

08-20-1999



08-12-1999

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U.S. Patent & TMOfc/TM Mail Rcpt Dt. #70

RECORDATION FORM COVER SHEET  
TRADEMARKS ONLY

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

**Submission Type** 8-12-99

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 receiving 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  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.)

Corporation  Association

Other

Citizenship/State of Incorporation/Organization

08/19/1999 DCDATES 00000102 071907 75120698

FOR OFFICE USE ONLY

01 FC:481 40.00 CH  
02 FC:482 200.00 CH

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Public burden reporting for this collection of information is estimated to average approximately 30 minutes per Cover Sheet to be recorded, including time for reviewing the document and gathering the data needed to complete the Cover Sheet. Send comments regarding this burden estimate to the U.S. Patent and Trademark Office, Chief Information Officer, Washington, D.C. 20231 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (0651-0027), Washington, D.C. 20503. See OMB Information Collection Budget Package 0451-0027, Patent and Trademark Assignment Practice. DO NOT SEND REQUESTS TO RECORD ASSIGNMENT DOCUMENTS TO THIS ADDRESS.

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

TRADEMARK  
REEL: 001946 FRAME: 0019

**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 including any attachments. #

**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)		
<input type="text" value="75/120698"/>	<input type="text"/>	<input type="text"/>	<input type="text" value="2006677"/>	<input type="text" value="1918983"/>	<input type="text"/>
<input type="text" value="75/120855"/>	<input type="text"/>	<input type="text"/>	<input type="text" value="2067493"/>	<input type="text" value="2017942"/>	<input type="text"/>
<input type="text" value="75/392318"/>	<input type="text"/>	<input type="text"/>	<input type="text" value="2060770"/>	<input type="text" value="2036933"/>	<input type="text"/>

**Number of Properties** Enter the total number of properties involved. #

**Fee Amount** Fee Amount for Properties Listed (37 CFR 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.

Margaret M. Powers  
Name of Person Signing

*Margaret M. Powers*  
Signature

August 11, 1999  
Date Signed

Office of the Secretary of State

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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 RESTATED CERTIFICATE OF "ENACT HEALTH MANAGEMENT SYSTEMS, INC.", CHANGING ITS NAME FROM "ENACT HEALTH MANAGEMENT SYSTEMS, INC." TO "LIFECHART.COM, INC.", FILED IN THIS OFFICE ON THE TWENTY-NINTH DAY OF JUNE, A.D. 1999, AT 9 O'CLOCK A.M.



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

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Edward J. Freel, Secretary of State

AUTHENTICATION: 9909883

DATE: 08-09-99

**TRADEMARK**  
**REEL: 001946 FRAME: 0021**

AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION  
OF

ENACT HEALTH MANAGEMENT SYSTEMS, INC.

(Pursuant to Section 245 of General Corporation Law of the State of Delaware)

ENACT Health Management Systems, Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware (the "General Corporation Law"), which was originally incorporated in Delaware under the name ENACT Health Management Systems Delaware Coporation on April 22, 1997 (the "Corporation"), certifies as follows:

The Corporation's Amended and Restated Certificate of Incorporation was duly adopted by the Board of Directors and stockholders in accordance with Sections 242 and 245 of the General Corporation Law.

The Corporation's Amended and Restated Certificate of Incorporation is amended and restated to read in full as set forth in Exhibit A attached hereto.

IN WITNESS HEREOF, the Corporation has caused this Certificate to be signed by a duly authorized officer on June 29, 1999.

ENACT HEALTH MANAGEMENT SYSTEMS, INC.

By: Matthew H.L. Sanders  
Matthew H.L. Sanders, President

**EXHIBIT A**

**AMENDED AND RESTATED**

**CERTIFICATE OF INCORPORATION**

**OF**

**ENACT HEALTH MANAGEMENT SYSTEMS, INC.**

- FIRST:** The name of the Corporation is LifeChart.com, Inc. (hereinafter sometimes referred to as the "Corporation").
- SECOND:** The address of the registered office of the Corporation in the State of Delaware is Incorporating Services, Ltd., 15 East North Street, in the City of Dover, County of Kent. The name of the registered agent at that address is Incorporating Services, Ltd.
- THIRD:** The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of Delaware.

**FOURTH:**

The Corporation is authorized to issue two classes of shares to be designated respectively Preferred Stock and Common Stock. The total number of shares of all series of Preferred Stock that the Corporation shall have authority to issue is 1,606,248 and the total number of shares of Common Stock that the Corporation shall have authority to issue is 50,000,000. All the authorized shares shall have a par value of \$0.001.

The shares of Preferred Stock may be divided into such number of series as the Board of Directors may determine. The Board of Directors is authorized to determine and alter the rights, preferences, privileges and restrictions granted to and imposed upon the Preferred Stock or any series thereof with respect to any wholly unissued series of Preferred Stock, and to fix the number of shares of any such series of Preferred Stock. The Board of Directors, within the limits and restrictions stated in any resolution or resolutions of the Board of Directors originally fixing the number of shares constituting any series, may increase or decrease (but not below the number of shares of such series then outstanding) the number of shares of any series subsequent to the issue of shares of that series.

The Corporation shall from time to time in accordance with the laws of the State of Delaware increase the authorized amount of its Common Stock if at any time the number of shares of Common Stock remaining unissued and available for issuance shall not be sufficient to permit conversion of the Preferred Stock.

The sole series of Preferred Stock shall be comprised of 1,606,248 shares, designated as "New Series A Preferred Stock."

As of the date of filing of this Amended and Restated Certificate of Incorporation, all of the outstanding Preferred Stock of the Corporation shall be converted into Common Stock and New Series A Preferred Stock as provided below, and the rights, preferences and privileges of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock shall be eliminated. Each issued and outstanding share of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock is hereby converted as follows:

Each outstanding share of Series A Preferred Stock shall convert into 0.866 of a share of Common Stock and 0.134 of a share of New Series A Preferred Stock;

Each outstanding share of Series B Preferred Stock shall convert into 0.31 of a share of Common Stock and 0.69 of a share of New Series A Preferred Stock;

Each outstanding share of Series C Preferred Stock shall convert into one (1) share of New Series A Preferred Stock; and

Each outstanding share of Series D Preferred Stock shall convert into 1.1428571 of a share of New Series A Preferred Stock;

all without any action on the part of the holders thereof.

No fractional shares shall be issued as a result of such conversion; provided, however, that the number of shares of Common Stock and New Series A Preferred Stock to be received by a stockholder as a result of such conversion shall be rounded to the nearest whole share, and the number of full shares of Common Stock and New Series A Preferred Stock to be issued upon conversion of a stockholder's previously outstanding Series A, Series B, Series C or Series D Preferred Stock, as applicable, shall be computed on the basis of the aggregate number of shares of such series of Preferred Stock held by such stockholder prior to the date of filing of this Amended and Restated Certificate of Incorporation.

The rights, preferences, privileges and restrictions granted to and imposed upon the Common Stock and New Series A Preferred Stock and the holders thereof are as follows:

Section 1. Dividends. The holders of New Series A Preferred Stock shall be entitled to receive dividends out of any funds legally available therefor, payable in preference and priority to any payment of any dividend on Common Stock, when, as and if declared by the Board of Directors. The right to dividends on the New Series A Preferred Stock shall not be cumulative, and no right shall accrue to holders of the New Series A Preferred Stock by reason of the fact that dividends on such shares are not declared or paid in any prior year. No dividends on Common Stock shall be declared or paid unless and until a dividend in an equal amount per share on an as-converted basis has been declared and paid on the New Series A Preferred Stock.

## Section 2. Preference on Liquidation

(a) In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation, the holders of shares of New Series A Preferred Stock then outstanding shall be entitled to be paid, out of the assets of the Corporation available for distribution to its stockholders, whether from capital surplus or earnings, before any payment shall be made with respect to the Common Stock, an amount equal to (i) \$5.25 per share of New Series A Preferred Stock then held by them (each such amount to be adjusted to reflect subsequent stock dividends, stock splits or recapitalizations), and (ii) an amount equal to all declared and unpaid dividends with respect to each the New Series A Preferred Stock to the date fixed for distribution.

(b) If upon liquidation, dissolution or winding up of the Corporation, the assets of the Corporation available for distribution to its stockholders shall be insufficient to pay the holders of New Series A Preferred Stock the full amounts to which they shall be entitled under Section 2(a) above, the holders of the New Series A Preferred Stock shall share ratably in any distribution of assets according to the respective amounts which would be payable with respect to the shares held by them upon such distribution if all amounts payable on or with respect to said shares were paid in full.

(c) After setting apart or paying in full the amounts due the holders of the New Series A Preferred Stock under Sections 2(a) and 2(b), above, the remaining assets of the Corporation available for distribution to stockholders, if any, shall be distributed ratably on a per share basis among the holders of Common Stock.

(d) The (i) merger or consolidation of the Corporation into or with another corporation in which the stockholders of the Corporation shall own less than 50% of the voting securities of the surviving corporation, (ii) sale, transfer or lease (but not including a transfer or lease by pledge or mortgage to a bona fide lender) of all or substantially all of the assets of the Corporation, or (iii) sale by the Corporation's stockholders of 50% or more of the Corporation's outstanding securities in one or more related transactions shall be deemed to be a liquidation, dissolution or winding up of the Corporation as those terms are used in this Section 2; *provided that* the transactions described in subsections (i), (ii) and (iii) of this paragraph (d) shall not be deemed to be a liquidation, dissolution or winding up if (x) the holders of a majority of the New Series A Preferred Stock elect not to treat such transaction as a liquidation, dissolution or winding up, or (y) the holders of the shares of New Series A Preferred Stock would receive under the terms of the agreement regarding the transaction described in clause (i), (ii) or (iii) above, an amount per share of New Series A Preferred Stock which is equal to or greater than the amount which they would receive per share upon a liquidation, dissolution or winding up of the Corporation on the date of such transaction, assuming for such purpose that the aggregate consideration received by such holders in such transaction were treated as an asset of the Corporation. If the consideration received in such transaction is other than cash, the value of such consideration shall be the fair market value as determined in good faith by the Board of Directors of the Corporation.

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### Section 3. Voting.

(a) Voting for Directors. The holders of New Series A Preferred Stock, voting together as a separate class, shall be entitled to elect one director. The holders of Common Stock, voting together as a separate class, shall be entitled to elect five directors. The holders of Common Stock and New Series A Preferred Stock, voting together as a separate class at any annual or special meeting of stockholders of the Corporation, or by written consent, shall be entitled to elect the remaining directors on the following basis: each holder of shares of New Series A Preferred Stock shall be entitled to such number of votes for the New Series A Preferred Stock held by him on the record date fixed for such meeting, or on the effective date of such written consent, as shall be equal to the whole number of shares of the Common Stock into which all of his shares of New Series A Preferred Stock are convertible immediately after the close of business on the record date fixed for such meeting or the effective date of such written consent (such basis for voting of shares of the Corporation's stock shall hereinafter be referred to as an "As Converted Basis"). Any vacancy in the Board occurring because of the death, resignation or removal of a director elected by the holders of the outstanding class with voting power entitled to elect him or her shall be filled by the vote or written consent of the holders of the outstanding class with voting power entitled to elect him or her or, in the absence of action by such holders, by action of the remaining directors. A director may be removed with or without cause by the vote or consent of the holders of the outstanding class with voting power entitled to elect him or her. Any vacancy in the Board caused by an increase in the number of authorized directors of the Corporation shall be filled by the vote or written consent of the holders of the outstanding shares of New Series A Preferred Stock and the holders of the outstanding Common Stock voting together as a single class.

(b) All Other Matters. On all other matters, except as otherwise required by law or as set forth herein, the shares of New Series A Preferred Stock shall be voted on an as-converted basis with the shares of the Common Stock at any annual or special meeting of stockholders of the Corporation, or the holders thereof may act by written consent in the same manner as the holders of the Common Stock.

### Section 4. Conversion

The holders of the New Series A Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Each share of New Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for the New Series A Preferred Stock, into Common Stock as more fully described below. The number of shares of fully paid and nonassessable Common Stock into which each share of New Series A Preferred Stock may be converted shall be determined by dividing \$5.25 by the Conversion Price (as hereinafter defined) in effect at the time of conversion. The Conversion Price shall initially be \$5.25 for the New Series A Preferred Stock, subject to adjustment as provided in Section 4(e) below.



(b) Each share of New Series A Preferred Stock shall automatically be converted into shares of Common Stock utilizing the then effective Conversion Price for each such share immediately upon (i) the holders of more than two-thirds of the New Series A Preferred Stock then outstanding consenting to the conversion of the New Series A Preferred Stock to Common Stock, (ii) such date as two-thirds of the authorized number of the New Series A Preferred Stock shall have been converted to Common Stock, or (iii) the closing of the Corporation's sale of Common Stock pursuant to an effective registration statement under the Securities Act of 1933, as amended, pursuant to a firm commitment underwritten public offering in which the Corporation receives or is to receive aggregate net proceeds of more than \$20,000,000, and the public offering price of which is not less than \$6.00 per share (adjusted to reflect subsequent stock dividends, stock splits or recapitalizations).

(c) No fractional shares of Common Stock shall be issued upon conversion of the New Series A Preferred Stock into Common Stock, and any shares of New Series A Preferred Stock surrendered for conversion which would otherwise result in a fractional share of Common Stock shall be redeemed for the then fair market value thereof as determined by the Corporation's Board of Directors, payable as promptly as possible whenever funds are legally available therefor. If more than one share of New Series A Preferred Stock is surrendered for conversion at any one time by the same holder, the number of full shares of Common Stock to be issued upon conversion shall be computed on the basis of the aggregate number of shares of New Series A Preferred Stock so surrendered.

(d) Before any holder of New Series A Preferred Stock shall be entitled to convert the same into shares of Common Stock, it shall surrender the certificate or certificates therefor at the office of the Corporation or of any transfer agent for the New Series A Preferred Stock, and shall give written notice to the Corporation at such office that it elects to convert the same and shall state therein the name or names in which the holder wishes the certificate or certificates for shares of Common Stock to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of New Series A Preferred Stock, or to its nominee or nominees, a certificate or certificates for the number of shares of Common Stock to which it shall be entitled as aforesaid. 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 New Series A 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. If the conversion is in connection with an underwritten offer of securities registered pursuant to the Securities Act of 1933, as amended, the conversion may, at the option of any holder tendering New Series A Preferred Stock for conversion, be conditioned upon the closing with the underwriter of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive the Common Stock issuable upon such conversion of the New Series A Preferred Stock shall not be deemed to have converted such New Series A Preferred Stock until immediately prior to the closing of such sale of securities.

(e) The Conversion Price for the New Series A Preferred Stock shall be subject to adjustment from time to time as follows:

(1) In case the Corporation shall at any time subdivide the outstanding shares of Common Stock, or shall issue a stock dividend on its outstanding Common Stock, without an equivalent subdivision of, or dividend on, the New Series A Preferred Stock, the Conversion Price in effect immediately prior to such subdivision or the issuance of such dividend shall be proportionately decreased, and in case the Corporation shall at any time combine the outstanding shares of Common Stock, without an equivalent combination of the New Series A Preferred Stock, the Conversion Price in effect immediately prior to such combination shall be proportionately increased, effective at the close of business on the date of such subdivision, dividend or combination, as the case may be.

(2) If at any time or from time to time there shall be a recapitalization of the Common Stock (other than a subdivision, combination or merger or sale of assets transaction provided for elsewhere in this Section 4), provision shall be made so that the holders of the New Series A Preferred Stock shall thereafter be entitled to receive upon conversion of the New Series A Preferred Stock the number of shares of stock or other securities or property of the Corporation or otherwise, to which a holder of Common Stock deliverable upon conversion would have been entitled on such recapitalization. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4 with respect to the rights of the holders of the New Series A Preferred Stock after the recapitalization so that the provisions of this Section 4 (including adjustment of the Conversion Price then in effect and the number of shares purchasable upon conversion of the New Series A Preferred Stock) shall be as nearly applicable after that event as may be practicable.

(3) If the Corporation shall issue or sell Equity Securities as defined in Section 4(f)(1) below without consideration or at a consideration per share (the "Lower Price") less than the Conversion Price for the New Series A Preferred Stock in effect immediately prior to the time of such issue or sale, then forthwith upon such issue or sale, the Conversion Price of each share of the New Series A Preferred Stock shall be adjusted to a price (calculated to the nearest cent) determined by dividing:

(A) an amount equal to the sum of (x) the number of shares of Common Stock outstanding immediately prior to such issue or sale multiplied by the then existing Conversion Price, (y) the number of shares of Common Stock issuable upon conversion or exchange of any shares of stock or convertible securities of the Corporation outstanding immediately prior to such issue or sale multiplied by the then existing Conversion Price, and (z) an amount equal to the aggregate "consideration actually received" by the Corporation upon such issue or sale; by

(B) the sum of the number of shares of Common Stock outstanding immediately after such issue or sale and the number of shares of Common Stock issuable upon conversion or exchange of any shares of stock of the Corporation outstanding immediately after such issue or sale.

(f) For purposes hereof the following provisions shall be applicable:

(1) The term "Equity Securities" shall mean any shares of Common Stock, or any obligation, any share of stock or other security of the Corporation convertible into, exercisable or exchangeable for Common Stock issued after the date of filing of this Amended and Restated Certificate of Incorporation, except for (i) up to 5,508,611 shares of Common Stock issued or issuable on or after the date of filing of this Amended and Restated Certificate of Incorporation to officers, directors, employees or consultants of the Corporation pursuant to stock grants, stock purchase and stock option plans or other stock incentive programs, agreements or arrangements, (ii) shares issued pursuant to transactions described in subsection (e)(1) of this Section 4, (iii) shares of New Series A Preferred Stock, (iv) shares issuable pursuant to any notes or warrants that are outstanding upon first issuance of the New Series A Preferred Stock, (v) securities issued pursuant to the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets or other reorganization whereby the Corporation or its stockholders own not less than a majority of the voting power of the surviving or successor corporation, provided that such transaction is unanimously approved by the Corporation's Board of Directors, (vi) securities issued in connection with a bank line of credit or equipment lease approved by the Board of Directors, and (vii) shares of Common Stock issued upon conversion of the New Series A Preferred Stock.

(2) In the case of an issue or sale for cash of shares of Common Stock or shares convertible into or exchangeable for Common Stock, the "consideration actually received" by the Corporation therefor shall be deemed to be the amount of cash received, before deducting therefrom any discounts, commissions or expenses paid by the Corporation.

(3) In case of the issuance (otherwise than upon conversion or exchange of obligations or shares of stock of the Corporation) of additional shares of Common Stock for a consideration other than cash or a consideration partly other than cash, the amount of the consideration other than cash received by the Corporation for such shares shall be deemed to be the value of such consideration as determined reasonably and in good faith by the Board of Directors.

(4) In case of the issuance by the Corporation in any manner of any rights to subscribe for or to purchase shares of Common Stock, or any options for the purchase of shares of Common Stock or stock convertible into Common Stock, all shares of Common Stock or stock convertible into Common Stock to which the holders of such rights or options shall be entitled to subscribe for or purchase pursuant to such rights or options shall be deemed to be issued for purposes of this Section 4 as of the date of the offering of such rights or the granting of such options, as the case may be, and the minimum aggregate consideration named in such rights or options for the shares of Common Stock or stock convertible into Common Stock covered thereby, plus the consideration, if any, received by the Corporation for such rights or options, shall be deemed to be the "consideration actually received" by the Corporation (as of the date of the offering of such rights or the granting of such options, as the case may be) for the issuance of such shares.

(5) In case of the issuance or issuances by the Corporation in any manner of any obligations or of any shares of stock of the Corporation that shall be convertible into or exchangeable for Common Stock, all shares of Common Stock issuable upon the

conversion or exchange of such obligations or shares shall be deemed issued for purposes of this Section 4 as of the date such obligations or shares are issued, and the amount of the "consideration actually received" by the Corporation for such additional shares of Common Stock shall be deemed to be the total of (x) the amount of consideration received by the Corporation upon the issuance of such obligations or shares, as the case may be, plus (y) the minimum aggregate consideration, if any, other than such obligations or shares, receivable by the Corporation upon such conversion or exchange, except in adjustment of dividends.

(6) The amount of the "consideration actually received" by the Corporation upon the issuance of any rights or options referred to in subsection (4) above or upon the issuance of any obligations or shares which are convertible or exchangeable as described in subsection (5) above, and the amount of the consideration, if any, other than such obligations or shares so convertible or exchangeable, receivable by the Corporation upon the exercise, conversion or exchange thereof shall be determined in the same manner provided in subsections (2) and (3) above with respect to the consideration received by the Corporation in case of the issuance of additional shares of Common Stock; provided, however, that if such obligations or shares of stock so convertible or exchangeable are issued in payment or satisfaction of any dividend upon any stock of the Corporation other than Common Stock, the amount of the "consideration actually received" by the Corporation upon the original issuance of such obligations or shares or stock so convertible or exchangeable shall be deemed to be the value of such obligations or shares of stock, as of the date of the adoption of the resolution declaring such dividend, as determined by the Board of Directors at or as of that date. On the expiration of any rights or options referred to in subsection (4), or the termination of any right of conversion or exchange referred to in subsection (5), or any change in the number of shares of Common Stock deliverable upon exercise of such options or rights or upon conversion of or exchange of such convertible or exchangeable securities, the Conversion Price then in effect shall forthwith be readjusted to such Conversion Price as would have obtained had the adjustments made upon the issuance of such option, right or convertible or exchangeable securities been made upon the basis of the delivery of only the number of shares of Common Stock actually delivered or to be delivered upon the exercise of such rights or options or upon the conversion or exchange of such securities.

(7) In the event the Corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by the Corporation or other persons or options or rights not referred to in this Section 4(f), then, in each such case, the holders of the New Series A Preferred Stock shall be entitled to the distributions provided for in Section 1 above, and no adjustment to the Conversion Price provided for in this Section 4 shall be applicable.

(g) 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 hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 4 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of the New Series A Preferred Stock against impairment.

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

(i) The Corporation shall at all times reserve and keep available, out of its authorized but unissued Common Stock, solely for the purpose of effecting the conversion of the New Series A Preferred Stock, the full number of shares of Common Stock deliverable upon the conversion of all New Series A Preferred Stock from time to time outstanding. The Corporation shall from time to time (subject to obtaining necessary director and stockholder action, which the Corporation shall use its best efforts to obtain), in accordance with the laws of the State of Delaware, increase the authorized amount of its Common Stock if at any time the authorized number of shares of its Common Stock remaining unissued shall not be sufficient to permit the conversion of all of the shares of New Series A Preferred Stock at the time outstanding.

#### Section 5. Status of Converted Stock

In the event any shares of New Series A Preferred Stock shall be converted pursuant to Section 4 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation, and the Certificate of Incorporation of the Corporation shall be appropriately amended to effect the corresponding reduction in the Corporation's authorized capital stock.

#### Section 6. Protective Provisions

(a) So long as any shares of New Series A Preferred Stock are outstanding, the Corporation shall not, without first obtaining the approval by vote or written consent, in the manner provided by law, of the holders of a two-thirds of the total number of outstanding shares of New Series A Preferred Stock, voting together as a separate class, undertake any of the following actions:

(1) agree to enter into any merger or consolidation or other business combination of the Corporation with or into one or more other corporations;

(2) any action that changes the authorized number of directors on the board of directors;

(3) any sale, lease, exchange, license, transfer or other disposition of all or substantially all of the Corporation's assets, or a liquidation, winding up or dissolution of the Corporation;

(4) any action that alters or changes the rights, preferences or privileges of the New Series A Preferred Stock;

(5) any action that increases or decreases the authorized number of shares of New Series A Preferred Stock;

(6) any action that (i) authorizes or creates or obligates the Corporation to issue shares or reclassifies any outstanding shares into shares of any class or series of stock having preferences superior or on a parity basis to the New Series A Preferred Stock as to dividends, redemption, liquidation preference, voting or other rights, or (ii) authorizes or creates or obligates the Corporation to issue shares of any class or series of any bonds, debentures, notes or other obligations entitling the purchaser to purchase any shares of stock of the Corporation;

(7) any amendment of the Corporation's Certificate of Incorporation or Bylaws that adversely affects the rights of the New Series A Preferred Stock;

(8) the declaration or payment of a dividend on any class of stock (other than dividends payable solely in shares of Common Stock); or

(9) Any redemption, retirement, purchase or acquisition, directly or indirectly through affiliates or otherwise, of any class or series of Preferred Stock or Common Stock except (i) by conversion in accordance with Section 4, or (ii) repurchases of Common Stock by the Corporation from employees of the Corporation upon termination of employment pursuant to the terms of employee stock purchase agreements.

(b) So long as any shares of New Series A Preferred Stock are outstanding, the Corporation shall not alter or change any or all of the rights, preferences, privileges and restrictions granted to or imposed upon the New Series A Preferred Stock or amend the provisions of this Article IV, Section 6 without first obtaining the approval by vote or written consent, in the manner provided by law, of the holders of a majority of the outstanding shares of the New Series A Preferred Stock.

FIFTH: The following provisions are inserted for the management of the business and the conduct of the affairs of the Corporation, and for further definition, limitation and regulation of the powers of the Corporation and of its directors and stockholders:

- A. The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors. In addition to the powers and authority expressly conferred upon them by statute or by this Certificate of Incorporation or the Bylaws of the Corporation, the directors are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the Corporation.

- B. The directors of the Corporation need not be elected by written ballot unless the Bylaws so provide.
- C. On and after the closing date of the first sale of the Corporation's Common Stock pursuant to a firmly underwritten registered public offering (the "IPO"), any action required or permitted to be taken by the stockholders of the Corporation must be effected at a duly called annual or special meeting of stockholders of the Corporation and may not be effected by any consent in writing by such stockholders. Prior to such sale, unless otherwise provided by law, any action which may otherwise be taken at any meeting of the stockholders may be taken without a meeting and without prior notice, if a written consent describing such actions is signed by the holders of outstanding shares having not less than the minimum number of votes which would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.
- D. Special meetings of stockholders of the Corporation may be called only (1) by 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 for adoption) or (2) by the holders of not less than ten percent (10%) of all of the shares entitled to cast votes at the meeting.

SIXTH:

- A. The number of directors shall initially be set at seven (7) and, thereafter, shall be fixed from time to time exclusively by the Board of Directors pursuant to a resolution adopted by a majority of the total number of authorized directors but subject to the rights of the holders of any series of Preferred Stock then outstanding (whether or not there exist any vacancies in previously authorized directorships at the time any such resolution is presented to the Board for adoption). Upon the closing of the IPO, the directors shall be divided into three classes with the term of office of the first class (Class I) to expire at the first annual meeting of the stockholders held following the IPO; the term of office of the second class (Class II) to expire at the second annual meeting of stockholders held following the IPO; the term of office of the third class (Class III) to expire at the third annual meeting of stockholders held following the IPO; and thereafter for each such term to expire at each third succeeding annual meeting of stockholders after such election. Subject to the rights of the holders of any series of Preferred Stock then outstanding, a vacancy resulting from the removal of a director by the stockholders as provided in Article SIXTH, Section C below may be filled at a special meeting of the stockholders held for that purpose. All directors shall hold office until the expiration of the term for which elected, and until their respective successors are

elected, except in the case of the death, resignation, or removal of any director.

- B. Subject to the rights of the holders of any series of Preferred Stock then outstanding, newly created directorships resulting from any increase in the authorized number of directors or any vacancies in the Board of Directors resulting from death, resignation or other cause (other than removal from office by a vote of the stockholders) may be filled only by a majority vote of the directors then in office, though less than a quorum, and directors so chosen shall hold office for a term expiring at the next annual meeting of stockholders at which the term of office of the class to which they have been elected expires, and until their respective successors are elected, except in the case of the death, resignation, or removal of any director. No decrease in the number of directors constituting the Board of Directors shall shorten the term of any incumbent director.
- C. Subject to the rights of the holders of any series of Preferred Stock then outstanding, any directors, or the entire Board of Directors, may be removed from office at any time, with or without cause, but only by the affirmative vote of the holders of at least a majority of the voting power of all of the then outstanding shares of capital stock of the Corporation entitled to vote generally in the election of directors, voting together as a single class. Vacancies in the Board of Directors resulting from such removal may be filled by a majority of the directors then in office, though less than a quorum, or by the stockholders as provided in Article SIXTH, Section A above. Directors so chosen shall hold office for a term expiring at the next annual meeting of stockholders at which the term of office of the class to which they have been elected expires, and until their respective successors are elected, except in the case of the death, resignation, or removal of any director.

**SEVENTH:** The Board of Directors is expressly empowered to adopt, amend or repeal Bylaws of the Corporation. Any adoption, amendment or repeal of Bylaws of the Corporation by the Board of Directors shall require the approval of a majority of the total number of authorized directors (whether or not there exist any vacancies in previously authorized directorships at the time any resolution providing for adoption, amendment or repeal is presented to the Board). The stockholders shall also have power to adopt, amend or repeal the Bylaws of the Corporation. Any adoption, amendment or repeal of Bylaws of the Corporation by the stockholders shall require, in addition to any vote of the holders of any class or series of stock of the Corporation required by law or by this Certificate of Incorporation, the affirmative vote of the holders of at least sixty-six and two-thirds percent (66-2/3%) of the voting power of all of the then outstanding shares of the capital stock of the Corporation entitled to vote generally in the election of directors, voting together as a single class.



**EIGHTH:** A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involved 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 hereafter amended to authorize the further elimination or limitation of the liability of a director, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

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

**NINTH:** The Corporation reserves the right to amend or repeal any provision contained in this Certificate of Incorporation in the manner prescribed by the laws of the State of Delaware and all rights conferred upon stockholders are granted subject to this reservation; provided, however, that, notwithstanding any other provision of this Certificate of Incorporation or any provision of law which might otherwise permit a lesser vote or no vote, but in addition to any vote of the holders of any class or series of the stock of this Corporation required by law or by this Certificate of Incorporation, the affirmative vote of the holders of at least 66-2/3% of the voting power of all of the then outstanding shares of the capital stock of the Corporation entitled to vote generally in the election of directors, voting together as a single class, shall be required to amend or repeal Article FIFTH, Article SIXTH, Article SEVENTH, Article EIGHTH or this Article NINTH.