stock, Series B Stock, Series C Stock, Series D Stock or Common Stock.

V.

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

A. Board of Directors.

1. The management of the business and the conduct of the affairs of the Corporation shall be vested in its Board of Directors. The number of directors that shall constitute the entire Board of Directors shall be fixed exclusively by one or more resolutions adopted by the Board of Directors.

2. Subject to the rights of the holders of any series of Preferred Stock to elect additional directors under specified circumstances, directors shall be elected at each annual meeting of stockholders for a term of one year. Each director shall serve until his successor is duly elected and qualified or until his death, resignation or removal. No increase in the number of directors constituting the Board of Directors shall shorten the term of any incumbent director.

3. Subject to any limitations imposed by law, the Board of Directors or any individual director may be removed from office at any time (A) with cause by the affirmative vote of the holders of at least a majority of the voting power of all the then-outstanding shares of voting stock of the Corporation entitled to vote at an election of directors (the "Voting Stock"), or (B) without cause by the affirmative vote of the holders of at least two-thirds of the voting power of all then-outstanding shares of Voting Stock.

4. Subject to the rights of the holders of any series of Preferred Stock, any vacancies on the Board of Directors resulting from death, resignation, disqualification, removal or other causes and any newly created directorships resulting from any increase in the number of directors shall be filled by the affirmative vote of a majority of the directors then in office, even though less than a quorum of the Board of Directors, and not by the stockholders, unless the Board of Directors determines by resolution that any such vacancies or newly created directorships shall be filled by the stockholders, and except as otherwise provided by law. Any director elected in accordance with the preceding sentence shall hold office for the remainder of the full term of the director for which the vacancy was created or occurred and until such director's successor shall have been elected and qualified.

B. General.

1. Subject to paragraph (h) of Section 44 of the Bylaws, the Bylaws may be altered or amended or new Bylaws adopted by the affirmative vote of at least two-thirds of the voting power of all of the then-outstanding shares of the Voting Stock. The Board of Directors also shall have the power to adopt, amend, or repeal Bylaws.

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

3. No action shall be taken by the stockholders of the Corporation except at an annual or special meeting of stockholders called in accordance with the Bylaws, and following the closing

of an initial public offering pursuant to an effective registration statement under the 1993 Act, covering the offer and sale of Common Stock to the public (the "Initial Public Offering"), no action shall be taken by the stockholders by written consent.

4. Special meetings of the stockholders of the Corporation may be called for any purpose or purposes by (i) the Chairman of the Board of Directors, (ii) the Chief Executive Officer, (iii) the Board of Directors pursuant to a resolution adopted by a majority of the total number of authorized directors (whether or not there exist any vacancies in previously authorized directorships at the time any such resolution is presented to the Board of Directors for adoption), or (iv) by the holders of the shares entitled to cast not less than 10% of the votes at the meeting and shall be held at such place, on such date, and at such time as the Board of Directors shall fix.

5. Advance notice of stockholder nominations for the election of directors and of business to be brought by stockholders before any meeting of the stockholders of the Corporation shall be given in the manner provided in the Bylaws of the Corporation.

## VI.

A. The liability of the directors of the Corporation for monetary damages shall be eliminated to the fullest extent permissible under Delaware law.

B. A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for any 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 Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit. If the Delaware General Corporation Law is amended after approval by the stockholders of this Article to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director shall be eliminated or limited to the fullest extent permitted by the Delaware General corporation Law, as so amended.

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

## VII.

A. The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, except as provided in paragraph B. of this Article VII, and all rights conferred upon the stockholders herein are granted subject to this reservation.

B. Notwithstanding any other provisions of this Certificate of Incorporation or any provision of law that otherwise might permit a lesser vote or no vote, but in addition to any affirmative vote of the holders of any particular class or series of the Voting Stock required by law, this Certificate of Incorporation or any Preferred Stock Designation, the affirmative vote of the holders of at least two-thirds of the voting power of all of the then-outstanding shares of the Voting Stock, voting together as a single class, shall be required to alter, amend or repeal Articles V, VI, and VII.