

11-25-2002



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OFFICE OF TRADEMARK

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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

- 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
Effective Date
Month Day Year
- Change of Name
- Other

Conveying Party

Mark if additional names of conveying parties attached

Execution Date
Month Day Year

Name

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

11/22/2002 TBIAZ1 00000215 76023266

FOR OFFICE USE ONLY

01 FC:4521 40.00 OP
02 FC:4522 75.00 OP

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 0651-0027, 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: 002621 FRAME: 0200

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="76023286"/>	<input type="text" value="75713228"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text" value="76022649"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text" value="78063983"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<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

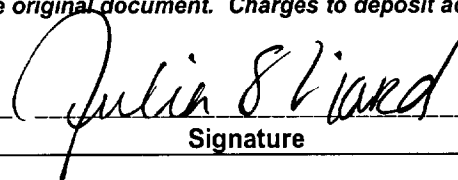
No

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.

Julia Spoor Gard

Name of Person Signing



Signature

11/15/2002

Date Signed

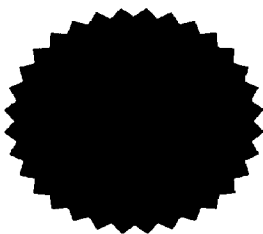
Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "GENESOFT, INC.", CHANGING ITS NAME FROM "GENESOFT, INC." TO "GENESOFT PHARMACEUTICALS, INC.", FILED IN THIS OFFICE ON THE TWENTIETH DAY OF SEPTEMBER, A.D. 2002, AT 9 O'CLOCK A.M.

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



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1995480

DATE: 09-23-02

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TRADEMARK
REEL: 002621 FRAME: 0202

SIXTH AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
GENESOFT, INC.

David B. Singer hereby certifies that:

FIRST: He is the duly elected and acting Chief Executive Officer of GeneSoft, Inc., a Delaware corporation (the "Corporation").

SECOND: The original Certificate of Incorporation of the Corporation was filed with the Secretary of State of Delaware on August 12, 1997. The original name of the Company was GeneSoft Pharmaceuticals, Inc.

THIRD: The Certificate of Amendment changing the name of the Corporation to GeneSoft, Inc. was filed with the Secretary of State of Delaware on May 21, 1998.

FOURTH: By vote of the Board of Directors of the Corporation a resolution was adopted, pursuant to Sections 242 and 245 of the General Corporation Law of the State of Delaware, setting forth an amendment to the Certificate of Incorporation of the Corporation and declaring said amendment to be advisable. The stockholders of the Corporation duly approved said proposed amendment by written consent in accordance with Sections 228, 242 and 245 of the General Corporation Law of the State of Delaware, and prompt written notice of the taking of the action without a meeting by less than unanimous written consent has been given in accordance with Section 228(d) to the stockholders who did not consent in writing.

FIFTH: The Fifth Amended and Restated Certificate of Incorporation of the Corporation is hereby amended and restated to read in its entirety as follows:

Article I

The name of the Corporation is GeneSoft Pharmaceuticals, Inc.

Article II

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

Article III

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

Article IV

A. Classes of Stock. This Corporation is authorized to issue two classes of stock, to be designated respectively preferred stock ("Preferred Stock") and common stock ("Common Stock"). The total number of shares of Common Stock this Corporation shall have the authority to issue is Thirty Eight Million Nine Hundred Fifty Thousand (38,950,000). The total number of shares of Preferred Stock this Corporation shall have the authority to issue is Twenty Four Million Nine Hundred Seventy Five Thousand (24,975,000), Five Million Four Hundred Twenty Five Thousand (5,425,000) shares shall be designated Series A Preferred Stock, Six Million (6,000,000) shares shall be designated Series B Preferred Stock, Six Million and Six Hundred Thousand (6,600,000) shares shall be designated Series C Preferred Stock, Five Million Nine Hundred Fifty Thousand (5,950,000) shares shall be designated Series D Preferred Stock and One Million (1,000,000) shares shall be designated Series 1 Preferred Stock. The Preferred Stock and the Common Stock shall each have a par value of \$0.0001.

B. Rights, Preferences and Restrictions of Preferred Stock.

The powers, preferences, rights, restrictions, and other matters relating to the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock are as follows:

1. Dividends and Non-Liquidating Distributions.

a. The holders of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock shall be entitled to receive dividends at the rate of 8% of the Original Series A Purchase Price, the Original Series B Purchase Price, the Original Series C Purchase Price or the Original Series D Purchase Price (as defined in Section 2.a. below) per share, as the case may be, per annum, and the holders of the Series 1 Preferred Stock shall be entitled to receive dividends at the rate of \$0.24 per share per annum (adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like with respect to such shares), in each case payable out of funds legally available therefor. Such dividends shall be payable only when, as, and if declared by the Board of Directors and shall be non-cumulative.

No dividends (other than those payable solely in the Common Stock of the Corporation) shall be paid on any Common Stock of the Corporation during any fiscal year of the Corporation until dividends required to be paid by this Section 1 on the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock shall have been paid or declared and set apart during that fiscal year and any prior year in which dividends accumulated but remain unpaid.

No right shall accrue to holders of shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock by reason of the fact that dividends on said shares are not declared in any prior year, nor shall any unpaid dividend bear or accrue any interest.

b. 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,

assets (excluding cash dividends) or options or rights to purchase any such securities or evidences of indebtedness, then, in each such case the holders of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock shall be entitled to a proportionate share of any such distribution as though the holders of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock were the holders of the number of shares of Common Stock of the Corporation into which their respective shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution.

c. After the holders of the Series A Preferred, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock have received their dividend preference as set forth above, any additional dividends or distributions declared by the Board of Directors out of funds legally available therefor shall be distributed among all holders of Common Stock, together with holders of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock, *pari passu*, in proportion to the number of shares of Common Stock into which their respective shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock are convertible as of the record date fixed for determining those entitled to receive such distribution.

2. Liquidation Preference.

a. In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the holders of the Series D Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation available for distribution to its stockholders, whether from capital, surplus, earnings or otherwise to the holders of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series 1 Preferred Stock, Common Stock or any other equity security of the Corporation, by reason of their ownership of such stock, the amount of \$4.00 per share (the "Series D Original Purchase Price") for each share of Series D Preferred Stock then held by them (adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like with respect to such shares) plus any declared but unpaid dividends on such share (such sum being referred to herein as the "Series D Liquidation Value"). If upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series D Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then the entire assets and funds of the Corporation legally available for distribution shall be distributed among the holders of the Series D Preferred Stock in proportion to the amount of such stock owned by each such holder.

b. Upon completion of the distribution required by subsection (a) of this Section 2, the holders of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation available for distribution to its stockholders, whether from capital, surplus, earnings, or otherwise to the holders of the Series 1 Preferred Stock, Common Stock or any other equity security of the Corporation, by reason of their

ownership of such stock, (i) the amount of \$1.00 per share (the "Series A Original Purchase Price") for each share of Series A Preferred Stock then held by them (adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like with respect to such shares) plus any declared but unpaid dividends on such share (such sum being referred to herein as the "Series A Liquidation Value"), (ii) the amount of \$2.50 per share (the "Series B Original Purchase Price") for each share of Series B Preferred Stock then held by them (adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like with respect to such shares) plus any declared but unpaid dividends on such share (such sum being referred to herein as the "Series B Liquidation Value") and (iii) the amount of \$5.00 per share (the "Series C Original Purchase Price") for each share of Series C Preferred Stock then held by them (adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like with respect to such shares) plus any declared but unpaid dividend on such shares (such sum being referred to herein as "Series C Liquidation Value"). If upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then, the entire assets and funds of this Corporation legally available for distribution shall be distributed among the holders of the Series A Preferred Stock, Series B Preferred Stock and Series C Preferred Stock in proportion to the full Series A Liquidation Value, Series B Liquidation Value and Series C Liquidation Value each such holder is otherwise entitled to receive in accordance with the preceding sentence.

c. Upon completion of the distributions required by subsections (a) and (b) of this Section 2, the holders of the Series 1 Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation available for distribution to its stockholders, whether from capital, surplus, earnings, or otherwise to the holders of Common Stock or any other equity security of the Corporation, by reason of their ownership of such stock, the amount of \$1.50 per share for each share of Series 1 Preferred Stock then held by them (adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like with respect to such shares) plus any declared but unpaid dividends on such share (such sum being referred to herein as the "Series 1 Liquidation Value"). If upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series 1 Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amounts, then, the entire assets and funds of this Corporation legally available for distribution shall be distributed among the holders of the Series 1 Preferred Stock in proportion to the full Series 1 Liquidation Value each such holder is otherwise entitled to receive in accordance with the preceding sentence.

d. Upon the completion of the distributions required by subsections (a), (b) and (c) of this Section 2, the remaining assets of this Corporation available for distribution to stockholders shall be distributed among the holders of Series A Preferred Stock, Series 1 Preferred Stock and Common Stock pro rata based on the number of shares of Common Stock held by each (assuming full conversion of all such Series A Preferred Stock and Series 1 Preferred Stock) until with respect to the holders of Series A Preferred Stock and the holders of Series 1 Preferred Stock, such holders shall have received an aggregate of \$2.50 per share and \$3.00 per share, respectively (adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like with respect to such shares) (including amounts paid

pursuant to subsection (b) and (c) of this Section 2, as applicable); thereafter, if assets remain in this Corporation, the holders of the Common Stock of this Corporation shall receive all of the remaining assets of this Corporation pro rata based on the number of shares of Common Stock held by each.

c. For purposes of this Section 2, (i) any acquisition of the Corporation by means of merger or other form of corporate reorganization in which outstanding shares of the Corporation are exchanged for securities or other consideration issued, or caused to be issued, by the acquiring corporation or its subsidiary (other than a mere reincorporation transaction) and pursuant to which the holders of the outstanding voting securities of the Corporation as constituted immediately prior to such consolidation, merger or other transaction fail to hold equity securities representing a majority of the voting power of the Corporation or surviving entity immediately following such consolidation, merger or other transaction or (ii) a sale of all or substantially all of the assets of the Corporation, shall be treated as a liquidation, dissolution or winding up of the Corporation and shall entitle the holders of Preferred Stock to receive at the closing in cash, securities or other property (valued as provided in Section 2(f) below) amounts as specified in Sections 2(a), 2(b), 2(c) and 2(d) above.

f. Whenever the distribution provided for in this Section 2 shall be payable in securities or property other than cash, the value of such distribution shall be the fair market value of such securities or other property as determined in good faith by the Board of Directors.

3. Redemption. The Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock shall not be redeemable at the option of the holder.

4. Conversion. The holders of the Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

a. Right to Convert.

(i) Each share of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 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 such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$1.00, in the case of the Series A Preferred Stock, \$2.50, in the case of the Series B Preferred Stock, \$5.00, in the case of the Series C Preferred Stock, \$4.00, in the case of the Series D Preferred Stock, or \$3.00, in the case of the Series 1 Preferred Stock (in each case as adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like) by the applicable Series A Conversion Price, the applicable Series B Conversion Price, the applicable Series C Conversion Price, the applicable Series D Conversion Price or the applicable Series 1 Conversion Price, as the case may be, in effect on the date the certificate is surrendered for conversion. The initial "Series A Conversion Price" for the Series A Preferred Stock shall be \$1.00. The initial "Series B Conversion Price" for the Series B Preferred Stock shall be \$2.50. The initial "Series C Conversion Price" for Series C Preferred Stock shall be \$4.79617. The

initial "Series D Conversion Price" for Series D Preferred Stock shall be \$4.00. The initial "Series 1 Conversion Price" for Series 1 Preferred Stock shall be \$3.00. The initial Series A Conversion Price, the initial Series B Conversion Price, the initial Series C Conversion Price, the initial Series D Conversion Price and the initial Series 1 Conversion Price shall be subject to adjustment as hereinafter provided. No amount shall be payable by a stockholder in respect of the conversion of any share of Preferred Stock.

(ii) Automatic Conversion. Each share of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Series A Conversion Price, the then effective Series B Conversion Price, the then effective Series C Conversion Price, the then effective Series D Conversion Price or the then effective Series 1 Conversion Price immediately upon the earlier of (i) the date specified by written consent or agreement of holders of at least two-thirds (2/3) of the shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock (voting together as a single class on an as converted basis) then outstanding, or (ii) immediately upon the closing of the sale of the Corporation's Common Stock in a firm commitment, underwritten public offering registered under the Securities Act of 1933, as amended (the "Securities Act"), at a public offering price (prior to underwriters' discounts and offering expenses) equal to or exceeding \$5.00 per share (adjusted for any combinations, consolidations, stock splits, or stock distributions or dividends or the like with respect to such shares), and the aggregate proceeds to the Corporation (before deduction for underwriters' discounts and offering expenses) equal to or exceeding \$15,000,000.

b. Mechanics of Conversion.

(i) Before any holder of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock shall be entitled to convert the same into shares of Common Stock, he, she or it shall surrender the certificate or certificates therefor, duly endorsed, at the office of this Corporation or of any transfer agent for the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock and shall give written notice to this Corporation at its principal corporate office of the election to convert the same and shall state therein the name or names in which the certificate or certificates for shares of Common Stock are to be issued. This Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock, or to the nominee or nominees of such holder, a certificate or certificates for the number of shares of Common Stock to which such holder 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 Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 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 as of such date.

(ii) If the conversion is in connection with an underwritten offering of securities registered pursuant to the Securities Act, the conversion may, at the option

of any holder tendering Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive the Common Stock upon conversion of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock, as applicable, shall not be deemed to have converted such Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock until immediately prior to the closing of such sale of securities. A holder electing to condition his, her or its conversion pursuant to this Section 4(b)(ii) must provide written notice of such election along with its endorsed certificate.

c. Conversion Price Adjustments of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock for Certain Dilutive Issuances, Splits and Combinations. The respective Series A, Series B, Series C, Series D and Series 1 Conversion Price shall be subject to adjustment from time to time as follows:

(i)(A) If the Corporation shall issue after the date of first issuance of shares of Series 1 Preferred Stock (the "Purchase Date"), any Additional Stock (as defined below) without consideration or for a consideration per share less than the respective Conversion Price for such series in effect immediately prior to the issuance of such Additional Stock, the Series A Conversion Price, the Series B Conversion Price, the Series C Conversion Price, the Series D Conversion Price or the Series 1 Conversion Price in effect immediately prior to each such issuance shall forthwith (except as otherwise provided in this clause) be adjusted to a price determined by multiplying such Series A Conversion Price, Series B Conversion Price, Series C Conversion Price, Series D Conversion Price or Series 1 Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance plus the number of shares of Common Stock that the aggregate consideration received by the Corporation for such issuance would purchase at such Series A Conversion Price, Series B Conversion Price, Series C Conversion Price, Series D Conversion Price or Series 1 Conversion Price, as the case may be; and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance plus the number of shares of such Additional Stock. For the purpose of the above calculation, the number of shares of Common Stock outstanding immediately prior to such issuance shall be calculated on a fully diluted basis, as if all shares of stock or convertible or exchangeable securities had been fully converted or exchanged into shares of Common Stock and any outstanding warrants, options or other rights for the purchase of shares of stock or convertible or exchangeable securities had been fully exercised (and the resulting securities fully converted or exchanged into shares of Common Stock, if so convertible or exchangeable) as of such date at a price equal to the consideration, if any, received by the Corporation upon the issuance of the security plus the minimum additional consideration, if any, to be received by the Corporation upon the conversion or exchange or exercise of such security.

(B) No adjustment of the Conversion Price for any series of Preferred Stock shall be made in an amount less than one cent per share, provided that any adjustments which are not required to be made by reason of this sentence shall be carried forward and shall be either taken into account in any subsequent adjustment made prior to 3

years from the date of the event giving rise to the adjustment being carried forward, or shall be made at the end of 3 years from the date of the event giving rise to the adjustment being carried forward. No adjustment of the Conversion Price for any series of Preferred Stock pursuant to this subsection 4(c)(i) shall have the effect of increasing such Conversion Price above the Conversion Price in effect immediately prior to such adjustment.

(C) In the case of the issuance of Common Stock for cash, the consideration shall be deemed to be the amount of cash paid therefor excluding amounts paid or payable for accrued interest or accrued dividends and before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by this Corporation for any underwriting or otherwise in connection with the issuance and sale thereof.

(D) In the case of the issuance of the Common Stock for a consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined by the Board of Directors irrespective of any accounting treatment.

(E) In the case of the issuance (whether before, on or after the Purchase Date) of options to purchase or rights to subscribe for Common Stock, securities by their terms convertible into or exchangeable for Common Stock or options to purchase or rights to subscribe for such convertible or exchangeable securities, the following provisions shall apply for all purposes of this subsection 4(c)(i) and subsection 4(c)(ii):

(1) The aggregate maximum number of shares of Common Stock deliverable upon exercise (assuming the satisfaction of any conditions to exercisability, including without limitation, the passage of time, but without taking into account potential antidilution adjustments) of such options to purchase or rights to subscribe for Common Stock shall be deemed to have been issued at the time such options or rights were issued and for a consideration equal to the consideration (determined in the manner provided in subsections 4(c)(i)(C) and 4(c)(i)(D)), if any, received by this Corporation upon the issuance of such options or rights plus the minimum exercise price provided in such options or rights for the Common Stock covered thereby.

(2) The aggregate maximum number of shares of Common Stock deliverable upon conversion of, or in exchange (assuming the satisfaction of any conditions to convertibility or exchangeability, including, without limitation, the passage of time, but without taking into account potential antidilution adjustments) for, any such convertible or exchangeable securities or upon the exercise of options to purchase or rights to subscribe for such convertible or exchangeable securities and subsequent conversion or exchange thereof shall be deemed to have been issued at the time such securities were issued or such options or rights were issued and for a consideration equal to the consideration, if any, received by this Corporation for any such securities and related options or rights (excluding any cash received on account of accrued interest or accrued dividends), plus the minimum additional consideration, if any, to be received by this Corporation upon the conversion or exchange of such securities or the exercise of any related options or rights (the consideration in each case to be determined in the manner provided in subsections 4(c)(i)(C) and (c)(i)(D)).

(3) In the event of any change in the number of shares of Common Stock deliverable or in the consideration payable to this Corporation upon exercise of such options or rights or upon conversion of or in exchange for such convertible or exchangeable securities, including, but not limited to, a change resulting from the antidilution provisions thereof, the Conversion Prices of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series I Preferred Stock, to the extent in any way affected by or computed using such options, rights or securities, shall be recomputed to reflect such change, but no further adjustment shall be made for the actual issuance of Common Stock or any payment of such consideration upon the exercise of any such options or rights or the conversion or exchange of such securities.

(4) Upon the expiration of any such options or rights, the termination of any such rights to convert or exchange or the expiration of any options or rights related to such convertible or exchangeable securities, the Conversion Price of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series I Preferred Stock, to the extent in any way affected by or computed using such options, rights or securities or options or rights related to such securities, shall be recomputed to reflect the issuance of only the number of shares of Common Stock (and convertible or exchangeable securities that remain in effect) actually issued upon the exercise of such options or rights, upon the conversion or exchange of such securities or upon the exercise of the options or rights related to such securities.

(5) The number of shares of Common Stock deemed issued and the consideration deemed paid therefor pursuant to subsections 4(c)(i)(E)(1) and (2) shall be appropriately adjusted to reflect any change, termination or expiration of the type described in either subsection 4(c)(i)(E)(3) or (4).

(ii) "Additional Stock" shall mean any shares of Common Stock issued by this Corporation (or deemed to have been issued pursuant to subsection 4(c)(i)(E)) after the Purchase Date other than:

(A) Common Stock issued pursuant to a transaction described in subsection 4(c)(iii) hereof;

(B) Common Stock issuable or issued in connection with a bona fide acquisition by this Corporation (or a subsidiary thereof), whether by merger, consolidation, sale of assets, sale or exchange of stock or otherwise, in any case approved by the Board of Directors

(C) shares of Common Stock (or options or warrants therefor) issuable or issued to employees or directors of, or consultants to, this Corporation or any subsidiary directly or pursuant to a stock option plan or stock purchase plan or agreements approved by the Board of Directors of this Corporation;

(D) Common Stock issued or issuable upon conversion of shares of convertible Preferred Stock;

(E) Common Stock issued or issuable pursuant to a recapitalization or as a dividend or distribution on shares of Common Stock or Preferred Stock;

(F) Common Stock issued or issuable in connection with a public offering of securities of this Corporation; or

(G) Shares of capital stock or convertible securities (or warrants or options therefor) issued or issuable to landlords, licensors of technology, vendors, lenders, lessors or other third parties with which the Corporation has, or is entering into, a business relationship or pursuant to a joint venture or corporate partnering arrangement with the Company, provided such issuance has been approved by the Board of Directors of the Corporation.

(iii) In the event the Corporation should at any time or from time to time after the date on which this Certificate of Incorporation is filed fix a record date for the effectuation of a split or subdivision of the outstanding shares of Common Stock or the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock (hereinafter referred to as "Common Stock Equivalents") without payment of any consideration by such holder for the additional shares of Common Stock or the Common Stock Equivalents (including the additional shares of Common Stock issuable upon conversion or exercise thereof), then, as of such record date (or the date of such dividend distribution, split or subdivision if no record date is fixed), the Series A Conversion Price, Series B Conversion Price, Series C Conversion Price, Series D Conversion Price and Series 1 Conversion Price shall be appropriately decreased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be increased in proportion to such increase of the aggregate of shares of Common Stock outstanding and those issuable with respect to such Common Stock Equivalents.

(iv) If the number of shares of Common Stock outstanding at any time after the date on which this Certificate of Incorporation is filed is decreased by a combination of the outstanding shares of Common Stock, then, following the record date of such combination, the Series A Conversion Price, Series B Conversion Price, Series C Conversion Price, Series D Conversion Price and Series 1 Conversion Price shall be appropriately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in outstanding shares.

d. Recapitalizations. 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 or Section 2) provision shall be made so that the holders of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock shall thereafter be entitled to receive upon conversion of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 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 Preferred Stock after the recapitalization to the end 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 Preferred Stock) shall be applicable after that event as nearly equivalent as may be practicable.

e. No Impairment. Without the written consent of the holders of at least two-thirds (2/3) of the Series A Preferred Stock (voting as a separate class), at least two-thirds (2/3) of the Series B Preferred Stock (voting as a separate class) at least two-thirds (2/3) of the Series C Preferred Stock (voting as a separate class), at least two-thirds (2/3) of the Series D Preferred Stock (voting as a separate class) and at least two-thirds (2/3) of the Series 1 Preferred Stock (voting as a separate class), this Corporation will not, by amendment of this Certificate of Incorporation or through any reorganization, recapitalization, 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 this 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 Preferred Stock against impairment.

f. No Fractional Shares and Certificate as to Adjustments.

(i) No fractional shares shall be issued upon the conversion of any share or shares of the Preferred Stock, and in lieu of such fractional shares, the holders thereof shall be entitled to receive in cash the fair value of such fractional shares at the time of the conversion, as determined in good faith by the Corporation's Board of Directors. The payment that a holder will be entitled to receive pursuant to this section shall be determined on the basis of the total number of shares of Preferred Stock the holder is at the time converting into Common Stock and the fractional share of Common Stock otherwise issuable upon such aggregate conversion.

(ii) Upon the occurrence of each adjustment or readjustment of the Conversion Price of Preferred Stock pursuant to this Section 4, this Corporation, at its expense, shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. This Corporation shall, upon the written request at any time of any holder of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock, furnish or cause to be furnished to such holder a certificate setting forth (A) the Series A Conversion Price, Series B Conversion Price, Series C Conversion Price, Series D Conversion Price or Series 1 Conversion Price at the time in effect, and (B) 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 a share of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock.

g. Notices of Record Date. In the event:

(i) of any taking by this Corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend (other than a cash dividend) or other distribution, 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; or

(ii) that the Corporation subdivides or combines its outstanding shares of Common Stock;

(iii) of any reclassification of the Common Stock of the Corporation (other than a subdivision or combination of its outstanding shares of Common Stock or a stock dividend or stock distribution thereon), or of any consolidation or merger of the Corporation into or with another corporation, or of the sale of all or substantially all of the assets of the Corporation; or

(iv) of the involuntary or voluntary dissolution, liquidation or winding up of the Corporation,

this Corporation shall mail to each holder of Preferred Stock, at least 20 days prior to the date specified therein, a notice specifying the date on which any such record is to be taken for the purpose of such dividend, distribution or right, and the amount and character of such dividend, distribution or right.

h. Reservation of Stock Issuable Upon Conversion. This Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock, in addition to such other remedies as shall be available to the holder of such Preferred Stock, this 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 purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to this certificate.

i. Notices. Any notice required by the provisions of this Section 4 to be given to the holders of shares of Preferred Stock shall be deemed given upon (i) personal delivery to the party to be notified, (ii) one day after deposit with a reputable overnight courier service (charges pre-paid) or (iii) upon confirmed transmission via facsimile or electronic mail.

5. Voting Rights.

a. Each holder of shares of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series I Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred

Stock, Series D Preferred Stock and Series 1 Preferred Stock could be converted and shall have voting rights and powers equal to the voting rights and powers of the Common Stock (except as otherwise expressly provided herein or as required by law, voting together with the Common Stock as a single class on an as converted basis) and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward).

b. The number of directors constituting the Company's Board of Directors shall be set forth in the Amended and Restated Bylaws of the Company and may only be changed or amended as provided for in such Amended and Restated Bylaws.

6. Protective Provisions. So long as the shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock originally issued remain outstanding, the Corporation shall not, without the vote or written consent by the holders of at least two-thirds (2/3) of the then outstanding shares of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock and Series 1 Preferred Stock (voting together as a single class and on an as converted basis) (and in the case of Article IV.B.6(iii), with respect to the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, of the holders of at least a majority of such series of Preferred Stock then outstanding who are adversely effected); provided, however, that nothing contained herein shall limit the rights of the holders of the Series 1 Preferred Stock pursuant to Section 242(b) of the Delaware General Corporation Law):

(i) authorize or issue, or obligate itself to issue, any other equity security, including any other security convertible into or exercisable for any equity security, having a preference over, or being on a parity with, any series of Preferred Stock with respect to dividends, liquidation, redemption or voting;

(ii) Effect any sale or other conveyance of all or substantially all of the assets of the Corporation or any of its subsidiaries, or any consolidation or merger involving the Corporation or any of its subsidiaries, in which in excess of 50% of the Corporation's voting power is transferred, or any reorganization or recapitalization of the Company;

(iii) Amend or repeal its Certificate of Incorporation, if such amendment would adversely change any of the rights, preferences or privileges provided for herein for the benefit of any shares of Preferred Stock;

(iv) Redeem, repurchase or pay or declare any dividends on any securities; provided, however, that the Corporation may repurchase equity securities from employees, directors, consultants or other persons performing services for this Corporation or any subsidiary upon termination of such services without obtaining the vote required by this section; or

(v) Increase or decrease the authorized number of directors constituting the Board of Directors of the Company.

7. No Reissuance of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock. No share or shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock or Series 1 Preferred Stock acquired by the Corporation by reason of purchase, conversion or otherwise shall be reissued, and all such shares shall be cancelled, retired and eliminated from the shares which the Corporation shall be authorized to issue.

C. The Common Stock.

1. Dividend Rights. Subject to the prior rights of the holders of all classes of stock at the time outstanding having prior rights as to dividends and subject to the provisions set forth in Article IV(B)(6), the holders of the Common Stock shall be entitled to receive, when and as declared by the Board of Directors, out of any assets or the Corporation legally available therefor, such dividends as may be declared from time to time by the Board of Directors. Such dividends shall be non-cumulative.

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 Division (B) of this Article IV.

3. Redemption. The Common Stock shall not be redeemable at the option of the holder.

4. Voting Rights. The holder of 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 this Corporation, and shall be entitled to vote upon such matters and in such manner as may be provided herein or by law. The rights of the holders of Common Stock with respect to the election of directors shall be as set forth in Section 5(b) of Division (B) of this Article IV.

Article V

A. Indemnification.

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

2. This Corporation is authorized to provide indemnification of agents (and any other persons to which Delaware law permits this Corporation to provide indemnification) through bylaw provisions, agreements with the agents, votes of stockholders or disinterested directors, or otherwise in excess of the indemnification otherwise permitted by Section 145 of the Delaware General Corporation Law, subject only to limits created by applicable Delaware law with respect to actions for breach of duty to the Corporation and its stockholders.

Article VI

A. Bylaws. The Bylaws of the Corporation may be adopted, amended or repealed by the vote or the written consent of stockholders entitled to exercise a majority of the voting power of the Corporation. Bylaws may be adopted, amended or repealed by the Board of Directors, except that a Bylaw amendment thereof changing the authorized number of directors may be adopted by the Board of Directors only if the Bylaws being amended permit an indefinite number of directors and the Bylaws or amendment thereof adopted by the Board of Directors changes the authorized number of directors within the limits specified in those Bylaws.

IN WITNESS WHEREOF, the Company has caused this Sixth Amended and Restated Certificate of Incorporation to be signed by its Chief Executive Officer and Chairman this 20th day of September 2002.

/S/ David B. Singer

David B. Singer
Chief Executive Officer & Chairman