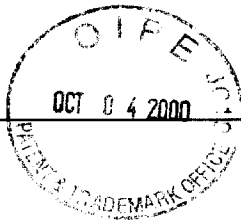


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## RECORDATION FORM COVER SHEET

11-01-2000

Attorney Docket Number

10082-003-999

TO THE HONORABLE



ADDITIONAL REMARKS

101502518

Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):

10-10-00

Della &amp; James, Inc.

2. Name and address of receiving party(ies):

Name: DELLA.COM, INC.

Additional name(s) of conveying party(ies) attached? ☐ Yes ☒ NoAddress: 201 Potrero Avenue  
San Francisco, CA 94103

3. Nature of conveyance:

☐ Assignment☐ Merger☐ Security Agreement☒ Change of Name☐ Other

Country (if other than USA):

Execution Date: February 11, 2000

4. Application number(s) or patent number(s):

If this document is being filed together with a new application, the execution date of the application is:

A. Patent Application No.(s) 09/459,766,  
filed December 13, 1999

B. Patent No.(s)

Additional numbers attached? ☐ Yes ☒ No

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

PENNIE & EDMONDS LLP  
1155 Avenue of the Americas  
New York, NY 10036

6. Number of applications and patents involved: 1

7. Total fee (37 CFR 3.41): \$ 40.00  
Please charge to the deposit account listed in Section 8.8. Deposit account number:  
16-1150

10/31/2000 RMHED1 00000110 161150 09459766

01 FC:581 40.00 CH

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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.*

Brett Lovejoy

42,813

Signature

October 4, 2000

Date

For: William S. Galliani (Reg. No. 33,885)  
Name of Person Signing Reg. No.

Total number of pages including cover sheet:

23

Mail documents to be recorded with required cover sheet information to:  
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A0539404

State of California



## SECRETARY OF STATE

I, *BILL JONES*, Secretary of State of the State of California, hereby certify:

That the attached transcript of 21 page(s) has been compared with the record on file in this office, of which it purports to be a copy, and that it is full, true and correct.

**IN WITNESS WHEREOF**, I execute this certificate and affix the Great Seal of the State of California this day of

FEB 16 2000

*Bill Jones*

Secretary of State

A0539404

## RESTATED ARTICLES OF INCORPORATION

OF

DELLA & JAMES, INC.

**ENDORSED - FILED**  
in the office of the Secretary of State  
of the State of California

FEB 14 2000

Rebecca Patton and Jessica Herrin hereby certify that:

BILL JONES, Secretary of State

**ONE:** They are the duly elected and acting President and Secretary, respectively, of Della & James, Inc., a California corporation (the "Corporation" or the "Company").

**TWO:** The Articles of Incorporation of this corporation are hereby amended and restated to read as follows:

### I.

The name of the Corporation is **DELLA.COM** (the "Corporation" or the "Company").

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 California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code.

### II.

**A.** This Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares which the Corporation is authorized to issue is Seventy-four Million (74,000,000) shares, Forty-three Million Seven Hundred Thousand (43,700,000) shares of which shall be Common Stock (the "Common Stock") and Thirty Million Three Hundred Thousand (30,300,000) shares of which shall be Preferred Stock (the "Preferred Stock"). The Preferred Stock shall have a par value of \$0.001 per share and the Common Stock shall have a par value of \$0.001 per share.

**B.** Two Million (2,000,000) of the authorized shares of Preferred Stock are hereby designated "Series A Preferred Stock" (the "Series A Preferred").

**C.** Four Million Five Hundred Thousand (4,500,000) of the authorized shares of Preferred Stock are hereby designated "Series B Preferred Stock" (the "Series B Preferred").

**D.** Five Million Eight Hundred Thousand (5,800,000) of the authorized shares of Preferred Stock are hereby designated "Series C Preferred Stock" (the "Series C Preferred").

**E.** Fifteen Million (15,000,000) of the authorized shares of Preferred Stock are hereby designated Series D Preferred Stock (the "Series D Preferred").

F. Three Million (3,000,000) of the authorized shares of Preferred Stock are hereby designated Series E Preferred Stock (the "Series E Preferred" and, together with the Series A, Series B, Series C and Series D Preferred, the "Series Preferred").

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

1. Dividend Rights.

a. Holders of Series A, Series B, Series C, Series D and Series E Preferred, in preference to the holders of any other stock of the Company ("Junior Stock"), shall be entitled to receive, when and as declared by the Board of Directors, but only out of funds that are legally available therefor, cash dividends at the rate of eight percent (8%) of the "Original Issue Price" per annum on each outstanding share of Series A, Series B, Series C, Series D and Series E Preferred (each as adjusted for any stock dividends, combinations, splits recapitalizations and the like with respect to such shares). The Original Issue Price of the Series A Preferred shall be fifty cents (\$0.50) per share (the "Series A Original Issue Price"). The Original Issue Price of the Series B Preferred shall be one dollar (\$1.00) per share (the "Series B Original Issue Price"). The Original Issue Price of the Series C Preferred shall be four dollars and seventy-five cents (\$4.75) per share. The Original Issue Price of the Series D Preferred shall be the average, per-share price at which the outstanding Series D Preferred were issued by the Company. The Original Issue Price of the Series E Preferred shall be six dollars and fifty-six cents (\$6.56) per share. Such dividends shall be payable only when, as and if declared by the Board of Directors and shall be non-cumulative.

b. So long as any shares of Series A, Series B, Series C, Series D and Series E Preferred shall be outstanding, no dividend, whether in cash or property, shall be paid or declared, nor shall any other distribution be made, on any Junior Stock, nor shall any shares of any Junior Stock of the Company be purchased, redeemed, or otherwise acquired for value by the Company (except for acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares upon termination of services to the Company or in exercise of the Company's right of first refusal upon a proposed transfer) until all dividends (set forth in Section 1a above) on the Series A, Series B, Series C, Series D and Series E Preferred shall have been paid or declared and set apart. In the event dividends are paid on any share of Common Stock, an additional dividend shall be paid with respect to all outstanding shares of Series A, Series B, Series C, Series D and Series E Preferred in an amount equal per share (on an as-if-converted to Common Stock basis) to the amount paid or set aside for each share of Common Stock. The provisions of this Section 1b shall not, however, apply to (i) a dividend payable in Common Stock, (ii) the acquisition of shares of any Junior Stock in exchange for shares of any other Junior Stock, or (iii) any repurchase of any outstanding securities of the Company that is unanimously approved by the Company's Board of Directors. The holders of the Series A, Series B, Series C, Series D and Series E Preferred expressly waive their rights, if any, as described in California Corporations Code Sections 502, 503 and 506 as they relate to repurchase of shares upon termination of employment.

## 2. Voting Rights.

a. **General Rights.** Except as otherwise provided herein or as required by law, the Series A, Series B, Series C, Series D and Series E Preferred shall be voted equally with the shares of the Common Stock of the Company and not as a separate class, at any annual or special meeting of shareholders of the Company, and may act by written consent in the same manner as the Common Stock, in either case upon the following basis: each holder of shares of Series A, Series B, Series C, Series D and Series E Preferred shall be entitled to such number of votes as shall be equal to the whole number of shares of Common Stock into which such holder's aggregate number of shares of Series A, Series B, Series C, Series D and Series E Preferred are convertible (pursuant to Section 4 hereof) immediately after the close of business on the record date fixed for such meeting or the effective date of such written consent.

b. **Separate Majority Vote of Preferred Stock.** For so long as at least six hundred thousand (600,000) shares of Series A Preferred remain outstanding, at least one million two hundred thousand (1,200,000) shares of Series B Preferred remain outstanding, at least one million seven hundred forty thousand (1,740,000) shares of Series C Preferred remain outstanding, at least three million (3,000,000) shares of Series D Preferred remain outstanding, or at least seven hundred fifty thousand (750,000) shares of Series E Preferred remain outstanding (in each case, subject to adjustment for any stock split, reverse stock split or other similar event affecting the Series A, Series B, Series C, Series D or Series E Preferred, as applicable) in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least a majority of the outstanding Preferred Stock, voting together as a class, shall be necessary for effecting or validating the following actions:

(i) Any redemption, repurchase, payment of dividends or other distributions with respect to Junior Stock (except for acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares upon termination of services to the Company or in exercise of the Company's right of first refusal upon a proposed transfer);

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

(iii) Any distribution of capital stock of the Company that would constitute a "deemed dividend distribution" within the meaning of Section 305 of the Internal Revenue Code of 1986, as amended.

c. **Separate Super-Majority Vote of Preferred Stock.** For so long as at least six hundred thousand (600,000) shares of Series A Preferred remain outstanding, at least one million two hundred thousand (1,200,000) shares of Series B Preferred remain outstanding, at least one million seven hundred forty thousand (1,740,000) shares of Series C Preferred remain outstanding, at least three million (3,000,000) shares of Series D Preferred, or at least seven hundred fifty thousand (750,000) shares of Series E Preferred remain outstanding, and *provided that* no shares of Series D Preferred remain outstanding other than the sum of (i)

the number of shares of Series D Preferred Stock issuable upon conversion of the Convertible Promissory Note in the amount of Twenty-one Million Seven Hundred Nineteen Thousand Three Hundred Seventy Dollars and Twenty-five Cents (\$21,719,370.25) issued by the Company to Amazon.com on September 16, 1999 (the "Note") and (ii) Seven Hundred Thirty-eight Thousand Eight Hundred Six (738,806) additional shares of Series D Preferred Stock (in each case, subject to adjustment for any stock split, reverse stock split or other similar event affecting the Series A, Series B, Series C, Series D or Series E Preferred, as applicable), in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least sixty-five percent (65%) of the outstanding Preferred Stock, voting together as a class, shall be necessary for effecting or validating the following actions:

(i) Any increase or decrease (other than by redemption or conversion) in the authorized number of shares of Common Stock or Series A, Series B, Series C, Series D or Series E Preferred;

(ii) Any authorization or any designation, whether by reclassification or otherwise, of any new class or series of stock or any other securities convertible into equity securities of the Company ranking on a parity with or senior to the Series A, Series B, Series C, Series D and Series E Preferred in rights of redemption, liquidation preference, voting, dividends or antidilution or any increase in the authorized or designated number of any such new class or series;

(iii) Any increase in the number of shares reserved under the Company's 1998 Equity Incentive Plan (or any successor plan);

(iv) Any increase in the size of the Company's Board of Directors; and

(v) Effecting or validating any agreement by the Company or its shareholders regarding an Asset Transfer or Acquisition (each as defined in Section 3c).

Upon such date that more shares of Series D Preferred are outstanding than the sum of (i) all shares of Series D Preferred Stock acquired upon conversion of the Note and (ii) Seven Hundred Thirty-eight Thousand Eight Hundred Six (738,806) additional shares of Series D Preferred Stock (subject to adjustment for any stock split, reverse stock split or other similar event affecting the Series D Preferred), the actions set forth in Sections 3c(i), (ii), (iii), (iv) and (v) may be effected or validated upon the vote or written consent of the holders of at least a majority of the outstanding Preferred Stock, voting together as a class and the vote or written consent of the holders of at least sixty-five percent (65%) of the outstanding Preferred Stock will not be required.

d. **Separate Vote of Series A, Series B, Series C, Series D Preferred and Series E Preferred.** For so long as at least six hundred thousand (600,000) shares of Series A Preferred remain outstanding, at least one million two hundred thousand (1,200,000) shares of Series B Preferred remain outstanding, at least one million seven hundred

forty thousand (1,740,000) shares of Series C Preferred, at least three million (3,000,000) shares of Series D Preferred remain outstanding, or at least seven hundred fifty thousand (750,000) shares of Series E Preferred remain outstanding (in each case, subject to adjustment for any stock split, reverse stock split or other similar event affecting the Series A, Series B, Series C, Series D or Series E Preferred, as applicable), in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least a majority of the outstanding Series A, Series B, Series C, Series D and Series E Preferred, each voting as a separate class, shall be necessary for any amendment, alteration, or repeal of any provision of the Articles of Incorporation or the Bylaws of the Company (including any filing of a Certificate of Determination) that changes the voting powers, preferences, or other special rights or privileges, or restrictions of the Series A, Series B, Series C, Series D or Series E Preferred, as applicable.

e. **Election of Board of Directors.** (i) The holders of Series A Preferred, voting as a separate class, shall be entitled to elect one (1) member of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director, so long as at least six hundred thousand (600,000) shares of Series A Preferred remain outstanding; (ii) the holders of Series B Preferred, voting as a separate class, shall be entitled to elect two (2) members of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director; so long as at least one million two hundred thousand (1,200,000) shares of Series B Preferred remain outstanding; (iii) the holders of Series C Preferred, voting as a separate class, shall be entitled to elect one (1) member of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director, so long as at least one million seven hundred forty thousand (1,740,000) shares of Series C Preferred remain outstanding; and (iv) the holders of Series D Preferred, voting as a separate class, shall be entitled to elect one (1) member of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such director and to fill any vacancy caused by the resignation, death or removal of such director, so long as at least three million (3,000,000) shares of Series D Preferred remain outstanding (in each case, subject to adjustment for any stock split, reverse stock split or other similar event affecting the Series A, Series B, Series C or Series D Preferred, as applicable). In addition, the holders of Common Stock, voting as a separate class, shall be entitled to elect two (2) members of the Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors; and the holders of Common Stock and Series Preferred, voting together as a class, shall be entitled to elect any and all remaining members of the Board of Directors at each meeting or pursuant to each consent of the Company's shareholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors.

### 3. Liquidation Rights.

a. Upon any liquidation, dissolution, or winding up of the Company, whether voluntary or involuntary, before any distribution or payment shall be made to the holders of any Junior Stock, the holders of Series A, Series B, Series C, Series D and Series E Preferred shall be entitled to be paid out of the assets of the Company an amount per share of Series A, Series B, Series C, Series D and Series E Preferred equal to the Series A, Series B, Series C, Series D and Series E Preferred Original Issue Price plus all declared and unpaid dividends on such shares of Series A, Series B, Series C, Series D and Series E Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) for each share of Series A, Series B, Series C, Series D and Series E Preferred held by them.

b. After the payment of the full liquidation preference of the Series A, Series B, Series C, Series D and Series E Preferred as set forth in Section 3a above, the assets of the Company legally available for distribution, if any, shall be distributed ratably to the holders of the Common Stock and Series Preferred on an as-if-converted to Common Stock basis until such time as the holders of Series Preferred have received pursuant to Section 3a above and this Section 3b an aggregate amount per share of Series Preferred equal to two (2) times the Original Issue Price (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to the Series Preferred). The remaining assets of the Company legally available for distribution, if any, shall be distributed ratably to the holders of the Common Stock.

c. The following events shall be considered a liquidation under this Section 3:

(i) any consolidation or merger of the Company with or into any other corporation or other entity or person, or any other corporate reorganization, in which the shareholders of the Company immediately prior to such consolidation, merger or reorganization, own less than fifty percent (50%) of the Company's voting power immediately after such consolidation, merger or reorganization, or any transaction or series of related transactions to which the Company is a party in which in excess of fifty percent (50%) of the Company's voting power is transferred (an "Acquisition");

(ii) a sale, lease or other disposition of all or substantially all of the assets of the Company (an "Asset Transfer").

d. If, upon any liquidation, distribution, or winding up, the assets of the Company shall be insufficient to make payment in full to all holders of Series A, Series B, Series C, Series D and Series E Preferred of the liquidation preference set forth in Section 3a, then such assets shall be distributed among the holders of Series A, Series B, Series C, Series D and Series E Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled.



e. In any of such events, if the consideration received by this corporation is other than cash, its value will be deemed its fair market value as determined in good faith by the Board of Directors. Any securities shall be valued as follows:

(i) Securities not subject to investment letter or other similar restrictions on free marketability covered by Section 3e(ii) below:

(a) If traded on a securities exchange or through the Nasdaq National Market, the value shall be deemed to be the average of the closing prices of the securities on such quotation system over the thirty (30) day period ending three (3) days prior to the closing;

(b) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or sale prices (whichever is applicable) over the thirty (30) day period ending three (3) days prior to the closing; and

(c) If there is no active public market, the value shall be the fair market value thereof, as determined in good faith by the Board of Directors.

(ii) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a shareholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in Section 3e(i) to reflect the approximate fair market value thereof, as determined in good faith by the Board of Directors.

f. In the event the requirements of Section 3c are not complied with, the Company shall forthwith either:

(i) cause the closing of such event to be postponed until such time as the requirements of this Section 3 have been complied with; or

(ii) cancel such event, in which case the rights, preferences and privileges of the holders of Series A, Series B, Series C, Series D and Series E Preferred shall revert to and be the same as such rights, preferences and privileges existing immediately prior to the notice referred to in Section 4f below.

#### 4. Conversion Rights.

The holders of the Series A, Series B, Series C, Series D and Series E Preferred shall have the following rights with respect to the conversion of Series A, Series B, Series C and Series D Preferred into shares of Common Stock (the "Conversion Rights"):

a. **Optional Conversion.** Subject to and in compliance with the provisions of this Section 4, any shares of Series A, Series B, Series C, Series D and Series E Preferred may, at the option of the holder, be converted at any time into fully-paid and nonassessable shares of Common Stock. The number of shares of Common Stock to which a

holder of Series A, Series B, Series C, Series D, and Series E Preferred shall be entitled upon conversion shall be the product obtained by multiplying the Series A, Series B, Series C, Series D or Series E Preferred Conversion Rate then in effect (determined as provided in Section 4b) by the number of shares of Series A, Series B, Series C, Series D or Series E Preferred being converted, respectively.

b. **Preferred Stock Conversion Rate.** The conversion rate in effect at any time for conversion of the Series A Preferred (the "Series A Preferred Conversion Rate") shall be the quotient obtained by dividing the Series A Original Issue Price by the Series A Conversion Price, calculated as provided in Section 4c. The conversion rate in effect at any time for conversion of the Series B Preferred (the Series B Preferred Conversion Rate) shall be the quotient obtained by dividing the Series B Original Issue Price by the "Series B Conversion Price," calculated as provided in Section 4c. The conversion rate in effect at any time for conversion of the Series C Preferred (the "Series C Preferred Conversion Rate") shall be the quotient obtained by dividing the Series C Original Issue Price by the Series C Conversion Price, calculated as provided in Section 4c. The conversion rate in effect at any time for conversion of the Series D Preferred (the "Series D Preferred Conversion Rate") shall be the quotient obtained by dividing the Series D Original Issue Price by the Series D Conversion Price, calculated as provided in Section 4c. The conversion rate in effect at any time for conversion of the Series E Preferred (the "Series E Preferred Conversion Rate") shall be the quotient obtained by dividing the Series E Original Issue Price by the Series E Conversion Price, calculated as provided in Section 4c.

c. **Conversion Price.** The conversion price for Series A Preferred shall initially be the Series A Original Issue Price (the "Series A Conversion Price"). The conversion price for Series B Preferred shall initially be the Series B Original Issue Price (the "Series B Conversion Price"). The conversion price for Series C Preferred shall initially be the Series C Original Issue Price (the "Series C Conversion Price"). The conversion price for Series D Preferred shall initially be the Series D Original Issue Price (the "Series D Conversion Price"). The conversion price for Series E Preferred shall initially be the Series E Original Issue Price (the "Series E Conversion Price"). Such initial Series A, Series B, Series C, Series D and Series E Conversion Price shall be adjusted from time to time in accordance with this Section 4. All references to the Series A, Series B, Series C, Series D or Series E Conversion Price herein shall mean the Series A, Series B, Series C, Series D or Series E Conversion Price as so adjusted.

d. **Mechanics of Conversion.** Each holder of Series A, Series B, Series C, Series D or Series E Preferred who desires to convert the same into shares of Common Stock pursuant to this Section 4 shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or any transfer agent for the Series A, Series B, Series C, Series D and Series E Preferred, and shall give written notice to the Company at such office that such holder elects to convert the same. Such notice shall state the number of shares of Series A, Series B, Series C, Series D or Series E Preferred being converted. Thereupon, the Company shall promptly issue and deliver at such office to such holder a certificate or certificates for the number of shares of Common Stock to which such holder is entitled and shall promptly pay in cash or, to the extent sufficient funds are not then legally available therefor, in Common Stock

(at the Common Stock's fair market value determined by the Board of Directors as of the date of such conversion), any declared and unpaid dividends on the shares of Series A, Series B, Series C, Series D or Series E Preferred being converted. Such conversion shall be deemed to have been made at the close of business on the date of such surrender of the certificates representing the shares of Series A, Series B, Series C, Series D and Series E Preferred to be converted, and the person entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Common Stock on such date.

e. **Adjustment for Stock Splits and Combinations.** If the Company shall at any time or from time to time after the date that the first share of Series A Preferred is issued (the "Series A Original Issue Date"), Series B Preferred is issued (the "Series B Original Issue Date"), Series C Preferred is issued (the "Series C Original Issue Date"), Series D Preferred is issued (the "Series D Original Issue Date") or Series E is issued (the "Series E Original Issue Date") effect a subdivision of the outstanding Common Stock without a corresponding subdivision of the Series A, Series B, Series C, Series D and Series E Preferred, the Series A, Series B, Series C, Series D and Series E Conversion Price in effect immediately before that subdivision shall be proportionately decreased. Conversely, if the Company shall at any time or from time to time after the Original Issue Date combine the outstanding shares of Common Stock into a smaller number of shares without a corresponding combination of the Preferred Stock, the Series A, Series B, Series C, Series D and Series E Conversion Price in effect immediately before the combination shall be proportionately increased. Any adjustment under this Section 4e shall become effective at the close of business on the date the subdivision or combination becomes effective.

f. **Adjustment for Common Stock Dividends and Distributions.** If the Company at any time or from time to time after the Original Issue Date makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, in each such event the Series A, Series B, Series C, Series D and Series E Conversion Price that is then in effect shall be decreased as of the time of such issuance or, in the event such record date is fixed, as of the close of business on such record date, by multiplying the Series A, Series B, Series C, Series D and Series E Conversion Price then in effect by a fraction (i) the numerator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and (ii) the denominator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; *provided, however*, that if such record date is fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series A, Series B, Series C, Series D and Series E Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series A, Series B, Series C, Series D and Series E Conversion Price shall be adjusted pursuant to this Section 4f to reflect the actual payment of such dividend or distribution.

g. **Adjustment for Reclassification, Exchange and Substitution.** If at any time or from time to time after the Original Issue Date, the Common Stock issuable upon

the conversion of the Preferred Stock is changed into the same or a different number of shares of any class or classes of stock, whether by recapitalization, reclassification or otherwise (other than an Acquisition or Asset Transfer as defined in Section 3c or a subdivision or combination of shares or stock dividend or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 4), in any such event each holder of Preferred Stock shall have the right thereafter to convert such stock into the kind and amount of stock and other securities and property receivable upon such recapitalization, reclassification or other change by holders of the maximum number of shares of Common Stock into which such shares of Preferred Stock could have been converted immediately prior to such recapitalization, reclassification or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof.

**h. Reorganizations, Mergers, Consolidations or Sales of Assets.** If at any time or from time to time after the Original Issue Date, there is a capital reorganization of the Common Stock (other than an Acquisition or Asset Transfer as defined in Section 3c or a recapitalization, subdivision, combination, reclassification, exchange or substitution of shares provided for elsewhere in this Section 4), as a part of such capital reorganization, provision shall be made so that the holders of Preferred Stock shall thereafter be entitled to receive upon conversion of the Preferred Stock the number of shares of stock or other securities or property of the Company to which a holder of the number of shares of Common Stock deliverable upon conversion would have been entitled on such capital reorganization, subject to adjustment in respect of such stock or securities by the terms thereof. 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 Preferred Stock after the capital reorganization to the end that the provisions of this Section 4 (including adjustment of the Series A, Series B, Series C, Series D and Series E Conversion Price then in effect and the number of shares issuable upon conversion of the Series A, Series B, Series C, Series D and Series E Preferred, respectively) shall be applicable after that event and be as nearly equivalent as practicable.

**i. Certificate of Adjustment.** In each case of an adjustment or readjustment of the Series A, Series B, Series C, Series D and Series E Conversion Price for the number of shares of Common Stock or other securities issuable upon conversion of the Series A, Series B, Series C, Series D and Series E Preferred, if the Series A, Series B, Series C, Series D and Series E Preferred is then convertible pursuant to this Section 4, the Company, at its expense, shall compute such adjustment or readjustment in accordance with the provisions hereof and prepare a certificate showing such adjustment or readjustment, and shall mail such certificate, by first class mail, postage prepaid, to each registered holder of Series A, Series B, Series C, Series D and Series E Preferred at the holder's address as shown in the Company's books. The certificate shall set forth such adjustment or readjustment, showing in detail the facts upon which such adjustment or readjustment is based, including a statement of (i) the Series A, Series B, Series C, Series D and Series E Conversion Price at the time in effect, and (ii) the type and amount, if any, of other property which at the time would be received upon conversion of the Series A, Series B, Series C, Series D and Series E Preferred.

j. **Notices of Record Date.** Upon (i) any taking by the Company 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 or other distribution, or (ii) any Acquisition (as defined in Section 3c) or other capital reorganization of the Company, any reclassification or recapitalization of the capital stock of the Company, any merger or consolidation of the Company with or into any other corporation, or any Asset Transfer (as defined in Section 3c), or any voluntary or involuntary dissolution, liquidation or winding up of the Company, the Company shall mail to each holder of Preferred Stock at least twenty (20) days prior to the record date specified therein a notice specifying (A) the date on which any such record is to be taken for the purpose of such dividend or distribution and a description of such dividend or distribution, (B) the date on which any such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up is expected to become effective, and (C) the date, if any, that is to be fixed as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up.

k. **Sale of Shares Below Series Preferred Conversion Price.**

(i) If at any time or from time to time after the Series D Original Issue Date, the Company issues or sells, or is deemed by the express provisions of this subsection (i) to have issued or sold, Additional Shares of Common Stock (as defined in subsection k(iv) below), other than as a dividend or other distribution on any class of stock as provided in Section 4f above, and other than a subdivision or combination of shares of Common Stock as provided in Section 4e above, for an Effective Price (as defined in subsection k(iv) below) less than the then effective Series A, Series B, Series C, Series D or Series E Preferred Conversion Price, then in each such case the then existing Series A, Series B, Series C, Series D and/or Series E Preferred Conversion Price, as applicable, shall be reduced, as of the opening of business on the date of such issue or sale, to a price determined by multiplying the Series A, Series B, Series C, Series D and/or Series E Preferred Conversion Price by a fraction (i) the numerator of which shall be (A) the number of shares of Common Stock deemed outstanding (as defined below) immediately prior to such issue or sale, plus (B) the number of shares of Common Stock which the aggregate consideration received (as defined in subsection k(ii)) by the Company for the total number of Additional Shares of Common Stock so issued would purchase at such Series Preferred Conversion Price, and (ii) the denominator of which shall be the number of shares of Common Stock deemed outstanding (as defined below) immediately prior to such issue or sale plus the total number of Additional Shares of Common Stock so issued. For the purposes of the preceding sentence, the number of shares of Common Stock deemed to be outstanding as of a given date shall be the sum of (A) the number of shares of Common Stock actually outstanding, (B) the number of shares of Common Stock into which the then outstanding shares of Series Preferred could be converted if fully converted on the day immediately preceding the given date, and (C) the number of shares of Common Stock which

could be obtained through the exercise or conversion of all other rights, options and convertible securities outstanding on the day immediately preceding the given date.

(ii) For the purpose of making any adjustment required under this Section 4k, the consideration received by the Company for any issue or sale of securities shall (A) to the extent it consists of cash, be computed at the net amount of cash received by the Company after deduction of any underwriting or similar commissions, compensation or concessions paid or allowed by the Company in connection with such issue or sale but without deduction of any expenses payable by the Company, (B) to the extent it consists of property other than cash, be computed at the fair value of that property as determined in good faith by the Board of Directors, and (C) if Additional Shares of Common Stock, Convertible Securities (as defined in subsection k(iii)) or rights or options to purchase either Additional Shares of Common Stock or Convertible Securities are issued or sold together with other stock or securities or other assets of the Company for a consideration which covers both, be computed as the portion of the consideration so received that may be reasonably determined in good faith by the Board of Directors to be allocable to such Additional Shares of Common Stock, Convertible Securities or rights or options.

(iii) For the purpose of the adjustment required under this Section 4k, if the Company issues or sells (i) stock or other securities convertible into, Additional Shares of Common Stock (such convertible stock or securities being herein referred to as "Convertible Securities") or (ii) rights or options for the purchase of Additional Shares of Common Stock or Convertible Securities and if the Effective Price of such Additional Shares of Common Stock is less than the Series Preferred Conversion Price, in each case the Company shall be deemed to have issued at the time of the issuance of such rights or options or Convertible Securities the maximum number of Additional Shares of Common Stock issuable upon exercise or conversion thereof and to have received as consideration for the issuance of such shares an amount equal to the total amount of the consideration, if any, received by the Company for the issuance of such rights or options or Convertible Securities, plus, in the case of such rights or options, the minimum amounts of consideration, if any, payable to the Company upon the exercise of such rights or options, plus, in the case of Convertible Securities, the minimum amounts of consideration, if any, payable to the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) upon the conversion thereof; *provided* that if in the case of Convertible Securities the minimum amounts of such consideration cannot be ascertained, but are a function of antidilution or similar protective clauses, the Company shall be deemed to have received the minimum amounts of consideration without reference to such clauses; *provided further* that if the minimum amount of consideration payable to the Company upon the exercise or conversion of rights, options or Convertible Securities is reduced over time or on the occurrence or non-occurrence of specified events other than by reason of antidilution adjustments, the Effective Price shall be recalculated using the figure to which such minimum amount of consideration is reduced; *provided further* that if the minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities is subsequently increased, the Effective Price shall be again recalculated using the increased minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities. No

further adjustment of the Series A, Series B, Series C, Series D or Series E Preferred Conversion Price, as adjusted upon the issuance of such rights, options or Convertible Securities, shall be made as a result of the actual issuance of Additional Shares of Common Stock on the exercise of any such rights or options or the conversion of any such Convertible Securities. If any such rights or options or the conversion privilege represented by any such Convertible Securities shall expire without having been exercised, the Series A, Series B, Series C, Series D and/or Series E Preferred Conversion Price as adjusted upon the issuance of such rights, options or Convertible Securities shall be readjusted to the Series A, Series B, Series C, Series D and/or Series E Preferred Conversion Price which would have been in effect had an adjustment been made on the basis that the only Additional Shares of Common Stock so issued were the Additional Shares of Common Stock, if any, actually issued or sold on the exercise of such rights or options or rights of conversion of such Convertible Securities, and such Additional Shares of Common Stock, if any, were issued or sold for the consideration actually received by the Company upon such exercise, plus the consideration, if any, actually received by the Company for the granting of all such rights or options, whether or not exercised, plus the consideration received for issuing or selling the Convertible Securities actually converted, plus the consideration, if any, actually received by the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) on the conversion of such Convertible Securities, *provided* that such readjustment shall not apply to prior conversions of Series A, Series B, Series C, Series D or Series E Preferred.

(iv) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 4k, whether or not subsequently reacquired or retired by the Company, other than (A) shares of Common Stock issued upon conversion of the Series Preferred; (B) up to 3,439,500 shares of Common Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock, and any additional shares or other securities approved in accordance with Article II.F.2c(iii) of the Company's Restated Articles of Incorporation, issued pursuant to such options, warrants or other rights (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like) after the Original Issue Date to employees, officers or directors of, or consultants or advisors to the Company or any subsidiary, pursuant to stock purchase or stock option plans or other arrangements that are approved in accordance with Section 2c(iii) above; (C) shares of Common Stock issued pursuant to the exercise of options, warrants or convertible securities outstanding as of the Original Issue Date; (D) up to 591,624 shares of Series C Preferred Stock at subsequent closings under that certain Series C Preferred Stock Purchase Agreement dated July 29, 1999 between the Company and the parties set forth on Schedule A thereto; and (E) shares of Common Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or other rights issued for consideration other than cash pursuant to a merger, consolidation, acquisition or similar business combination approved by the Board. References to Common Stock in the subsections of this clause (iv) above shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 4k. The "Effective Price" of Additional Shares of Common Stock shall mean the quotient determined by dividing the total number of Additional Shares of Common Stock issued or sold, or deemed to have been issued or

sold by the Company under this Section 4k, into the aggregate consideration received, or deemed to have been received by the Company for such issue under this Section 4k, for such Additional Shares of Common Stock.

**I. Automatic Conversion.**

(I) Each share of Series A, Series B, Series C, Series D and Series E Preferred shall automatically be converted into shares of Common Stock, based on the then-effective Series A, Series B, Series C, Series D and Series E Conversion Price, as applicable, (A) at any time upon the affirmative election of the holders of at least a majority of the outstanding shares of Preferred Stock, voting together as a class, or (B) immediately upon the closing of a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Company in which (i) the per share price is at least \$10.00 (as adjusted for stock splits, dividends, recapitalizations and the like), and (ii) the gross cash proceeds to the Company (before underwriting discounts, commissions and fees) are at least \$10,000,000. Upon such automatic conversion, any declared and unpaid dividends shall be paid in accordance with the provisions of Section 4d.

(ii) Upon the occurrence of the event specified in paragraph (i) above, the outstanding shares of Series A, Series B, Series C, Series D and Series E Preferred, respectively, shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Company or its transfer agent; *provided, however*, that the Company shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such conversion unless the certificates evidencing such shares of Series A, Series B, Series C, Series D and Series E Preferred are either delivered to the Company or its transfer agent as provided below, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. Upon the occurrence of such automatic conversion of Series A, Series B, Series C, Series D and Series E Preferred, the holders of Series A, Series B, Series C, Series D and Series E Preferred shall surrender the certificates representing such shares at the office of the Company or any transfer agent for the Series A, Series B, Series C, Series D and Series E Preferred. Thereupon, there shall be issued and delivered to such holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common Stock into which the shares of Series A, Series B, Series C, Series D and Series E Preferred surrendered were convertible on the date on which such automatic conversion occurred, and any declared and unpaid dividends shall be paid in accordance with the provisions of Section 4d.

m. **Fractional Shares.** No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the



issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Company shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Common Stock's fair market value (as determined by the Board of Directors) on the date of conversion.

n. **Reservation of Stock Issuable Upon Conversion.** The Company shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of 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 Preferred Stock. If at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of Preferred Stock, the Company will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

o. **Notices.** Any notice required by the provisions of this Section 4 shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified, (ii) when sent by confirmed telex or facsimile if sent during normal business hours of the recipient; if not, then on the next business day or (iii) upon confirmation of receipt after having been sent by registered or certified mail, return receipt requested, postage prepaid or by nationally recognized overnight courier. All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Company.

p. **Payment of Taxes.** The Company will pay all taxes (other than taxes based upon income) and other governmental charges that may be imposed with respect to the issue or delivery of shares of Common Stock upon conversion of shares of Preferred Stock, excluding any tax or other charge imposed in connection with any transfer involved in the issue and delivery of shares of Common Stock in a name other than that in which the shares of Preferred Stock so converted were registered.

q. **No Dilution or Impairment.** Without the consent of the holders of the then outstanding Series A, Series B, Series C, Series D and Series E Preferred, as required under Sections 2b and 2c, the Company shall not amend its Articles of Incorporation or participate in any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or take any other voluntary action, for the purpose of avoiding or seeking to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Company, but shall at all times in good faith assist in carrying out all such action as may be reasonably necessary or appropriate in order to protect the conversion rights of the holders of Series A, Series B, Series C, Series D and Series E Preferred against dilution or other impairment.

## 5. **Redemption.**

a. The Company shall be obligated to redeem Preferred Stock as follows:

(i) The holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Series A Preferred, voting together as a separate class, may require the Company, to the extent it may lawfully do so, to redeem Series A Preferred in three (3) annual installments beginning on the seventh anniversary of the Series E Original Issue Date, and ending on the date two (2) years from such first redemption date (each a "Redemption Date"). The Company shall effect such redemptions on the applicable Redemption Date by paying in cash in exchange for the shares of Series A Preferred to be redeemed a sum equal to the Series A Original Issue Price per share of Series A Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) plus declared and unpaid dividends with respect to such shares. The total amount to be paid for the Series A Preferred is hereinafter referred to as the "Redemption Price." The number of shares of Series A Preferred that the Company shall be required to redeem on any one Redemption Date shall be equal to the amount determined by dividing (A) the aggregate number of shares of Series A Preferred outstanding immediately prior to the Redemption Date by (B) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies).

(ii) The holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Series B Preferred, voting together as a separate class, may require the Company, to the extent it may lawfully do so, to redeem Series B Preferred in three (3) annual installments beginning on the seventh anniversary of the Series E Original Issue Date, and ending on the date two (2) years from such first redemption date (each a "Redemption Date"). The Company shall effect such redemptions on the applicable Redemption Date by paying in cash in exchange for the shares of Series B Preferred to be redeemed a sum equal to the Series B Original Issue Price per share of Series B Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) plus declared and unpaid dividends with respect to such shares. The total amount to be paid for the Series B Preferred is hereinafter referred to as the "Redemption Price." The number of shares of Series B Preferred that the Company shall be required to redeem on any one Redemption Date shall be equal to the amount determined by dividing (A) the aggregate number of shares of Series B Preferred outstanding immediately prior to the Redemption Date by (B) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies).

(iii) The holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Series C Preferred, voting together as a separate class, may require the Company, to the extent it may lawfully do so, to redeem Series C Preferred in three (3) annual installments beginning on the seventh anniversary of the Series E Original Issue Date, and ending on the date two (2) years from such first redemption date (each a "Redemption Date"). The Company shall effect such redemptions on the applicable Redemption Date by paying in cash in exchange for the shares of Series C Preferred to be redeemed a sum equal to the Series C Original Issue Price per share of Series C Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) plus declared and unpaid dividends with respect to such shares. The total amount to be paid for

the Series C Preferred is hereinafter referred to as the "Redemption Price." The number of shares of Series C Preferred that the Company shall be required to redeem on any one Redemption Date shall be equal to the amount determined by dividing (A) the aggregate number of shares of Series C Preferred outstanding immediately prior to the Redemption Date by (B) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies).

(iv) The holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Series D Preferred, voting together as a separate class, may require the Company, to the extent it may lawfully do so, to redeem Series D Preferred in three (3) annual installments beginning on the seventh anniversary of the Series E Original Issue Date, and ending on the date two (2) years from such first redemption date (each a "Redemption Date"). The Company shall effect such redemptions on the applicable Redemption Date by paying in cash in exchange for the shares of Series D Preferred to be redeemed a sum equal to the Series D Original Issue Price per share of Series D Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) plus declared and unpaid dividends with respect to such shares. The total amount to be paid for the Series D Preferred is hereinafter referred to as the "Redemption Price." The number of shares of Series D Preferred that the Company shall be required to redeem on any one Redemption Date shall be equal to the amount determined by dividing (A) the aggregate number of shares of Series D Preferred outstanding immediately prior to the Redemption Date by (B) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies).

(v) The holders of at least sixty-six and two-thirds percent (66 2/3%) of the then outstanding shares of Series E Preferred, voting together as a separate class, may require the Company, to the extent it may lawfully do so, to redeem Series E Preferred in three (3) annual installments beginning on the seventh anniversary of the Series E Original Issue Date, and ending on the date two (2) years from such first redemption date (each a "Redemption Date"). The Company shall effect such redemptions on the applicable Redemption Date by paying in cash in exchange for the shares of Series E Preferred to be redeemed a sum equal to the Series E Original Issue Price per share of Series E Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) plus declared and unpaid dividends with respect to such shares. The total amount to be paid for the Series E Preferred is hereinafter referred to as the "Redemption Price." The number of shares of Series E Preferred that the Company shall be required to redeem on any one Redemption Date shall be equal to the amount determined by dividing (A) the aggregate number of shares of Series E Preferred outstanding immediately prior to the Redemption Date by (B) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies).

(vi) Shares subject to redemption pursuant to this Section 5a shall be redeemed from each holder of Series Preferred on a *pro rata* basis.

(vii) At least thirty (30) days but no more than sixty (60) days prior to the first Redemption Date, the Company shall send a notice (a "Redemption Notice") to all holders of Preferred Stock to be redeemed setting forth (A) the Redemption Price for the shares to be redeemed; and (B) the place at which such holders may obtain payment of the Redemption Price upon surrender of their share certificates. If the Company does not have sufficient funds legally available to redeem all shares to be redeemed at the Redemption Date (including, if applicable, those to be redeemed at the option of the Company), then it shall redeem such shares *pro rata* (based on the portion of the aggregate Redemption Price payable to them) to the extent possible and shall redeem the remaining shares to be redeemed as soon as sufficient funds are legally available.

b. On or prior to the Redemption Date, the Company shall deposit the Redemption Price of all shares to be redeemed with a bank or trust company having aggregate capital and surplus in excess of \$100,000,000, as a trust fund, with irrevocable instructions and authority to the bank or trust company to pay, on and after such Redemption Date, the Redemption Price of the shares to their respective holders upon the surrender of their share certificates. Any moneys deposited by the Company pursuant to this Section 5b for the redemption of shares thereafter converted into shares of Common Stock pursuant to Section 4 hereof no later than the fifth (5th) day preceding the Redemption Date shall be returned to the Company forthwith upon such conversion. The balance of any funds deposited by the Company pursuant to this Section 5b remaining unclaimed at the expiration of one (1) year following such Redemption Date shall be returned to the Company promptly upon its written request.

c. On or after such Redemption Date, each holder of shares of Preferred Stock to be redeemed shall surrender such holder's certificates representing such shares to the Company in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price of such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof and each surrendered certificate shall be canceled. In the event less than all the shares represented by such certificates are redeemed, a new certificate shall be issued representing the unredeemed shares. From and after such Redemption Date, unless there shall have been a default in payment of the Redemption Price or the Company is unable to pay the Redemption Price due to not having sufficient legally available funds, all rights of the holders of such shares as holders of Preferred Stock (except the right to receive the Redemption Price without interest upon surrender of their certificates), shall cease and terminate with respect to such shares; *provided* that in the event that shares of Preferred Stock are not redeemed due to a default in payment by the Company or because the Company does not have sufficient legally available funds, such shares of Preferred Stock shall remain outstanding and shall be entitled to all of the rights and preferences provided herein.

d. In the event of a call for redemption of any shares of Preferred Stock, the Conversion Rights (as defined in Section 4) for such Preferred Stock shall terminate as to the shares designated for redemption at the close of business on the fifth (5th) day preceding the Redemption Date, unless default is made in payment of the Redemption Price.

## **6. No Reissuance of Preferred Stock.**

No share or shares of Preferred Stock acquired by the Company by reason of redemption, purchase, conversion or otherwise shall be reissued; and in addition, the Articles of Incorporation shall be appropriately amended to effect the corresponding reduction in the Company's authorized stock.

### **III.**

The number of directors which shall constitute the whole Board of Directors of this Corporation shall be fixed as provided in the bylaws of the Corporation.

### **IV.**

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

B. The Corporation is authorized to provide indemnification of agents (as defined in Section 317 of the General Corporation Law of California) for breach of duty to the Corporation and its shareholders through bylaw provisions or through agreements with agents, or both, in excess of the indemnification otherwise permitted by Section 317 of the General Corporation Law of California, subject to the limits on such excess indemnification set forth in Section 204 of the General Corporation Law of California. If, after the effective date of this Article, California law is amended in a manner which permits a corporation to limit the monetary or other liability of its directors or to authorize indemnification of, or advancement of such defense expenses to, its directors or other persons, in any such case to a greater extent than is permitted on such effective date, the references in this Article to "California law" shall to that extent be deemed to refer to California law as so amended.

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


**THREE:** The foregoing amendment and restatement of the Articles of Incorporation has been duly approved by the Board of Directors of this Corporation.

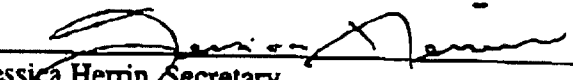
**FOUR:** The foregoing amendment and restatement of the Articles of Incorporation has been duly approved by the required vote of shareholders in accordance with Section 902 of the California Corporations Code. The Corporation has four classes of stock outstanding and all classes of stock are entitled to vote with respect to the amendment herein set forth. The total number of outstanding shares of Common Stock of the Corporation is [4,543,750]. The total number of outstanding shares of Series A Preferred of the Corporation is 2,000,000. The total number of outstanding shares of Series B Preferred of the Corporation is 4,500,000. The total number of outstanding shares of Series C Preferred of the Corporation is 4,680,340. The total number of outstanding shares of Series D Preferred of the Corporation is 4,572,499. The number

of shares voting in favor of the amendment equaled or exceeded the vote required. The percentage vote required was more than fifty percent (50%) of the outstanding Common Stock, Series A Preferred, Series B Preferred, Series C Preferred and Series D Preferred, each voting separately as a class

The undersigned, Rebecca Patton and Jessica Herrin, the President and Secretary, respectively, of **DELLA & JAMES, INC.**, declare under penalty of perjury under the laws of the State of California that the matters set out in the foregoing Certificate are true of their own knowledge.

Executed at San Francisco, California on February 11, 2000.

  
\_\_\_\_\_  
Rebecca Patton, President

  
\_\_\_\_\_  
Jessica Herrin, Secretary



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