

04-16-2001



101674892

To the Honorable Commissioner of

and original documents or copy thereof.

Address of receiving party(ies):

1. Name of conveying party(ies):  
**Black Pearl Software, Inc.**  
 Individual(s)  Association  
 General Partnership  Limited Partnership  
 Corporate - State: **Delaware**

Name: **Black Pearl, Inc.**  
Internal Address:  
Street Address: **40 Federal Street**

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

City: **San Francisco**  
State: **California** Zip: **94107**

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

Individual(s) citizenship  
 Association  
 General Partnership  
 Limited Partnership  
 Corporate - State: **Delaware**  
 Other

Execution Date: **November 20, 2000**

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

4. Application number(s) or registration number(s): 12

A. Trademark Application Nos.:  
SEE ATTACHED

B. Trademark Registration No.(s)

75697752

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

Name: **Eliane Setton, Esq.**  
Internal Address: **GRAY CARY WARE & FREIDENRICH**  
**400 Hamilton Avenue**  
**Palo Alto, CA 94301-1823**

6. Total number of applications and registrations involved: 12

7. Total fee (37 CFR 3.41) . . . . . \$ 315. 00

Enclosed  
 Authorized to be charged to deposit account

8. Deposit account number: **07-1907**. Please debit any underpayment or credit any overpayment to the above deposit account.

**GRAY CARY WARE & FREIDENRICH**

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

DO NOT USE THIS SPACE

9. 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*

Eliane Setton, Esq.  
Name of Person Signing

Signature

3/8/01

Date

Total number of pages comprising cover sheet: [2]

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

**Commissioner of Patents and Trademarks**  
**Box Assignments**  
**Washington, DC 20231**

04/13/2001 070N11 00000:19 071907 75697752  
01 FC:481 40.00 CH  
02 FC:482 275.00 CH

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**TRADEMARK**  
**REEL: 002271 FRAME: 0871**

**TRADEMARK SERIAL NO.**

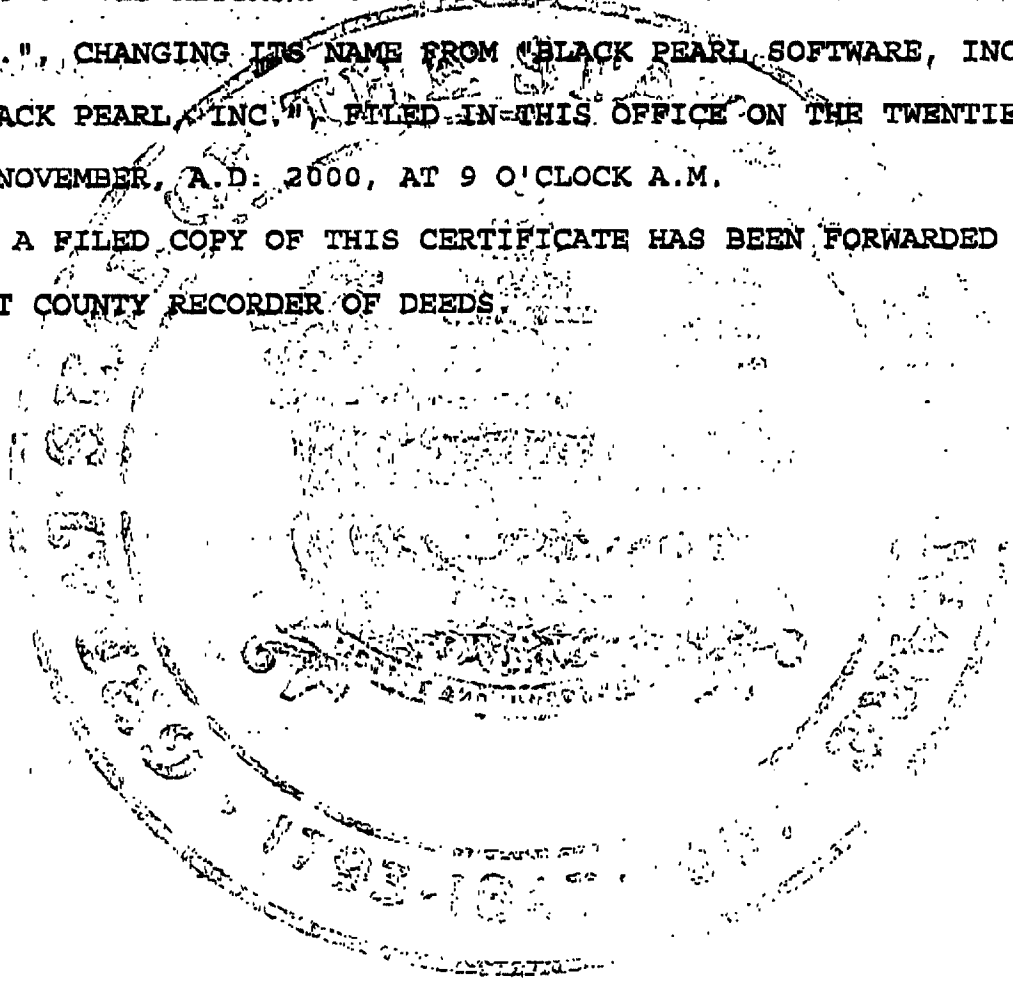
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76/116684  
76/116537  
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75/495838

State of Delaware

Office of the Secretary of State

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 "BLACK PEARL SOFTWARE, INC.", CHANGING ITS NAME FROM "BLACK PEARL SOFTWARE, INC." TO "BLACK PEARL, INC." FILED IN THIS OFFICE ON THE TWENTIETH DAY OF NOVEMBER, A.D. 2000, AT 9 O'CLOCK A.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE KENT COUNTY RECORDER OF DEEDS.



*Edward J. Freel*

Edward J. Freel, Secretary of State

2875430 8100

AUTHENTICATION: 0807212

001583636

DATE: 11-21-00

TRADEMARK  
REEL: 002271 FRAME: 0873

STATE OF DELAWARE  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
FILED 09:00 AM 11/20/2000  
001583636 - 2873430

**THIRD AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION**

**OF**

**BLACK PEARL SOFTWARE, INC.**

The undersigned, Lisa Hammitt and Donald M. Keller, Jr., hereby certify that:

1. They are the duly elected and acting President and Secretary, respectively, of Black Pearl Software, Inc., a Delaware corporation.
2. The Certificate of Incorporation of this corporation was originally filed with the Secretary of State of Delaware on March 24, 1998 under the name "Sfera, Inc."
3. The Certificate of Incorporation of this corporation shall be amended and restated to read in full as follows:

**"ARTICLE I**

The name of this corporation is Black Pearl, Inc. (the "Corporation").

**ARTICLE II**

The address of the Corporation's registered office in the State of Delaware is 15 E. North Street, City of Dover, County of Kent. The name of its registered agent at such address is Incorporating Services, Ltd.

**ARTICLE III**

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

**ARTICLE IV**

(A) Classes of Stock. The Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares which the Corporation is authorized to issue is 58,254,260 shares, each with a par value of \$0.0001 per share. 40,000,000 shares shall be Common Stock and 18,254,260 shares shall be Preferred Stock.

(B) Rights, Preferences and Restrictions of Preferred Stock. The Preferred Stock authorized by this Third Amended and Restated Certificate of Incorporation may be issued from time to time in one or more series. The first series of Preferred Stock shall be designated

"Series A Preferred Stock" and shall consist of 2,827,060 shares. The second series of Preferred Stock shall be designated "Series B Preferred Stock" and shall consist of 5,577,200 shares. The third series of Preferred Stock shall be designated "Series C Preferred Stock" and shall consist of 9,850,000 shares. The rights, preferences, privileges, and restrictions granted to and imposed on the Series A, Series B and Series C Preferred Stock are as set forth below in this Article IV(B).

1. Dividend Provisions.

(a) The holders of shares of Series A, Series B and Series C Preferred Stock shall be entitled to receive dividends, out of any assets legally available therefor, prior and in preference to any declaration or payment of any dividend (payable other than in Common Stock or other securities and rights convertible into or entitling the holder thereof to receive, directly or indirectly, additional shares of Common Stock of the Corporation) on the Common Stock of the Corporation, at the rate of (a) \$0.0449 per share per annum on each outstanding share of Series A Preferred Stock (as adjusted for any stock splits, stock dividends, recapitalizations or the like), (b) \$0.160537 per share per annum on each outstanding share of Series B Preferred Stock (as adjusted for any stock splits, stock dividends, recapitalizations or the like), and (c) \$0.160537 per share per annum on each outstanding share of Series C Preferred Stock (as adjusted for any stock splits, stock dividends, recapitalizations or the like), or, for each such series of Preferred Stock, if greater (as determined on a per annum basis and on an as converted basis for such series of Preferred Stock), an amount equal to that paid on any other outstanding shares of this corporation, payable quarterly when, as and if declared by the Board of Directors. Such dividends shall not be cumulative.

(b) After payment of such dividends, any additional dividends shall be distributed among all holders of Common Stock and all holders of Series A, Series B and Series C Preferred Stock in proportion to the number of shares of Common Stock which would be held by each such holder if all shares of Series A, Series B and Series C Preferred Stock were converted to Common Stock at the then effective conversion rate.

2. Liquidation.

(a) Preference. In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, the holders of the Series A, Series B and Series C Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the Corporation to the holders of Common Stock by reason of their ownership thereof, an amount per share equal to (i) \$0.449 per share (as adjusted for any stock splits, stock dividends, recapitalizations or the like) for each share of Series A Preferred Stock then held by them, (ii) \$1.60537 per share (as adjusted for any stock splits, stock dividends, recapitalizations or the like) for each share of Series B Preferred Stock then held by them, and (iii) \$1.60537 per share (as adjusted for any stock splits, stock dividends, recapitalizations or the like) for each share of Series C Preferred Stock then held by them, plus, in each case, declared but unpaid dividends. If, upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series A, Series B and Series C Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then the entire

2. **Liquidation Rights.** Upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation shall be distributed as provided in Section 2 of Article IV(B).

3. **Redemption.** The Common Stock is not redeemable.

4. **Voting Rights.** Each share of Common Stock shall have the right to one vote, and shall be entitled to notice of any stockholders' meeting in accordance with the bylaws of the Corporation, and shall be entitled to vote upon such matters and in such manner as may be provided by law.

#### ARTICLE V

The Board of Directors of the Corporation is expressly authorized to make, alter or repeal bylaws of the Corporation.

#### ARTICLE VI

Elections of directors need not be by written ballot unless otherwise provided in the Bylaws of the Corporation.

#### ARTICLE VII

(A) To the fullest extent permitted by the Delaware General Corporation Law, as the same exists or as may hereafter be amended, 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.


(B) The Corporation shall indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he, his testator or intestate is or was a director or officer of the Corporation or any predecessor of the Corporation, or serves or served at any other enterprise as a director or officer at the request of the Corporation or any predecessor to the Corporation.

(C) Neither any amendment nor repeal of this Article VII, nor the adoption of any provision of the Corporation's Certificate of Incorporation inconsistent with this Article VII, shall eliminate or reduce the effect of this Article VII in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this Article VII, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision."

\* \* \*

The foregoing Amended and Restated Certificate of Incorporation has been duly adopted by this corporation's Board of Directors and stockholders in accordance with the applicable provisions of Sections 228, 242 and 245 of the General Corporation Law of the State of Delaware.

Executed at San Francisco, California, on the 20<sup>th</sup> day of November, 2000.

  
\_\_\_\_\_  
Lisa Hammitt, President

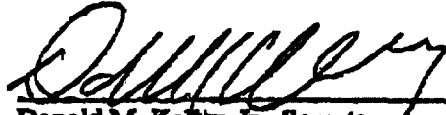
\_\_\_\_\_  
Donald M. Keller, Jr., Secretary

**SIGNATURE PAGE TO BLACK PEARL  
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Donald M. Kefter, Jr., Secretary

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